ENVIRONMENTAL DEFENDERS OFFICE NT

2/7 Pavonia Place Nightcliff 0810
GPO Box 4289 Darwin NT 0801
Tel: (08) 8981 5883
edont@edont.org.au
www.edont.org.au

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Environmental Regulatory Reform Program
Environment Policy Team
Department of Environment and Natural Resources
Level 1, Arnhemica House, 16 Parap Road
Parap NT 0820

By email: environment.policy@nt.gov.au

Dear Environment Policy Team

Submission on draft Environment Protection Bill and draft Environment Protection Regulations

The Environmental Defenders Office (NT) Inc (**EDONT**) welcomes the opportunity to make this submission on the draft Environment Protection Bill (**draft Bill**) and draft Environment Protection Regulations (**draft Regulations**) (together, **draft EP laws**).

EDONT is a community legal centre specialising in public interest environmental law. We regularly advise clients in relation to the *Environmental Assessment Act* and its interactions with other Northern Territory legislation, and on the full range of other Territory and Commonwealth environment and natural resource management laws.

Our experience is that the protections offered by the Territory's current environmental laws are, for the most part, highly inadequate. This is most acutely revealed by the failures of the EIA framework. Our concerns are frequently echoed by clients and community members. Persistent, critical issues that are raised, and directly experienced by EDONT through our work, include the lack of access to information about and the inability to genuinely participate in environmental decision-making, particularly with respect to large extractive industry projects, and the absence of genuine and robust regulatory oversight and enforcement.

In this submission, we provide our overarching views on the draft EP laws, and high-level commentary on key issues. We then set out more detailed comment on a selection of clauses in the draft Bill and draft Regulations at **Attachment A** (i.e. those clauses which we particularly support, or do not support and consider must be amended). We also provide further analysis on obligations under international law with respect to consultation with indigenous communities in environmental impact assessment processes (**Attachment B**), given the apparent failure to appropriately integrate these important obligations into the draft EP laws.

A. Introductory remarks

EDONT has long called for an overhaul of the *Environmental Assessment Act* (EA Act). In our view, this legislation is completely failing to act as an adequate safeguard against serious environmental, social and cultural impacts of development / major projects in the Northern Territory.

The EA Act, which hasn't been amended in any meaningful way since it was introduced in 1982, fails to meet modern environmental regulatory standards and community expectations. In our experience, the EA Act fails for a range of reasons, but primarily due to:

- excessively high discretion and very limited levels of legislative prescription (leading to inconsistent application, poor outcomes, and unaccountable/unenforceable decision-making);
- limited opportunities for public participation;

- minimal accountability and transparency checks and balances; and
- an absence of compliance and enforcement powers (reflecting the lack of any substantive power held by the NTEPA or Environment Minister).

A complete overhaul is clearly required. EDONT was pleased that this reform was a 2016 election commitment, and that the draft EP laws have finally been released for public exhibition.

Against this background, the draft EP laws (in particular through the introduction of a new environmental approval) are a vast improvement on the existing legislation. Although there are a number of areas for significant improvement in the draft Bill and draft Regulations (particularly the EIA process), on the whole EDONT strongly supports the draft EP laws. Together with the recommendations of the Final Report of the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory* (**Fracking Inquiry**), this is a 'once in a generation' opportunity to bring about genuine transformation to the environmental legal framework for the Northern Territory, so that it operates to effectively protect the environment in the public interest for current and future generations.

Of course, the real effectiveness of the new framework also relies on a number of matters that are not within the purview of the draft EP laws. In particular, we urge the government to commit to a significant increase in resourcing of the Department of Environment and Natural Resources (**DENR**) and the NTEPA, including for compliance and enforcement. Without commitment to properly resource DENR to ensure it has the appropriate capacity and expertise to administer and enforce the new framework, it is clear that it will be difficult to achieve the objects of the Act (cl 3) and deliver on the intended reform outcomes.

There are also a range of matters which are enabled by the draft Bill and draft Regulations but rely on the discretion of the Minister for the Environment and Natural Resources (**Environment Minister**) to put into place. Many of these are critical elements of the new system, and if/ how they are implemented could make the difference between the system operating effectively to protect the environment - or failing. Examples include the proposed triggers, the proactive use of tools such as 'protected environmental areas' and 'prohibited actions,' the appropriate use of assessment pathways, the use of compliance and enforcement powers, and the use of exemptions.

Further, although generally we consider the Bill has been drafted in accessible and clear language, the structure currently lacks coherence. In particular, it is not clear why the environmental impact assessment (**EIA**) procedure is included in the draft Regulations. This is the core of the legislation. As it contains important procedural rights, roles and responsibilities, it must be included in the Act. Regulations are not subject to the same level of Parliamentary scrutiny and are suitable for administrative or minor operational matters only, rather than important rights and responsibilities.

We also observe that there is considerable repetition in the drafting that could be streamlined. For example, the public notice/comment provisions appear to be drafted consistently throughout the draft Bill (with the only differences being the applicable time-frames). Of course, we strongly support these rights being available at multiple steps in the process. However, to streamline the drafting, we suggest it would be useful to consider a single provision for the 'public consultation process' that can be consistently cross-referenced throughout the Act at each step in the process.

We hope these drafting matters will be rectified in the subsequent version of the draft EP laws. We strongly urge the government to ensure this happens, to avoid confusion in interpretation and administration in the future.

Finally, we take this opportunity to express our concerns about the government's approach to consultation with respect to the environmental regulatory reform program. Given public participation in the decision-making process is a key rationale behind EIA, it is disappointing that (to our knowledge) no proper efforts to engage have been made with the broader community on these reforms. Creating opportunities for making written submissions is just one aspect of public

participation, albeit a critical one. However, steps to genuinely engage with the wider community (such as through public seminars or information sessions, including with remote and Aboriginal communities), must also be taken. Consulting only with key stakeholders places a heavy obligation on underfunded environmental groups to attempt to fill this gap, and more importantly, means the government does not have the benefit of actually hearing from those impacted by their proposals.

Our concerns about consultation have been exacerbated by the recent 'backflip' on third party appeal rights (communicated by media release dated 30 October 2018), and in particular the manner in which that decision was made - prior to the closure of the public exhibition period of these draft laws, and without having the full benefit of the range of community views (i.e based only on industry pressure).

In the context of a comprehensive election commitment,[1] which was framed to prioritise the restoration of community trust in government about environmental regulation, and against a backdrop of regulatory failures such as the Port Melville construction and the McArthur River Mine (amongst many others), this was an astonishing decision that has significantly undermined any developing trust. We strongly encourage the government to take proactive steps to rectify this as the reform process continues, including by early, ongoing and genuine engagement with all stakeholders, and the broader community.

We now provide our comments on what we view as the key positive elements of the draft EP laws, and areas of concern or improvement. As we previously noted, further comments on specific provisions are included in **Attachment A**.

B. Positive elements

1) We strongly support the introduction of a standalone environmental approval and detailed procedures for EIA, although there are significant opportunities to improve the EIA process

EDONT strongly supports that, for the first time, an environmental approval will be issued by the Environment Minister, on the advice of the NTEPA (draft Bill, Division 4, cl 73-79). This approval is at the core of the reforms. It is a significant step towards transforming environmental protection in the Northern Territory and 'breaking down' the inherent conflicts of interest that are at the core of the current approach (whereby sector Ministers are responsible for approving the environmental impacts for activities they are responsible for promoting).

We particularly support:

- the approach for decision-making by the Environment Minister when determining an approval (draft Bill, cl 87), and
- the explicit provisions enabling the NTEPA to recommend 'unacceptable impact' (cl 82).

When contrasted with the existing framework of the EA Act, we consider that a detailed EIA procedure, set out in in law, should bring significant improvements in accountability and rigour to the EIA process. We support:

- the inclusion of triggers, subject to these being set at appropriate thresholds and on the basis that they are underpinned by a test of 'significant impact'[2] operating as a safeguard (i.e. even if an activity does not meet a trigger but has a significant impact, it will require EIA and approval);
- the inclusion of the 'avoid, mitigate, offset' decision-making hierarchy;
- improved opportunities for public participation via public notice/submission rights (including the availability of oral and audio-visual submissions);

[1] http://territorylabor.com.au/Portals/territorylabor-staging/docs/HealthyEnvironmentStrongEconomy.pdf
[2] Noting that we consider the definition of 'significant impact' must be re-considered as 'not minor or inconsequential' or similar: draft Bill, cl 10

- requirements to provide reasons for some decisions;
- requirements to publish some key documents on a public register.

However, we do have some concerns with how the EIA framework is currently established in the draft EP laws. We discuss some initial, fundamental concerns here, with further issues outlined below in part C (3).

First, we query the role of 'Territory environmental objectives' (**TEOs**). It is not clear how these interact with other guiding elements of the draft Bill (i.e. the objects, and the principles) and we consider these various 'layers' have the potential to create confusion. We also consider that TEOs may have unintended consequences of constraining matters required to be considered in the EIA process, and may fail to enable the nuance and complex interactions amongst various 'objectives'.

If their intent is to provide greater clarity and certainty to proponents, we suggest this would more appropriately be done by the development of an assessment methodology and supported by guidance materials (e.g. how to identify biodiversity values and a proposal's impacts on those values; how to identify climate change implications of a proposal and how to assess the proposal's impacts with respect to climate change). This could be linked, for example, to cl 84, draft Regulations.

Second, while we consider that strategic assessments, if designed and used appropriately, are an important tool to assess landscape scale and cumulative impacts (amongst other things), the draft Bill contains limited guidance (and does not even define what this term means). The provisions that do exist are excessively discretionary, providing a significant risk that they could be inappropriately utilised to avoid the rigour of the individual / site-based assessment procedures. Further detail must therefore be provided in the draft Bill regarding strategic assessments.

Third, we have significant concerns about the coherence and rigour of the EIA process as currently drafted. We understand the intention is for the draft EP laws to implement a risk-based approach, providing for different assessment pathways to an approval for projects of varying complexity / scale / impact. Conceptually, we support this approach, but we consider the drafting has failed to establish an appropriate framework.

It is not apparent from the drafting how the system is intended to operate as a whole. There is no coherence between the draft Bill and draft Regulations. There is a heavy focus on process, while critical guidance on key substantive matters is completely absent. The EIA process also appears to have been unnecessarily overcomplicated.

Some key issues include:

- The process does not appear to establish clear provisions that make strong links between: (1) meeting a threshold of significant impact (based on referral); (2) the subsequent mandatory requirement for EIA and an approval; (3) the requirement for every assessment to follow the mitigation hierarchy.
- The approach to referrals appears highly confused when in reality, it should be quite simple:
    - A referral should require the NTEPA to make a decision about whether an application for an action meets a trigger or meets the test of 'significant impact' – and therefore, as a matter of law, must undertake an assessment and obtain an approval before proceeding. This initial step seems to be anticipated in cl 63, draft Bill, but not properly carried through to cl 20 draft Regulations. There should also be public scrutiny of this key referral decision, which appears to be missing.
    - The legislation should then guide how the NTEPA decides what level of assessment is required (i.e. what matters it must consider to decide whether a 'supplementary environmental report' or 'environmental impact statement' is required). The draft Regulations (Part 4, and in particular cl 28) are completely deficient in providing

guidance on this decision. It appears to simply carry over the current flawed process under the EA Act.

- The role of assessment and approval by 'referral information' is unclear and appears to enable proponents to avoid the scrutiny and rigour of the EIA process. It confuses the 'referral' and 'assessment' steps. The entire purpose of the EIA process is to ensure that if project will have a significant impact (based on assessment of a referral), it must be thoroughly assessed. A referral is simply a decision about whether it meets this threshold and requires assessment/approval - not an assessment pathway. Because there is no guidance or criteria around when it may be appropriate to proceed via assessment on 'referral information,' this option completely undermines transparency and accountability (and potentially, the EIA process itself). This 'pathway' must be removed from the draft EP laws.

Given these significant issues, we suggest a holistic reappraisal of EIA process is required, to fill these gaps and respond to these key issues. Further issues with the EIA process are identified in Part C, below.

2) The objects, principles and management hierarchies guiding the draft EIA laws are positive and supported, with some areas for improvement

Objects

EDONT supports the draft Bill's objects clause (cl 3), which is appropriately focused on protecting the environment and promoting ecologically sustainable development (**ESD**). However, we submit the clause should be expanded to include explicit recognition of the role and interests of Aboriginal people; to emphasise the importance of public participation in environmental decision-making; and to emphasise the importance of addressing / responding to climate change.

Principles

We support the explicit articulation of the principles of ESD[3] . This will establish a shared understanding about the meaning and application of these principles in decision-making under the legislation. However, it is unusual that there is no 'preamble' definition of ESD (i.e. a statement to the effect of ESD requiring the integration of social, economic and environmental considerations in decision-making processes). This should be included to give more appropriate and useful context to the principles of ESD, and because this represents longstanding accepted practice.

We also have concerns about how ESD is proposed to be operationalised (cl 14). While we welcome an explicit provision that provides instruction to decision-makers to consider the principles of ESD when making decisions under the Act, cl 14 is drafted in a way that undermines robust, accountable and transparent decision-making. We submit that:

- Cl 14(2) should be amended to require decision-makers to 'apply' the principles of ESD. This is consistent with recommendation 14.11 of the Fracking Inquiry's Final Report and ensures that the principles are not given 'lip service' but are genuinely operationalised. There should also be an obligation placed on decision-makers to further the objects of the Act in making decisions and administering the legislation.
- Cl 14(3) should be removed, as explicitly exempting decision-makers from specifying how he or she has considered these principles in a statement of reasons (cl 14(3)) undermines accountability and transparency with respect to the genuine application of the principles.

We further submit that the 'principle of economic competitiveness' (cl 21) must be removed. Aside from being irrelevant to the objects of the Act (i.e. protecting the environment and supporting ESD), it is not an accepted and longstanding principle of ESD (as all others in cl 16-20 are). Its inclusion is likely to be confusing and unhelpful to decision-makers. It is also inconsistent with longstanding interpretation in other jurisdictions, including at the Commonwealth level (EPBC Act, s 3A). If the new EP laws are intended to be accredited for an assessment bilateral with the

[3] We make some suggested amendments to various principles in Attachment A.

Commonwealth, we strongly recommended that the NT's guiding principles be consistent with those of the Commonwealth.

The international implications of environmental issues (e.g. climate change, biodiversity loss) can (and should) be incorporated into the draft Act through other means. If additional principles are considered appropriate for inclusion in the draft Bill, we suggest that the NT could look to recent reforms in Victoria[4] and Queensland[5] which include an emphasis on principles focused on the public interest, accountability and ethical decision-making, which would be far more appropriate to reinforce and give further meaning to operationalising the Act's objects.

Management hierarchies

EDONT supports the management hierarchies proposed in the draft Bill, namely the 'avoid, mitigate, offset' hierarchy (**mitigation hierarchy**), as well as the prioritisation of waste avoidance and minimisation through the waste management hierarchy[6]. We consider these hierarchies are broadly consistent with best practice, although in respect of the waste management hierarchy, we would support consideration being given to whether 'extended producer responsibility' can also be incorporated.

With respect to the mitigation hierarchy, we consider there may be more opportunities to better integrate this with the operational provisions of the EIA process in the draft EP laws (i.e. so that it is explicit that a proponent is required to follow this hierarchy when designing an action). We also consider it would be useful to adopt guidelines or methodologies to ensure there is appropriate guidance for proponents on how to implement the mitigation hierarchy.

3) The enforceable general environmental duty will be an important environmental safeguard and is supported

EDONT welcomes the inclusion of an enforceable 'general environmental duty' to avoid or take steps to minimise environmental harm. We consider this duty will be an important environmental safeguard. Although the *Waste Management and Pollution Control Act* currently contains a similar duty, this is not underpinned by an equivalent offence, limiting its utility (i.e. it is not enforceable). We therefore support this tool for the government to hold accountable anyone who causes environmental harm.

However, we consider that the test included in the offence, that a person must have acted 'recklessly' (cl 34) sets the bar too high. Provisions similar to those recently introduced in Victoria[7] would be a much more appropriate, best practice approach. This would involve removing the mental element for a standard level of breach (an offence of strict liability) and including intentional or reckless 'mental element' as an aggravated offence, with higher penalties. A similar (tiered) approach has recently been introduced in amendments to the offences in the NT's *Water Act*.

4) The range of protection tools for the Environment Minister / Department are important and are supported, although further guidance is required

EDONT supports the range of environmental protection tools afforded to the Environment Minister under the draft Bill, including the powers to approve environmental policies (draft Bill cl 27), declare protected environmental areas (draft Bill cl 49), and to prohibit certain actions (draft Bill cl 50). These are extremely important new powers and if used by the Environment Minister in a proactive manner, consistent with the objects of the Act, have the potential to deliver a comprehensive framework for environmental protection in the Northern Territory.

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[4] Part 2.3, *Environmental Protection Amendment Act 2018* (Vic). See: http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/62D4E44DA7940A96CA2582F7000A8851/$FILE/18-039aa%20authorised.pdf

[5] Sections 3, 4 and 5 in the *Planning Act 2016*, Queensland. See: https://www.legislation.qld.gov.au/view/html/inforce/2018-05-09/act-2016-025

[6] We assume that substantive provisions to operationalise the waste management hierarchy will be progressed in stage 2 of the reforms.

[7] See *Environment Protection Amendment Act 2018 (Vic)*, s25

We do have some concerns about the excessive amount of discretion afforded to the Environment Minister in making a finding to exercise some of these powers (e.g. draft Bill cl 49(2)). We suggest that some criteria would be appropriate to guide the basis upon which the Environment Minister can exercise these powers, or at a minimum, require that decisions are consistent with the objects of the Act.

We also strongly support the financial tools that are provided for in Part 9 of the draft Bill. The availability of these tools in the environment portfolio will undoubtedly play an important role in ensuring accountability on the part of regulated parties under the new legislation, and, through the levy and funds, provide opportunities to ensure the 'polluter pays' and 'user pays' principles can be properly operationalised in the Northern Territory.

5) The range of compliance and enforcement mechanisms are strongly supported

EDONT strongly supports the comprehensive suite of compliance and enforcement provisions contained within the draft Bill (Parts 10, 11), many of which are presently unavailable to protect the environment in the Northern Territory. We consider the compliance and enforcement elements to be one of the main strengths of the draft EP laws.

We particularly support:

- the important investigatory powers that are granted to DENR and the new compliance tools that can be used, including the availability of environment protection notices, stop work notices and closure notices;
- the range of offences (Part 13, including those in Part 5, Division 2);
- the provisions enabling a court to make penalties or orders targeted to the specific circumstances of environmental offences (draft Bill, cl 248-249).

We do, however, consider improvements should be made with respect to the drafting of a number of the offences. Many of the offences are drafted to include a mental element to the offence being 'reckless' or 'intentional' (see, for example, draft Bill cl 35, 47, 48, 57, 58). This sets an unreasonably high standard and has the potential to create excessive difficulties on the part of the prosecution to prove them, which could significantly undermine their utility and deterrent effect.

We submit there should be a 'tiered' structure that would have a standard (strict liability) offence with no mental element, with a second (or multiple offences) as aggravated offences. The aggravated offences would include a mental element (e.g. carelessness, recklessness, negligence, intention). The penalties would be higher for the aggravated offence. As noted above, this approach has been introduced in recent amendments to the NT's *Water Act*[8]. We strongly recommend that the range of offences throughout the draft EP laws be revisited and updated to reflect this approach. Beyond implementing best practice, it would deliver consistency across related environmental legislation.

We also strongly support the civil enforcement proceedings contained in Part 12 of the draft Bill, which provides for access to injunctions and other civil orders to remedy environmental harm or to prevent/ mitigate further harm. We particularly support the public interest components of this Part, which enables third party enforcement for an appropriate list of 'eligible applicants' (draft Bill, cl 214), and enable the court to take the public interest into account with respect to security for costs, undertakings and costs orders (draft Bill, cl 222, 223). These are critically important provisions that will enable third parties to take steps to see the law enforced, particularly in circumstances where a regulator is unable to, for various reasons.

Finally, we note that there appears to be one important element missing from the compliance and enforcement provisions - 'chain of responsibility' provisions, similar to those recently introduced in

[8] See *Water Legislation Amendment Bill 2018*, cl 44 for an example: https://legislation.nt.gov.au/LegislationPortal/Bills/~/link.aspx?_id=8A8A4398F9584EBCA6CCA7C2BC1249A2&_z=z

Queensland.[9] These provisions would provide the regulator (i.e. DENR) with the powers to enforce compliance with environmental obligations on 'related persons' of companies, to ensure companies and/or their 'related parties' bear the cost of managing and rehabilitating sites. These provisions are critical to ensure that companies responsible for environmental damage cannot avoid responsibility for clean-up and rehabilitation by simply dissolving the corporate entity with responsibility.

Given the number of legacy sites in the Northern Territory, such provisions are clearly essential here – moreover, they are supported by recommendation 14.30 of the Fracking Inquiry's Final Report (and therefore accepted by government). EDONT submits that it is appropriate for these powers to be included in the draft Bill to ensure the compliance provisions have real efficacy.

C. Concerns and areas for improvement

1) The regressive position on third party appeal rights undermines the rule of law and accountability and must be reversed

EDONT has significant concerns with the Northern Territory Government's publicly stated position that it intends to remove / significantly narrow third-party appeal rights for merits review and the judicial review[10]. Third-party appeal rights are critical to the integrity of environmental laws, supporting accountable, evidence-based decision-making and the rule of law. The Fracking Inquiry confirmed this. EDONT strongly submits that the Bill's third-party appeal rights, for both judicial review and merits appeal, must be retained as per the exhibition draft Bill (i.e. cl 254 and 255).

If the government proceeds to remove these rights, in our view the draft Bill becomes 'hollow' in its commitment to the rule of law and accountability. Indeed, the decision to amend the Bill prior to receiving all views via this public consultation process underscores the importance of retaining third-party appeal rights (particularly merits review), given these rights are a key accountability and anti-corruption safeguard in government decision-making processes.

The oft-cited concerns with respect to delaying development and 'vexatious' litigants for third-party appeal rights simply do not play out in practice. This point was emphasised in the Final Report of the Fracking Inquiry (chapter 14.9) and also has been explored in detail by a recent paper by Justice Pepper[11]. There are mechanisms already in place in the Northern Territory legal system to prevent vexatious litigation.[12] These measures (such as the ability to strike out proceedings) provide an appropriate safeguard against genuinely vexatious litigants without removing access to justice for those who seek access to Courts and Tribunals in the public interest to uphold the rule of law and ensure accountable, transparent and rigorous decision-making.

With respect to merits review, we note that the decision is directly contrary to the government's election commitment, which stated "Decisions made under this new suite of laws will be reviewable/appealable decisions under Northern Territory Civil and Administrative Tribunal

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[9] *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld): https://www.legislation.qld.gov.au/view/html/asmade/act-2016-014.
The key elements of the new Act include:
a. allowing environmental protection orders to be issued to a party that has some relevant relationship to the company that is in financial difficulty;
b. ensuring that authorised under the Act have powers to access:
i. sites no long subject to an environmental authority; and
ii. sites still subject to an environmental authority but no longer in operation;
c. compelling persons (including employees of a company in financial difficulty) to answer questions in relation to alleged offences committed;
d. expanding the ability of the relevant Department to access information for evidentiary purposes; and
e. increasing the grounds that need to be considered or satisfied before a court can stay a decision about an amount of financial assurance or a decision to issue an environmental protection order.

[10] As per A/Minister Moss' media release, dated 30 October 2018.

[11] See also the following paper by Justice Rachel Pepper and Rachael Chick entitled 'Ms Onus and Mr Neal: Agitators in an Age of "Green Lawfare": https://frackinginquiry.nt.gov.au/inquiry-reports?a=496018

[12] See the Supreme Court Rules (Order 23) and the *Vexatious Proceedings Act (NT)*. See also the comprehensive discussion of this issue in the expert report forming part of the submission on the Regulatory Reforms Discussion Paper June 2017 by the Northern and Central Land Councils: https://denr.nt.gov.au/__data/assets/pdf_file/0010/436258/21-Submission.pdf (Attachment p74-76)

(NTCAT)"[13]. Further, it is contrary to the findings and recommendations of the Fracking Inquiry's Final Report, which clearly intended that it would be appropriate for all fracking decisions (which would include a new framework of environmental approvals) to be subject to these appeal rights[14].

We also have no clarity around whether merits appeal rights to NTCAT will be retained for proponents. If these rights are intended to be retained, but third-party rights will be removed, we strongly submit that this will result in a skewed framework under which these rights can be abused by proponents with 'deep pockets' to place pressure on under-resourced regulators/ departments.

With respect to judicial review, we are concerned that the proposed approach to standing (i.e. available if a genuine/valid submission has been made[15]) will narrow what is currently available under common law. At common law, having made a submission is not determinative of whether a group has a 'special interest' sufficient to meet the test for standing. The government's proposed approach is flawed because, while submissions are an important procedural right, whether or not someone has made a submission:

- Is not a proper indicator of whether someone is genuinely acting in the public interest or has a legitimate interest (or indeed, whether they may be a 'vexatious' litigant);
- Potentially excludes those with a genuine public interest, but for an unrelated reason were unable to make a submission on the relevant decision; and
- Would exclude access to challenge important decisions for which no public submission process is available under the law, which as we note in this submission, are missing in some important areas (e.g. granting of approval where Minister rejects statement of unacceptable impact, cl 92).

It is vital that the position on third party appeal rights be reconsidered, and a more thoughtful approach is taken. This position must be based on evidence and on a clear, thorough understanding of the legal implications. It must be based on a more balanced perspective that recognises the need to protect the public interest, deliver on commitments to accountability, and ensure the rule of law is able to be upheld.

EDONT considers alternative drafting could be explored to establish third-party appeal rights that accommodate various stakeholder concerns, without absolutely denying access to justice for concerned citizens and groups acting in the public interest for the Northern Territory[16]. The government's current position must re-considered.

2) The failure to appropriately acknowledge the interests of Aboriginal people and communities and to integrate effective consent and consultation mechanisms must be addressed

Another area of significant concern is the failure of the draft EP laws to appropriately recognise and integrate the interests of Aboriginal people and communities. This is critical in a jurisdiction where remote Aboriginal communities are the ones that are often the most impacted by large development projects.

In particular, we are concerned about:

- the failure to acknowledge the role and interests of Aboriginal people with respect to the protection and management of the environment, the role of traditional ecological knowledge can play, and their cultural and spiritual relationship with the Northern Territory's environment (which, as noted previously, should at a minimum be included in the objects clause); and
- the failure to include a specific mechanism to ensure culturally appropriate consultation with, and consent of, affected Aboriginal communities.

[13] http://territorylabor.com.au/Portals/territorylabor-staging/docs/HealthyEnvironmentStrongEconomy.pdf at p13
[14] See section 14.9 of the Fracking Inquiry's Final Report.
[15] As per the media release of A/Minister Moss, 30 October 2018
[16] For example, in response to stated industry concerns about foreign/interstate 'vexatious' litigants, third-party merits review could be restricted to individuals, groups and organisations based in the Northern Territory.

By failing to recognise the importance of genuine public participation for those who will be most directly affected, the draft EP laws effectively deny decision-makers the perspective of those best able to speak to the cultural impact of a proposal and capable of sharing traditional knowledge of the environment.

The importance of consultation with potentially affected Indigenous communities has been recognised by both the *Environmental Reform Discussion Paper* (issued by the Territory Government) and the Fracking Inquiry Final Report, making the omission from the draft EP laws all the more surprising. We provide **Attachment B** to set out Australia's obligations under international law to consult with Indigenous peoples (as exists under international human rights law and in treaties to which Australia is a party) and to outline requirements for best practice consultation with Indigenous communities.

While respecting the consent processes that exist under the *Aboriginal Land Rights (Northern Territory) Act 1976* (**ALRA**) and *Native Title Act 1993* (**NTA**), it is our experience that these are, on some level, assumed to 'cover the field' with respect to consultation and consent requirements, including in relation to the environmental and other impacts of the proposed activity. However, in practice it is not clear that these legislative frameworks (which are obviously focused on land rights/ tenure) ensure there is appropriate levels of information provided to all affected persons, nor genuine consultation with all affected Aboriginal people about the various impacts of a proposed action.

Our view is that much more needs to be done to ensure the draft EP laws respond to the Northern Territory's context. The EIA framework needs to establish a proper consultation mechanism that includes minimum requirements for consultation with Aboriginal communities, including:

- obligations to ensure culturally appropriate methods are used;
- standards that must be met, particularly around satisfaction that accurate and appropriate information has been provided, and requirements that this information has been understood; and
- requirements to obtain free, prior and informed consent.

These requirements should be integrated with (or link to) the consent processes under ALRA and NTA (and of course, any mechanism should be developed in full consultation with the land councils). Ideally, the EIA process should be carried out prior to the consent processes related to tenure under ALRA and NTA.

To bring these matters appropriately into decision-making, the draft Bill should also include a requirement that the Minister must be satisfied that Aboriginal communities have been appropriately consulted and have given their free, prior and informed consent (e.g. in clause 87).

These reforms present a significant opportunity to ensure the EIA process is established to operate as a tool that will ensure Aboriginal people are giving their free, prior and informed consent to development and its impacts. With complex industries such as fracking proposed to be coming online in coming years, it is absolutely essential that these requirements are mandated through legislation.

3) There are a range of provisions that diminish transparency, accountability, public participation and good governance that should be reconsidered and revised

We acknowledge that, particularly in comparison with the existing EA Act, the draft EP laws make some important improvements regarding accountability, transparency and public participation, through legislated requirements for public comment at important policy development and assessment/approval decision points.

However, despite these gains, it is apparent that there are some critical issues that may undermine the validity of the entire EIA framework. We provide some of our most significant concerns below.

Avenues for excessive proponent influence

We have serious concerns that many steps in the EIA process provide far too many opportunities for consultation with proponents and statutory decision-makers, while excluding public consultation. This undermines one of the key benefits of having an environmental approval in the first place - the removal of 'conflict of interest' and undue influence from industry.

Examples include the opportunity for the NTEPA to consult with the proponent and statutory decision-maker on a draft approval and assessment report (cl 117 draft Regulations); and the mandatory obligation of the Environment Minister to consult with proponents and statutory decision-makers if intending to grant an approval despite the NTEPA's advice of 'unacceptable impact' (cl 92, draft Bill).

The obligations on the NTEPA and Minister to make these decisions under the draft EP laws are statutory duties – the decision-makers must act in accordance with their legislative obligations. It is therefore important that the decision-maker can be at 'arm's length' from those with the most interest in the outcomes. Instead, these provisions effectively invite undue influence and the potential for corruption in decision-making. Providing such clear (and repeated) opportunities to influence decision-making undermines objective, accountable and transparent decision-making and therefore, the public interest. They are completely contrary to best practice. As such, we consider these kinds of provisions must be removed. At a minimum, public consultation should also be provided in order to provide an appropriate safeguard.

These issues are exacerbated by provisions which give excessive opportunity for proponents to use the EIA system to 'negotiate' outcomes. For example, there is no rationale for proponents to be able to request a wavier of a requirement for a supplement (draft Regulations, cl 100). There should always be a requirement for proponents to respond to matters raised through public consultation on a draft EIS as a matter of accountability and transparency, and rigorous assessment. This clause must be removed.

The draft Regulations (Part 7) also provide excessive opportunities for variations, with insufficient guidance or constraints on when variations may be used. These provisions could be used by proponents to manipulate the system to avoid EIA (and therefore scrutiny). The use of variations also would enable significant pressure to be placed on the NTEPA (e.g. to change the assessment pathway that is required), undermining the EIA process. While there should be some opportunity for genuine variations to be made, the legislation should place clear limitations and safeguards on when these can be sought, and make sure that the same 'tests' continue to apply.

In summary, the EIA framework must not be set up so as to enable proponents to manipulate the framework to negotiate better outcomes for themselves. We are concerned that this is exactly what is enabled by the current drafting.

Excessive discretion of decision-making at key decision-points

The draft EP laws provide excessive discretion for decision-makers at various key decision-points, with the result that there is simply no guidance or criteria provided to ensure accountability and robust decision-making that is consistent with the objects of the Act. This is a fundamental flaw with the current EA Act, and it is disappointing that this approach has been carried over.

The draft EP laws appear to focus too heavily on process, without considering the substance of key issues (and providing proper guidance on these matters). For example, there is either no, or extremely limited, criteria or guidance around (amongst other things):

- how triggers will be set (draft Bill, cl 37);
- how protected environmental areas and prohibited actions are to be identified (draft Bill, cl 49(2), cl 52 (2));
- what strategic assessments are and when it may be appropriate to use them (draft Bill, cl 64);

- how the NTEPA is to decide which assessment process is suitable once an action meets either a trigger or test of significant impact (draft Regulations cl 28);
- when it would be suitable for assessment by referral information (cl 55 draft Regulations – although we recommend this option be deleted altogether).

We strongly submit that more substantive guidance must be included at these (and other) key points in the draft EP laws.

Excessive pressures on Ministerial / NTEPA decision-making

We are concerned that many of the timeframes imposed on decision-making under the Act are unnecessarily restrictive. These include: 30 days exhibition of complex draft environmental impact statements (cl 91 draft Regulations); 30 or 40 business days for the NTEPA to finalise an assessment report/draft approval/statement of unacceptable impact (cl 119 draft Regulations); 30 or 40 business days to determine an approval (cl 88 draft Bill). Short timeframes undermine accountable, considered decision-making, particularly for complex and technical projects.

While we acknowledge there are sometimes opportunities for the relevant decision-makers to extend relevant periods in some circumstances, this should not first require 'consultation' with the proponent. Any statutory 'minimum' timeframes should better reflect what is a reasonable period, without having to put the onus on the decision-maker to take steps to extend it.

The deemed approval processes (i.e. where there delay in the Minister reaching a decision within the specified timeframe, the approval is assumed to be approved per cl 88, draft Bill) also carry a risk of significantly undermining accountable, rigorous decision-making.

Inadequate public participation

Public participation and transparency is still absent from some key decisions. For example, on our review, there is no consultation on referrals (i.e. a referral can be 'refused' on the basis that the NTEPA considers EIA is not required, and this decision has no consultation / public notice requirements). This is completely inappropriate. There must be transparency and public consultation at this initial stage, so that there is public visibility over those projects that are being determined to not have a potential for a 'significant impact'.

Further, as noted above, we consider the draft EP laws are significantly undermined by the availably of consultation with proponents / statutory decision-makers at key (and inappropriate) points in the EIA process, while simultaneously excluding the option for public comment at these points. While we argue that these opportunities for proponent consultation should be removed, if they are retained it is essential that the public also has the opportunity to comment, to ensure there is balance at these key points.

It is also evident that the draft EP laws do not genuinely appreciate the value of broad participation in environmental decision-making, contrary to one of the primary objectives of EIA. This is demonstrated by provisions that exclude form letters as a genuine submission (e.g. cl 99, draft Regulations). We do not support this approach as it undermines public participation in decision-making. Any submission that includes relevant comments about an action should be accepted.

Finally, we reiterate our concern about the absence of public participation provisions that accommodate the circumstances of Aboriginal communities. This is something that should be integrated throughout the draft EP laws – i.e. that at all key stages, the participation of Aboriginal communities is appropriately carried out. While we acknowledge there are opportunities to make oral and audio/audio-visual submissions (which is supported), this is not sufficient to overcome the current systemic barriers to genuine public participation for these groups. Many of the procedures established will only serve to exacerbate their exclusion – particularly the short timeframes for public exhibition and comment periods.

Exemption power could undermine entire framework

We have significant concerns with the exemption power contained in the draft Bill (cl 267(f)), which enables Regulations to be made to exclude 'any person' from complying with the Act. There are no constraints or safeguards placed on when this power can be used.

Enabling an exemption via Regulations, which are not subject to rigorous Parliamentary scrutiny and debate, could be used to exclude an entire industry (e.g. fracking, pastoralism or mining) from compliance with the Act. This is an excessive power to be enabled for Regulations and could be used to fundamentally undermine the Act's operation and overall confidence in the regime established by the draft EP laws.

The current provisions must be significantly re-worked. EDONT submits that a more appropriate approach must be included in the draft Bill that:

- enables an exemption to be made in limited circumstances (such as emergencies, and where the exemption would be consistent with the objects of the Act);
- requires reasons to be published for any exemption, to provide transparency and accountability.

4) Details of critical elements are currently missing which undermines the ability to fully understand and analyse the implications of the draft EP laws

We acknowledge that a range of tools (e.g. triggers, environmental policies) and associated guidance materials are likely to be developed to support the implementation of the Act in the future. As we have noted, many of these tools or policy mechanisms will be critical to anticipate whether the system functions appropriately or not. There are also some elements of the draft EP laws that simply haven't been provided for in the exhibition documents.

Key areas of concern, where we do not have sufficient information, are as follows:

- *Transitional arrangements* – how proponents that are currently being assessed under the *Environmental Assessment Act* will be transitioned to the new Act, and more importantly, how projects that have been approved under other legislation will be transitioned to having an environmental approval (and being subject to the other range of tools that will now be available under the Act) will be critical for ensuring the legitimacy of the new system. We need to see the proposed details of this framework as soon as possible. It is essential that all existing major projects (e.g. mines) that are currently regulated under other legislation are brought into the EP laws, to avoid the existence of two regulatory frameworks. If this does not happen, there would be considerable inequity between proponents/projects, and more importantly, it would fundamentally undermine the entire purpose end effect of the reforms.
- *Penalty amounts* – the range of offences in the draft Bill do not have the penalty amount specified at present. While we assume these policy settings are being developed, the amount of penalties that apply for offences can make a significant difference with respect to the deterrent factor that the offence provides, and hence its likely efficacy. Maximum penalty amounts must be set at a level that is sufficiently high to ensure their payment is not simply factored into the 'cost of doing business' and must appropriately reflect the seriousness of the offences under the legislation. For the most serious offences, we suggest that penalties must be set $5 million for corporations and $1 million for individuals[17].
- *Proposed triggers* – the draft Bill includes a power to set both location and activity-based referral and approval triggers. However, because the triggers are currently discretionary powers with no criteria or guidance, EDONT is concerned that if not set appropriately, the triggers could have the potential to undermine the effectiveness of the draft EP laws in appropriately protecting the environment. We assume, based on the draft Bill, that any

[17] This would be consistent with equivalent offence provisions in New South Wales (*Environmental Planning and Assessment Act 1979*).

triggers will be underpinned by the test of 'significant impact' (i.e. that test will operate as a safeguard). Nevertheless, any triggers must be set appropriately, and must be set at thresholds that would be consistent with achieving the objects of the Act.

The NT Government must release details of these elements as soon as possible to enable a full understanding of the new legislative framework. There must also be genuine public consultation on these issues. With the excessive discretion afforded under many of these elements, it is not currently possible to be satisfied that these elements will be appropriately developed.

D. Concluding comments

We conclude by reiterating that while we do strongly support the draft EP laws, there are many opportunities to amend the current drafting to ensure a robust environmental regulatory framework is delivered to protect the environment for current and future generations of Territorians.

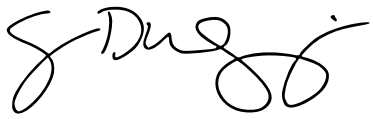
We also take this opportunity to acknowledge the ambitious agenda of the environmental regulatory reform program, which includes forthcoming reforms to pollution, waste management, contaminated land, mining and land clearing regulation. While we welcome all of these reforms as critical and long-overdue, we emphasise that it would be unwise to rush through the reform process such that inadequate consideration is given to policy positions. Further, to ensure the legitimacy of the proposed framework, it will be critical to ensure an equitable and fair system is established, with consistent standards applied to all sectors. There must be no exemptions for individual industries (e.g. fracking, mining) from the requirements for a rigorous assessment and approval under the new EP laws.

Finally, we reiterate that more efforts need to be made by government to engage the broader community in the reform process, and to undertake proper community consultation. This is essential to restore trust in the environmental regulatory framework and the government's commitment to genuine reform.

We look forward to our ongoing engagement in the environmental regulatory reform program, including a further review of the next iterations of the draft Bill and draft Regulations. We would also welcome the opportunity to further discuss our comments with you at any time.

Yours sincerely

Environmental Defenders Office (NT) Inc



Gillian Duggin

Principal Lawyer

Attachment A – Detailed comments on clauses of the draft Bill and draft Regulation

EDONT provides the following comments on relevant provisions of the draft Bill and draft Regulations. Our comments in this attachment must be read in the context of our submission letter.

1. Draft Bill

Part 1: Introduction

- Cl 3 (objects) – supported, although we would welcome this being expanded to include a specific reference to climate change, the importance of public participation and acknowledgment of the role/interests of Aboriginal people and communities
- Cl 8 (significant environmental harm) – this clause should be re-considered. It is not appropriate to define significance of harm with reference to remediation cost (as prescribed by regulations).
- Cl 9 (meaning of impact) – we support the acknowledgement of 'cumulative impact' in the definition of 'impact' although consider that subclause (2) should create a better linkage of how a cumulative impact can amount to a direct or indirect impact (e.g. contribution of GHG emissions).
- Cl 10 (meaning of significant impact) – generally supported with the exception of the use of 'major' which we consider sets a threshold too high. An appropriate alternative could be 'not minor'.

Part 2: Principles of environmental protection and management

- Division 1 (principles of ecologically sustainable development) - we generally support this division, subject to the following:
    - The insertion of a 'preamble' definition of ESD, consistent with longstanding practice in other jurisdictions
    - Cl 14(2) - decision-makers should "apply" rather than "consider" ESD, consistent with best practice, and the recommendations of the Fracking Inquiry
    - Cl 14 (3) – should be deleted as this significantly undermines accountability and the utility of/ commitment to ESD principles
    - Cl 19 – this should be amended to reflect the ordinary, accepted drafting of this principle – that biodiversity and ecological integrity are a fundamental consideration in decision-making. The amendment to the language of this principle reflects a broader concern that there is a serious lack of understanding of and appreciation for the importance of biodiversity and ecological integrity.
    - Cl 21 – this should be removed as it is not consistent with widely adopted and accepted definitions of ESD. While the consideration of "global dimension of environmental impacts" is supported in the context of issues such as climate change and biodiversity loss, the principle is not appropriate for the Bill. It undermines the development and use of consistent ESD principles (e.g. it is inconsistent with the EPBC Act). Its inclusion would undermine clear understanding and application of ESD.
- Division 2 (management hierarchies) – we support these provisions as drafted, and consider the hierarchies are generally reflective of best practice. However, we suggest that cl 24 would be strengthened by including reference to extended producer responsibility.

Part 3: Environmental protection policies

- We generally support these provisions, although we consider there should be greater guidance or criteria applied to the discretion of the Minister in approving an environmental policy (cl 27) and that there should be greater specificity (to support transparency and accountability) in requirements to publish approved policies. We suggest a specific obligation that the policy must be published online within 7 days of approval.

Part 4: General Environmental Duty

- We support the inclusion of an enforceable general environmental duty, which stands to operate as an important environmental safeguard. We particularly support the reversed burden of proof (cl 35(5)).
- However, we consider the standard included in the offence (cl 35) is too high (i.e. that for a standard offence, conduct must be 'reckless'). There should be an offence (of strict liability) that does not include this kind of mental element. We consider these provisions should be amended to reflect the approach recently introduced in Victoria (see Part 3.2, *Environment Protection Amendment Act 2018*)[1]

Part 5: Environmental Protection Declarations

- Division 1 (Declaration of objectives and triggers) – we query the role and likely efficacy of 'Territory environmental objectives,' particularly given the availability of the objects clause, principles and management hierarchies. We consider the use of TEOs may limit matters requiring consideration under the Act and view it as an inadequate tool for guiding impact assessment. It is not clear from the Western Australian experience that this approach has improved decision-making.
- Assuming triggers are set at appropriate thresholds and using appropriate criteria, we support their use, on the basis that the triggers are 'backed up' by a test of 'significant impact' which should act as a safeguard (i.e. even if something does or doesn't meet a trigger, it still may be captured by the requirement for an approval if it has a 'significant impact'). However, the Minister's power to set triggers is currently unconstrained and therefore considered too discretionary (cl 37). It is essential that criteria or guidance around matters to be considered in setting triggers should be included.
- We support the inclusion of consultation requirements for both objectives and triggers (cl 39), and that the Minister must publish a statement of reasons for declarations (cl 40). We consider there should be explicit requirements to publish declarations and reasons online within 7 days of being made.
- We support the requirement to review objectives and triggers but consider the timeframe should be a maximum of 5 years (cl 43) and there must be an obligation to consult with the public (not just the NTEPA) (cl 45).
- We support the inclusion of offences for causing harm (cl 47-48), although there should also be an option of strict liability offences that don't include a mental element (as noted previously).
- We strongly support the availability of declarations of prohibited actions and protected environmental areas, although we are concerned that the powers are highly discretionary (cl 49(2), 50(2)). We consider these powers should be supported by decision-making criteria r/ matters for consideration to provide greater transparency and accountability around these provisions.
- We are also concerned about the discretion associated with a decision to revoke a declaration (cl 54) – the guidance of 'if satisfied that it is in the interests of the Territory to revoke the

[1] http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/62d4e44da7940a96ca2582f7000a8851!OpenDocument

declaration in whole or in part' is excessively vague, and open to being used in a matter that is inconsistent with the Act's objects. Consistent with the principle of non-regression, revocations must be extremely limited by specific criteria, and only available in circumstances where the Minister is satisfied the decision is consistent with the objects of the Act.

- As per previous comments, it is not clear why the threshold of 'reckless' is included in the offence of carrying out actions in protected environmental areas / carrying out prohibited actions (cl 57 - 58) – we submit this is too high a bar and should be re-considered. 'Reckless' behaviour should be for an aggravated offence – the ordinary offence should not require any mental element.

Part 6: Environmental impact assessment process

- Cl 59 (purpose of the environmental assessment process) – we generally support ideas expressed in this provision, although it is not clear how this will be used in the decision-making process. Consideration should be given to better linking this clause with the operational provisions of the Part. We also consider that it would be appropriate to include specific reference to the interests and role of Aboriginal people and communities, in both (b) and (c).
- Cl 63 (referral of proposed action) – we support the use of referrals, although as per previous comments are unsure about the efficacy of both a referral and approval trigger, the role of the TEOs. There also appears to be some confusion between this clause, and the provisions governing the EIA process in the Regulations.
- Cl 64 (referral for strategic assessment) – although we acknowledge that strategic assessment can be a useful tool, the provisions should be in the Act (not Regulations) and there should be further guidance and criteria provided around the definition of strategic assessment, when strategic assessment is able to be used, and what implications it has at a site scale.
- Cl 66 (referral if application made to statutory decision-maker) – we support this referral power but consider it should explicitly enable the decision-maker to notify the NTEPA.
- Cl 68-69 (call in power and offence) – we support these provisions.
- Cl 71-72 (EPA consideration of variations and carrying out EIA) – we are very concerned that these fundamental procedures guiding EIA, which include important procedural rights and responsibilities, are relegated to the regulations. They must be included in Part 6 of the Act. They are the core elements of the EIA framework and must be subject to the accountability and scrutiny that legislation, not regulations, affords. Including these provisions in the Act would also ensure there is coherence in the draft Bill, which is currently lacking. As it currently reads, it appears that the procedures were included in an earlier draft and were removed to the regulations. There is no clear rationale for why this would be necessary or appropriate.
- Division 4 (approval notice for strategic proposals) – the role of these provisions is unclear, in particular the relationship between an 'approval notice' and an environmental approval. As noted previously, our view is the strategic assessment provisions required significant clarification. Moreover, they should all be included in the Act (not Regulations), given they may seek to be used for important, landscape scale activities or industries.

Part 7: Environmental Approval

- Division 1 (NTEPA to provide assessment report) – we generally support the procedures identified here, subject to our comments above that the EIA process in its entirety needs to be included in full in Part 6 of the Act, as this part is currently confusing and the Bill as a whole lacks coherence as a result. It is not clear what rationale would exist for including the EIA process in the Regulations.

- We support the availability of a 'statement of unacceptable impact' to be made (cl 82), although this should be a mandatory obligation where the mitigation hierarchy is not satisfied and there is an unacceptable impact (i.e. replace 'may' with 'must'). For consistency, cl 82 should refer to the mitigation hierarchy (it is confusing to now introduce 'avoid, mitigate, manage and offset' when the mitigation hierarchy already addresses management, within 'mitigation'). Cl 83 should include a specific requirement that these documents be published online.
- Division 2 (decision of Minister on environmental approval) – these are key provisions in the draft Bill and require careful drafting. First, we are very concerned with the requirements for mandatory consultation by the Minister on making a decision (s 86(2)(a)). This decision is for the Minister alone, on the advice of the NTEPA, and it is excessive to subject this to further consultation. It simply opens the Minister to undue influence and lobbying. At this stage in the process, there have been ample opportunities for input from proponents, statutory decision-makers, and the NTEPA (who prepares the assessment report, and presumably a brief of advice to the Minister), and all of this input should already be reflected in the NTEPA's report.
- We strongly support the approach proposed in cl 87 for the decision-making of the Minister. Given this is a key decision point in the Act, careful consideration must be given to the drafting. We recommend:
    - For clarity, 'environmental' be inserted in sub-clause (1)(c) prior to "..impacts and benefits.." (noting 'environment' is defined broadly in cl 4);
    - Sub-clause 1(d) be refined to matters that are consistent with the objects of the Act (to avoid undermining this sub-clause);
    - For sub-clause 2(a), the community should be consulted on the likely or anticipated impacts of the action, not just the design – this is a critical distinction and is directly linked to the purpose of EIA itself;
    - For sub-clause 2(b), it may be preferable to express this idea around being satisfied that the mitigation hierarchy has been appropriately applied, such that impacts first avoided, then mitigated, and lastly, offset;
    - For sub-clause 2(c), it is not clear what is meant by 'acceptable' – perhaps this should be expressed as 'any residual environmental impacts are acceptable' or 'residual impacts won't have an unacceptable impact on the environment'.
- We have significant concerns with cl 88(4), where there is a delay in the Minister reaching a decision within the specified timeframe, the approval is assumed to be approved. This undermines accountable, considered decision-making, and should be deleted.
- Division 3 (decision of Minister on statement of unacceptable impact) -we support the availability of a power to refuse an approval on the basis of 'unacceptable impact' (cl 91). The matters in cl 87 appear to be an appropriate safeguard on the Minister's ability to determine to make an approval in the fact of the NTEPA's advice to the contrary, although the drafting of cl 90 must be amended to state that 'cl 87 applies to the Minister's decision under this section' to ensure appropriate application of this section and to provide a proper safeguard.
- However, we again have strong concerns about the mandatory requirement for the Minister to consult with the proponent if it intends to issue an approval (cl 92(2))– again, this undermines transparent and accountable decision-making and opens the Minister to undue influence and corruption, particularly where no public consultation is provided for.
- Division 4 (publication of environmental approval) – while we support the requirement for a statement of reasons when a statement of unacceptable impact has been provided (cl 93(3), we are concerned that no statement of reasons is required for the ordinary grant of an environmental approval. This is a key accountability mechanism that should be provided.

- We strongly support the publication of approvals (cl 93) and statements of reasons where available, although consider more specificity should be provided about the terms (e.g. must be published within 7 days on a government website / the Register under cl 258) and notification should be provided to every person who made a submission on the approval.
- Division 5 (conditions of approval) – we strongly support these provisions requiring the application of conditions, including the ability for conditions to have effect after an action is completed (cl 95), to impose financial requirements such as bonds (cl 96) and to require reporting on compliance (cl 97). However, we are cautious about the use of standard conditions, noting that they could give rise to reduced rigour of decision-making.
- Division 6 (effect of environmental approval) – we strongly support an offence of failing to comply with approval and conditions (cl 103), including that it is an offence of strict liability.
- Division 7 (amendment of environmental approval) – we generally support cl 104, although strongly submit that there should be a public notification process for amending an approval – there is not rationale for excluding public comment, when comment is sought from the NTEPA, proponent and any statutory decision-maker.
- Division 8 (revocation of environmental approval) – we support these provisions, although we consider 28 business days to 'show cause' is excessive and could be limited to 2 weeks (10 business days) (cl 107) and there should be an 'emergency' option. Cl 110 should also extend the consultation requirements to the public – this could be a significant decision and there is no rationale from excluding the public (but including all other relevant parties) in this consultation process.
- Division 9 (transfer of environmental approval) – we support the requirement for the Minister's consent to transfer an environmental approval, and the matters the Minister is required to have regard to (cl 116). However, again, it is not clear why public consultation is excluded from a transfer decision, while all other parties are consulted with. As per the revocation decision, this could have significant implications for the environmental impact of an operation/project depending on the transferee and this should be subject to a transparent, public decision-making process.

Part 8: Environmental Offsets

- We generally support cl 119 to ensure there is guidance around the use of offsets under the mitigation hierarchy, although we consider regulations would be more appropriate to guide an offsets framework (to ensure it is enforceable), rather than guidelines. We strongly support the establishment of an offsets register, including the ability to prescribe offsets under other legislation.
- In relation to the information required in Schedule 2, we generally support the information proposed, although we consider it should be made explicitly clear that the actual documents, including an approval (with conditions) must be made publicly available – not just a summary of that information (for example). Ensuring all this information is in the one location will be important for transparency.

Part 9: Financial provisions

- We strongly support the provisions in Division 9 for bonds, levies and funds, and consider they will improve important tools to provide a safeguard for future liability, and protect the environment (assuming they are appropriately utilised by the Minister and CEO).
- In particular, we strongly support the provisions in cl 123 relating to the matters the Minister may consider in setting a bond (sub cl 2) and the explicit power for conditions to require a bond to be recalculated over time and that it may extend beyond the approval (sub cls (5) and (6)).

Part 10: Review by NTEPA and environmental audits

- We support the provisions enabling the NTEPA to carry out environmental audits (division 1) and review of 'environmental aspects of actions' (division 2) as important tools to support building capacity and understanding around environmental management and regulation in the Northern Territory, and to enable improvements in environmental regulation on an ongoing basis.
- However, we query whether these powers would be more appropriate for the CEO/ Department rather than the NTEPA, which we understand will operate in an approval/ advisory capacity.
- We also consider there should be an explicit requirement for audits to be carried out by registered auditors, and the key provisions for an environmental auditor scheme should be included in the Act, not regulations. Only minor administrative matters and procedures should be included in the regulations.
- We support the provisions regarding conflict of interest (cl 143), although again query whether a test of 'reckless' is too high a bar to set. We consider there should be a strict liability offence with no mental element. An aggravated offence could be 'intentional', 'recklessly' and/or 'with knowledge'. We also support the provisions for 'false or misleading information or missing information' regarding audits (cl 147) although again, we consider there should be a similar approach to tiered offences, including a strict liability offence.

Part 11: Enforcement

- We strongly support the enforcement provisions contained in part 11 and on the whole, consider they should be implemented as currently drafted. We particularly support the powers of environmental offices and the associated offence to fail to comply with requirement (cl 154-155) – including the application of strict liability and placing the burden of proof on the defendant; warrants (cl 156-157); directions and associated offence (cl 159 - 162).
- We strongly support: the availability of environment protection notices, including of emergency notices and associated offences (cl 163-167, 174,175) and support that they may lodged on title; the availability of stop work notices (cl 176- 181) (although we consider cl 177 should enable either (a) or (b) to be applicable rather than both); and the availability of closure notices (cl 182 -183), including support for the lodgement on title (cl 185).
- With respect to closure notices (but could be equally applicable to all enforcement powers), we suggest that these must include 'chain of responsibility' provisions (as described in our submission) to ensure liability can be placed on another related corporate entity, to avoid approval holders avoiding long term obligations under such a notice by dissolving the applicable corporate entity. This seems particularly relevant given difficulties in the Northern Territory in the past with abandoned mine sites.
- Division 8 (duty to notify environmental incidents) – we strongly support these provisions, including the application of strict liability to the offence provisions and the defendant's burden of proof.
- With regard to the offences in this part, we strongly support the strict liability offences relating to non-compliance with orders (e.g. cl 174, 181).

Part 12: Civil Proceedings

- Division 1 (injunctions and other orders) - we strongly support these provisions. They will provide important availability for third parties to prevent a breach or enforce compliance with the Act. In particular we support the broad approach to 'eligible applicants' (cl 214) in respect of civil proceedings. We also strongly support the availability of public interest discretion with respect to security and undertakes, costs orders and damages orders (cl 222-223). These will provide crucial protections for persons acting in the public interest and supports access to justice.

- However, we consider that cl 224 could undermine these provisions and should be removed as unnecessary; or in the very least, include that a relevant matter for the Court to consider in determining whether appropriate or not to make an order for damages is whether the proceedings were brought genuinely in the public interest.
- Division 2 (Civil penalties and directions) – we generally support these provisions as additional compliance tools, although we have some concerns about the broad discretion granted to the CEO, including the availability for the CEO to 'negotiate' a penalty and consider further guidance should be included. These provisions may be used to avoid proper legal process. We support cl 233 requiring the court to have regard to various appropriate matters (including the environmental harm, the financial benefit associated with the contravention and previous conduct) – similar requirements could be imposed on the CEO to guide any 'negotiation' of a penalty.

Part 13: Offences, penalties and criminal proceedings

- Division 1 (offences) - aside from the fact that the draft Bill doesn't include proposed penalty amounts (which, if set too low could cause these provisions to be completely ineffective), we support the provisions in Part 13.
- In particular we support the inclusion of an offence to provide false/misleading information (cl 240) and occupier/owner/body corporate liability (cl 243-244). However, we consider the penalty amount for an ongoing offence is too low at 10 penalty units per day (cl 242).
- Division 2 (specified environmental offences) - we strongly support the explicit principles to be applied in imposing a penalty for 'specified' environmental offences (cl 248) although we suggest sub-clause (g) should not refer to the NTEPA only but include references to the Minister, CEO and environmental officers (as the NTEPA is not the primary institution that will be responsible for compliance). It is also not clear to us why some, but not other offences are identified as 'specified environmental offences' (as defined in cl 4) – it would be appropriate for cl 248 to apply to all offences against the Act.
- We support the availability of additional court orders that are specific to environmental offences (cl 249) including measures such as to require the reimbursement of costs, to publicise the offence, or to take specified measures (e.g. to remediate or enhance the environment in another public area).
- Division 3 (criminal proceedings) – we support these provisions.

Part 14: Review of decisions

- We strongly support the current drafting of cl 254 (standing for judicial review) and cl 255 (review by Civil and Administrative Tribunal). Open standing provides critical access to justice and supports the rule of law and is particularly important in the Northern Territory where there is a legacy of failures of regulators and legislation to appropriately protect the environment.
- It is difficult to comment on the government's proposed new position for these rights as there is no clarity with respect to the drafting of these provisions.
- Based on the Minister's media release of 30 October, we comment as follows:
    - Our understanding of the proposed approach to open standing for judicial review is that only those who have made a 'valid and genuine submission' will have open standing. This is an artificial approach, and not an appropriate test to judge whether someone is acting genuinely in the public interest, which we assume would be the rationale. It risks excluding those who have been unable to make a submission (e.g. remote Aboriginal people/communities), and excludes review of a decision where a public submission process does not exist (e.g. the grant of an environmental approval where Minister does not accept a statement of unacceptable impact, cl 92)

- Although our preference is for the current drafting of cl 255 to be retained, there are other avenues to establish third-party merits appeal rights that accommodate various stakeholder concerns without absolutely denying access to justice for concerned citizens and groups acting in the public interest. For example, third-party merits review could be restricted to individuals, groups and organisations based in the Northern Territory.
- Further, we have no clarity around whether merits appeal rights to NTCAT will be retained for proponents as anticipated for many decisions, per Schedule 3. If these rights are intended to be retained (while third party rights are removed), we strongly submit that this will result in a skewed framework under which these rights can be abused by proponents with 'deep pockets' to place pressure on under-resourced regulators/ departments.

Part 15: General matters

- Division 2 (public register) - we strongly support establishing a public register (cl 258) as a key transparency measure. However we consider all documents that must be made available through the register should be specified in the Act (in Schedule 1), not further provided for by the regulations. There is no rationale for not including these requirements in the Act itself, to ensure there is appropriate scrutiny and accountability for these important provisions. It would be open for additional document/ information for inclusion in the Register to be specified via Regulations, if this was necessary in the future.
- Division 3 (directions to provide information) – we strongly support these provisions as a way to bring greater rigour and consistency to the environmental impact assessment process. However we do not support the availability of an exemption from compliance (cl 262) – this is unwarranted and opens up the Minister/regulator to be subject to pressure from proponents to have 'special treatment'. If an exemption power is retained, it must be on much more confined grounds (e.g. the exemption is consistent with the protection of the environment; or in an emergency).
- Division 4 (report by CEO) – we strongly support this provision, as an important transparency and accountability measure so that the public can understand what enforcement action has been undertaken. However, we consider more specific obligations should be placed on the CEO under this provision; for example that a report must be published annually and must be published online within 7 days of being made. The current provisions offer too much discretion, undermining the important role of such reporting.
- Division 5 (guidance and procedural documents) – we support these provisions as an appropriate mechanism to prepare guidance materials to support the Act. We consider these provisions may be more useful that the specific obligations to establish the TEOs, for example by publishing documents to guide how to prepare an assessment document and what matters are to be included, etc.
- Division 6 (regulations) – we are strongly opposed to the current drafting of cl 267(f) that enables the regulation to exempt any person from complying with the Act. This exemption could be used to exclude an entire industry from compliance with the Act, without appropriate scrutiny which is completely inappropriate. There are no constraints or safeguards placed on when this power can be used, significantly undermining accountability. We consider this clause should be deleted in its entirety. If an exemption power retained, it should be limited to very narrow circumstances such as emergencies, and should contain appropriate safeguards, for example, the Minister finding that the decision is consistent with environmental protection and the NTEPA providing its endorsement. Reasons should be required to be published for any decision to grant an exemption.

Part 16: Transitional provisions

- We have concerns about the framing of future transitional provisions in cl 268, and the fact that the detailed provisions have not been provided through the draft EP laws.
- We seek assurances from the NT government that existing actions (that have been approved under other legislation) are transitioned into this Act. Any other approach would create, in essence, two (or more) regulatory frameworks, with those operations approved prior to this Act subject to ongoing regulation under the current legislation (e.g. mining, petroleum, pastoral lands).
- There must be appropriate transitional arrangements that 'bring in' existing development within the bounds of this Act, e.g. currently operating projects such as mine being required to obtain an environmental approval (to replace an authorisation/MMP). While the process under the draft Bill and draft Regulations to go through an EIA process would clearly not apply given these actions are already in existence (and we accept that it would not be appropriate for offence provisions to apply retrospectively etc), it is essential for the integrity of the new regulatory framework that all major projects are subject to the same regulatory framework going forward, including for future offences and compliance/enforcement powers. An equitable transitional framework must be established.

2. Draft Regulations

Part 2: Concepts in Act

- Cl 4 (fit and proper person) – we strongly support the inclusion of a fit and proper person test. However, given this is such an important provision, it is not clear why this is in the Regulations, rather than the Act. This undermines accountability and would be more open to being amended in the future.
- We also consider it unnecessary to prescribe exactly which legislation is relevant in cl 4 – it is not clear if the current list is adequate as it has identified only some relevant state legislation (e.g. in NSW, the EIA process is regulated by the *Environmental Planning and Assessment Act 1979*, which would of course be relevant). It would be sufficient to specify that the Minister may consider any contraventions under environmental, work health and safety and other related legislation.
- Cl 5 (methods of environmental impact assessment) – this clause should be in the Act as a key framing provision for the EIA process.

Part 3: Environment protection policies

- We generally support these provisions, although consider they are significant procedural rights that must be included in the Act not Regulations (for reasons previously noted in relation to similar issues).

Part 4: Referral of proposed actions

- We consider this part should be included in the Act, not Regulations, for reasons previously noted. Only administrative matters (rather than key rights, obligations and responsibilities) should be in Regulations.
- We generally support the concept of referrals, although consider there are significant flaws with the current approach, including no public exhibition at the initial referral stage. There appears to be some mixing of the 'referral' process and the 'assessment' process (for reasons described in our submission). The drafting in Part 4 is also over-complicated and should be fundamentally re-conceptualised.
- We support the availability of public comment prior to a decision being made about the appropriate level of assessment (cl 28) as well as the ability to make a recommendation to refuse an approval (cl 28(2)-(3)).

- Clause 28 must explicitly refer to the test of 'significant impact' i.e. NTEPA must require an assessment if there is a potential for a significant impact – there should not be any discretion involved in a referral 'decision'. To this end, the referral language is awkward – a referral shouldn't be 'refused' or 'accepted'; these provisions should simply be framed around the NTEPA's threshold decision whether an EIA and approval is required because the proposed action will have a significant impact on the environment.
- We strongly submit that there should be criteria to guide the decision-making about the assessment pathway (cl 28 (2)) – there is currently complete discretion. This is one of the significant issues of the existing system and must be amended.
- We support the requirements for statement of reasons to be published, and the specifications for what information must be included in that (cl 31-31, 34-35, 38-39). However, as previously submitted, there should be an explicit timeframe for publication (e.g. 7 days) to ensure accountability.
- Other concerns include the high level of discretion around when a matter can be considered a 'strategic assessment' (none is provided in cl 21). Further, some of the timeframes seem quite restricted and could place unnecessary pressure on the NTEPA's decision-making (e.g. 10 days to request further information in cl 18; 20 business days to either accept or refuse a referral in cl 20).

Part 5: Environmental impact assessment

- The provisions in Part 5 should be in the Act, not Regulations, for reasons previously noted. Only administrative matters (rather than key rights, obligations and responsibilities) should be in Regulations.
- As a general comment, we consider this part could be streamlined. Per our comments above, further guidance must be provided when the NTEPA should choose each assessment pathway. On our review, there is nothing in the draft Bill nor Regulations that attempts to guide when each pathway should be utilised. This is confusing and further undermines accountability and consistent decision-making in the environmental impact assessment procedure – a feature of the current legislation, which must be rectified through this new legislation.
- Division 2 (general provisions for EIA) – we query the usefulness of TEOs (as previously noted). If retained, cl 43 provision should clearly be in the Act.
- We generally support the provisions providing NTEPA with powers to require additional information during the assessment process and associated matters (cl 44, 46, 48-51). These will be important powers to ensure proponents provide adequate, timely information, and will be important in ensuring decision-making is based on robust evidence and information.
- Division 3 (assessment by referral information) - we strongly object to 'assessment by referral information' (cl 55). This clause should be removed. It appears to confuse (or blend) the referral process with the assessment process, and the two should remain clearly separate steps. There is no accountability or transparency associated with undertaking an assessment on referral information, and we are highly concerned this pathway could be abused to avoid the more stringent consultation requirements imposed by the other pathways, particularly as there is no guidance as to when each pathway is appropriate / required.
- Division 4 (assessment by supplementary environmental report) – we do not have specific concerns with the procedures for assessment by supplementary environmental report, but consider that there must be some guide on the discretion of the NTEPA when it determines that this is an appropriate pathway. We also consider using alternative terminology than 'supplementary environmental report' as it does not clearly describe what it is (and may be confusing when considering how 'supplementary reports' are currently used under the *Environmental Assessment Act*, which also appears to have been carried over to the draft Bill

in the EIS provisions). On our understanding, this would be a modified / less detailed EIS document. In NSW, the equivalent is called a 'statement of environmental effects' and we suggest similar terminology be used in the NT.

- Division 5 (terms of reference) – we support the mandatory preparation of terms of reference (TOR) for assessment by EIS or inquiry (cl 65) and the public exhibition of the TORs. We are, however, concerned with clause 66(5) which states that the NTEPA is not required to prepare draft TORs if they were provided by a proponent upon referral. This is inappropriate and removes the statutory obligation on the NTEPA to consider whether those draft TORs are appropriate. Cl 66(2) is sufficient to enable the NTPEA to consider and build from any draft TORs prepared by a proponent. Sub-clause (5) must be deleted.
- Although we acknowledge that standard TORs may be useful for streamlining and could provide a useful starting point for various industries, we would expect each action ultimately to require a tailored TOR. We would be concerned if standard TORs were used as a matter of course. Standard TORs may undermine rigorous, independent decision-making. The legislation should make clear that the NTEPA, even if using a standard TOR, must consider the particulars of each action to ascertain that the standard TORs are appropriate.
- Division 6 (environmental impact statement assessment process) – we generally support the provisions for the EIS process, subject to the specific following comments.
- We support the concept of a clause such as cl 84 (matters to be included) although more careful consideration should be given to the exact language used to ensure the enumerated matters are not limiting on what each type of assessment should address (e.g. consider redrafting (d) as: an assessment which considers the potential impact of an action on Aboriginal culture, and/or sacred sites and/or the Territory's natural or built heritage). We also strongly submit that this clause should include clear, detailed obligations to assess the impacts of climate change, as well as cumulative impacts.
- We particularly support that cl 91 enables a submission to be made 'orally in person or by audio or audio-visual communication or recording,' as this may provide more culturally appropriate avenues for the recording and receipt of submissions. We would encourage this option to be made broadly available for all other public notice/ comment processes under the draft Bill and draft Regulations.
- We consider in many cases that 6 weeks (30 business day) consultation period for draft EIS's (cl 91(3)) will often be inadequate – we suggest 8 or 12 weeks as a starting point. Anything shorter would undermine the consultation process, given the complexity and technical detail usually associated with these documents.
- Cl 97 should require a supplement to be published online. It is also not clear why a more restricted approach to further consultation is contained in cl 99 – the same public consultation process should instead apply, rather than excluding the opportunity for submissions to be made (e.g. there may be valid reasons why a person was not able to make a submission on the initial publication of the draft EIS).
- We strongly object to the ability for a supplement to be waived (cl 100) – a proponent should always be required to provide a response to issues raised in submissions, and opening this up to influence by proponents could seriously undermine the legitimacy of the process. While there is a requirement for reasons to be published if this waiver is made, the fact that this does not apply to matters being assessed under the Commonwealth bilateral is a tacit acknowledgement that this availability for a wavier undermines acceptable assessment practice and procedure. Cl 100 must be deleted.
- Division 7 (assessment by inquiry) – we generally support the option for assessment to be conducted by inquiry. However, we consider further details should be provided in the legislation to guide when it may be appropriate to use this 'pathway' and whether it is mandatory for either an EIS or 'supplementary environmental report' will also be required (as

it must). Cl 112 is not clear in this regard. The provisions are highly discretionary, which undermines accountability, and there are no safeguards to ensure that this pathway is sufficiently rigorous. While we understand the intent of these may be to provide a more appropriate consultation forum (e.g. for remote Aboriginal communities), if this is the case, this must be acknowledged in the provisions themselves.

- Division 8 (assessment report) – we consider cl 113 has confused (or at least, appears to limit) what the appropriate role for the NTEPA is in these circumstances, and could be deleted. Cl 114 should be sufficient to guide the NTEPA about what material it must and may consider in preparing its report. The role of the relevant EIA document (EIS/ supplementary environmental report) is to 'assess' the potential impacts and risks. In our view, the appropriate role of the NTEPA is to provide advice to the Minister, based on an analysis of all information that forms part of the EIA process, regarding whether the impacts are acceptable or not. We would anticipate that the assessment report should canvas the matters that the Minister is legally obliged to consider when making a decision (e.g. under cl 87 including how the mitigation hierarchy has been appropriately applied or whether there is an 'unacceptable impact', whether the applicant is 'fit and proper' etc).
- We submit cl 117(2) must be deleted. It is completely inappropriate, and contrary to ordinary, accepted practice, for there to be consultation with a proponent over a draft assessment report, draft approval or draft statement – this opens the decision-making process up to undue influence and corruption and is completely unwarranted. This is completely contrary to best practice. It undermines the objective and independent analysis and advice of the NTEPA at this critical stage in the process. If there is proposed consultation at this stage, it should be public, to ensure transparency over this step and reduce risks associated with corruption.
- We also consider the assessment period requirements in cl 119 are too short – this puts considerable pressure on the NTEPA (a statutory board) and Department (in supporting the NTEPA) to prepare their assessment report in extremely short time frames. We suggest a minimum period could be provided, but the discretion must lie with the NTEPA. A requirement to notify the proponent would suffice (rather than consultation). The NTEPA must control the process subject to undue influence or pressure from proponents, to ensure the decision-making process is not undermined.

Part 6: Standard conditions of environmental approval

- These provisions should be in the Act, not Regulations, for reasons previously noted. Only administrative matters (rather than key rights, obligations and responsibilities) should be in Regulations.
- As per our comments regarding standardised TORs, while we don't outright object to the preparation of standard conditions, there is a risk that they could be used inappropriately. The NTEPA must have complete discretion with respect to the decision to amend or modify any standard conditions i.e. they must not give rise to any expectations that they will automatically apply. For the avoidance of doubt, this this must be made explicit in the Bill (e.g. in cl 94).

Part 7: Variation of actions

- These provisions should be in the Act, not Regulations, for reasons previously noted. Only administrative matters (rather than key rights, obligations and responsibilities) should be in Regulations.
- We have serious concerns that the variation provisions could be used by proponents to manipulate the EIA system by making multiple variations of an action to avoid proper scrutiny (as has occurred in other jurisdictions such as NSW), and to place significant pressure on the NTEPA (e.g. to change the assessment pathway that is required). It also has the potential to consume significant resources of the NTEPA (particularly as there are very constrained timeframes required for making various variation decisions) and undermines transparency and accountable decision-making processes. The EIA process should not be able to be used and

manipulated to negotiate a better outcome for proponents. In our view, this is what this Part enables.

- While we accept that there may be legitimate circumstances where a project changes over time, the provisions should provide less scope for amending an action at all stages of the assessment process. It is vastly more appropriate, if a variation is sought while the assessment process is underway that is not minor/inconsequential in nature (i.e. no environmental impact), for the proponent to be required to effectively re-commence the legislative process. This would also encourage proponents to ensure that they have, since the beginning, designed their projects fully in accordance with the 'avoid, mitigate and offset' hierarchy.
- While we think the entire part should be re-considered in line with the above comments, cl 142 and 143 (and equivalents in later divisions) in particular should be significantly revised to better respond to the potential abuse/misuse of these variation procedures (which has played out in other jurisdictions, including NSW). It is also not clear why different tests/ provisions apply depending on what stage a variation is presented (e.g. cl 142-143 vary from 162-163).
- We also consider it highly inappropriate that variations can effectively be made to 'undo' a statement of unacceptable impact (cl 164). This simply invites lobbying and pressure on the NTEPA. It also undermines the EIA process and it completely non-transparent. This provision must be deleted.
- In summary, we consider the variation provisions in their entirety are highly inappropriate and could lead to the entire EIA system being fundamentally undermined and weakened. They need to be fully re-considered.

Part 8: Registration of environmental practitioners

- We strongly support establishing a scheme of environmental practitioners, to ensure only those with appropriate skills and qualifications are able to prepare documents as part of the EIA process.
- However, as per previous comments, the majority of these provisions should be in the Bill (in particularly the 'fit and proper person' test).

Part 9: Registration of environmental auditors

- As per environmental practitioners, we support a registration scheme for auditors, although consider the majority of these provisions should be in the Bill.

Part 10: Notice of environmental incidents

- We support the information to be required in notification of incidents.

Schedule 2 – Fees

- It is not clear to us why there are no proposed fees for an application for an environmental approval, as well as variation fees. Setting an appropriate application fee would enable revenue to be generated and would recognise the considerable expense to government associated with administering this framework. It would be consistent with the 'user pays' and 'polluter pays' principles. This is consistent with best practice cost recovery principles in public administration.

Attachment B: Australia's obligations under International Law to Consult with, and to Ensure the Free, Prior and Informed Consent of, Indigenous Communities

1. Background

The Northern Territory Government has released its draft *Environment Protection Bill* ("Bill") and draft *Environment Protection Regulations* ("Regulations") for comment. These follow consultations based on the May 2017 *Environmental Regulatory Reform Discussion Paper*.[1] The reform of the Territory's environmental regulatory system is also taking place in the context of the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory*, which released its final report on 27 March 2018.[2]

Both the *Environmental Regulatory Reform Discussion Paper* (issued by the government) and the *Hydraulic Fracturing Report* (which the government supported the recommendations of[3]) recognise the importance of consultation with indigenous communities that may be affected by development projects, including resource developments such as shale gas projects. For example, one of the Discussion Paper's guiding principles is encouraging and supporting public participation. This "includes ensuring community are better included in the assessment process, building a process that allows for community input, and ensuring Aboriginal people and traditional environmental knowledge are included and recognised in the process", and supporting early engagement and translation of documents into local languages.[4] The *Hydraulic Fracturing Report* recognised that "Indigenous people have an international law right to be consulted in good faith about development on their land",[5] and included a series of recommendations to support such consultations and ensure they include the cultural impact of any development.[6]

Consistent with the *Hydraulic Fracturing Report*[7] and other prior recommendations, the proposed Bill envisages assessment of a broad range of impacts, including social and cultural, physical, and biological impacts.[8] Social and cultural impacts include "the potential impact of an action on Aboriginal culture."[9]

Unfortunately, the consultation drafts of the Bill and Regulations do not include any mechanism to ensure consultation with affected indigenous communities, or that consultations are carried out in an appropriate manner. This omission would deny decision-makers the invaluable perspectives of those best able to speak to the cultural impact of a proposal[10] and most capable of sharing traditional environmental knowledge of communities that have lived in and observed the relevant ecosystems for millennia.[11]

2. Legal Requirements for Consultation with Affected Indigenous Communities

States have an obligation to consult with indigenous communities prior to approving projects or developments that may affect those communities. This obligation derives from a range of sources, including human rights treaties to which Australia is a party. Such consultations serve not only to protect indigenous communities' ownership or title to land, but also to protect their cultural and other rights, and to ensure that traditional knowledge of the land and ecosystems are incorporated into decision-making.

Consultation must be carried out in good faith, allowing affected indigenous communities to present their views prior to any decision and with the objective of obtaining the consent of indigenous communities to the development. Indeed, the legal requirement for consultations with indigenous communities finds its fullest expression in the principle of free, prior and informed consent. And while obtaining the consent of the affected indigenous communities must be the good-faith objective of any consultation, that consent is a legal requirement for certain projects or developments that have substantial impacts on an indigenous community, its traditional lands, or its relationship with those lands.

a. <u>The Obligation to Consult Indigenous Communities under International Law</u>

Under international law, states have a duty to consult with indigenous peoples in good faith about matters that affect them, in particular those that affect their traditional lands and relationship with those lands. This duty is "firmly rooted in international human rights law",[12] and is grounded in core United Nations

human rights treaties[13] to which Australia is a party, such as the International Covenant on Civil and Political Rights ("ICCPR"),[14] the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),[15] and the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD").[16] The UN bodies established to monitor the implementation of these binding international legal treaties have clarified that consultation with indigenous peoples on matters that affect them is required in accordance with state obligations under those treaties.[17] The duty to consult with indigenous peoples about matters that affect them has also been recognised and reinforced in a series of other conventions and human rights bodies,[18] which are further "evidence of contemporary international opinion concerning matters relating to indigenous peoples."[19]

The duty to consult finds prominent expression in the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP" or "the Declaration"), including:

> Art 19: "States shall consult and co-operate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them";
>
> Art 32(2): "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources".[20]

This principle, often referred to as free, prior and informed consent, is not a new right or obligation. Rather, it is "a manifestation of indigenous peoples' right to self-determine their political, social, economic and cultural priorities. It constitutes three interrelated and cumulative rights of indigenous peoples: *the right to be consulted*; the right to participate; and the right to their lands, territories and resources."[21]

Although UNDRIP is not in itself a legally binding instrument, it "is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity that are in widely ratified human rights treaties",[22] and reflects international law enshrined in binding international agreements (such as the ICESCR, ICERD and ICCPR[23]). The Declaration, and the principle of free, prior and informed consent that it contains, thus "do[es] not create new rights for indigenous peoples, but rather provide[s] a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples".[24] Given that the Declaration articulates the content of pre-existing human rights obligations, the UN Special Rapporteur on the Rights of Indigenous Peoples explained that "[i]mplementation of the Declaration should be regarded as political, moral and, *yes, legal imperative without qualification*".[25]

The UN Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples ("EMRIP") recently addressed the obligation to consult in the specific context of environmental impact procedures, clarifying that "States should ensure that indigenous peoples have the opportunity to participate in impact assessment processes (human rights, environmental, cultural and social)".[26]

b. Australia Recognises the Importance of Consultation

In addition to the Northern Territory Government's statements above, Australia has repeatedly recognised the importance of consultation with affected indigenous communities, in particular in the context of environmental protection, cultural heritage, and related impact assessments.[27] Since April 2009, the federal government has expressed its support for the UNDRIP.[28] In 2016, it reiterated that support in the context of "recognis[ing] the importance of consulting with Indigenous peoples on decisions affecting them and that respect for Indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment."[29]

Just this year, in its Submission to EMRIP's Study on Free, Prior and Informed Consent, the Australian government "recognise[d] the importance of engaging in good faith with Aboriginal and Torres Strait Islander peoples in relation to decisions that affect them. We cannot overcome indigenous disadvantage or build on the strength of indigenous communities if governments do not consult effectively."[30]

c. Scope of the Obligation to Consult

The duty to consult derives from the overarching right of indigenous peoples to self-determination, and the obligation of non-discrimination.[31] It is "indivisible from and interrelated with other rights of indigenous peoples, such as their right to self-determination and their rights to their lands, territories and resources".[32] This applies to "*any* project *affecting* their lands or territories and other resources".[33]

The obligation to consult and the participation of indigenous peoples in all aspects of decisions affecting them is central to realising and protecting the full spectrum of substantive indigenous rights, including rights to cultural integrity and equality (as well as property).[34] The obligation to consult is thus not limited to specific or proprietary interests in land – the Australian Human Rights Commission has recognised that there are "a range of circumstances where States have an obligation to obtain the free, prior and informed consent of those affected".[35] Other human rights bodies have agreed that "[c]onsultation and consent are not limited to matters affecting indigenous property rights, but are also applicable to other state administrative … activity that has an impact on the rights or interests of indigenous peoples."[36] This full range of circumstances in which the requirement for consultation will be engaged is reflected in the three rationales identified by EMRIP for the principle of free, prior and informed consent: restoring "control over lands"; "cultural integrity"; and redressing "the power imbalance between indigenous peoples and States".[37]

The draft Bill and Regulations recognise that projects may have cultural impacts, and that these must be assessed. This is particularly important for indigenous communities, as their cultural rights are often closely dependent on their relationship with and uses of traditional lands. The duty to consult when cultural resources, integrity, or rights[38] of an indigenous people may be affected must therefore be implemented in full. Moreover, because the cultural value, expression and use of traditional lands may be affected by activities that do not affect a community's title to that land, consultation cannot be limited to activities that affect title.

Similarly, projects or activities may affect land (including its use and its cultural value and resources) beyond the particular site where they are located, for example where activities affecting water flows affect downstream communities.[39] Consultation thus also cannot be limited only to activities taking place *on* traditional lands. The importance of cultural rights means that the indigenous communities that are affected may extend beyond the traditional owners of particular land to other indigenous communities that have an interest in or cultural connection with particular land.[40] But the only way to know this, and to make a fully informed decision, is to consult with *all* potentially affected communities.

d. Consultation and Consent

Any consultation must be conducted in good faith, and with the objective of obtaining the consent of the indigenous communities,[41] in order to "reverse historical patterns of imposed decisions."[42] Consultation is thus not a single event or moment, a formalistic right to be heard, or notification of decisions that have effectively been made. Rather, consultation should be a process by which indigenous communities can engage "to influence the outcome of decision-making processes affecting them"; and should be directed "towards mutually acceptable arrangements prior to decisions on proposed measures".[43]

While all consultations must be conducted with the *objective* of obtaining the consent of the community, certain circumstances require states to secure the affirmative consent of affected indigenous peoples. These include activities that have a significant and direct impact on the community or on traditional indigenous lands.[44] International law establishes a *presumption or general rule* that extractive activities that take place on traditional lands or that have direct bearing on areas of cultural significance have a

significant and direct impact requiring affirmative consent of the affected peoples.[45] Certain other categories, such as activities that require the relocation of indigenous peoples or that require storage or disposal of hazardous materials, are recognised as *necessarily* having such an impact and requiring affirmative consent.[46] However, determining whether the impact on an indigenous community of other proposed activities is significant or direct enough to require obtaining their affirmative prior consent *cannot be done without consulting that community*.[47]

If consent is required to be given, as opposed to simply being the objective of good faith consultations, then it must be provided on a free and informed basis prior to the decision being made or the project being commenced. These requirements are closely linked to the nature of the consultations that lead to any consent. Without respecting the principles for effective consultations with indigenous communities set out below, it is unlikely that any consent would qualify as free, prior and informed.

3. Good Practices for Consultations with Indigenous Communities

Full, appropriate and good faith consultation with indigenous communities is essential to safeguarding those communities' fundamental human rights. It is also a way to make better decisions by ensuring that all relevant information and perspectives are incorporated early in the process and by identifying and addressing disagreements before projects begin.[48] It is not, and should not be treated as, a burden on decision-making.

The federal government recognises this, defining "good Indigenous engagement" as "involv[ing] the Aboriginal and Torres Strait Islander peoples in problem solving or decision making, and us[ing] community input to make better decisions"[49] The Northern Territory Government has similarly recognised, in the context of the environmental regulatory reforms, the importance of traditional environmental knowledge,[50] and of assessing cultural impacts.[51] This necessarily requires input from consultations with indigenous communities, who can contribute this traditional knowledge and are best placed to speak to cultural impacts on them, including the "living aspects that define the values of current Aboriginal society."[52]

The general processes that many governments have developed for obtaining information and providing input – for example, statutory notice and comment processes – often do not accommodate the realities of indigenous peoples' lives and decision-making processes, the distinctive characteristics of their culture and history, and their historic and current political marginalisation.[53] As a result, these processes are not effective or appropriate methods of gathering indigenous wisdom or becoming informed about the effects of decisions on indigenous communities, as the federal government has recognised.[54] Consultations must therefore be structured and implemented to take these realities into account. This process should not be left to policy or discretion, which has proven ineffective in the past.[55] Instead it "should be formal and carried out with mutual respect."[56]

The following is an overview of key principles for consultations with indigenous communities drawn from international standards,[57] federal government guidance,[58] Australian Human Rights Commission recommendations,[59] and submissions from Northern Territory indigenous groups.[60]

1. Identify *all* potentially affected indigenous stakeholders and communities.[61] As noted above, this should not be limited only to the traditional owners of the land on which the project will take place, and may include both other indigenous communities with cultural or traditional connections with that land, and communities whose traditional use or cultural value of other lands will be affected by the project (such as downstream communities).

2. The objective of the consultations must be to achieve consensus or obtain consent from the indigenous community.[62] The process must give the community a real opportunity to have input into and to influence the decision.[63] They should not present the community with a *fait accompli* on which they are asked to comment, or provide an opportunity to influence only peripheral

details after the core substantive decisions have already been taken.[64] A project with significant or direct impacts on indigenous peoples or lands must not go forward without the affirmative consent of the affected indigenous people.[65]

3. Establish the method and process for consultation in consensus with potentially affected indigenous communities.[66] All consultations, including those on the process for future communications or negotiation, must be conducted in a culturally sensitive manner and respect indigenous protocols for communication and decision-making.[67]

4. Respect and work through traditional and contemporary forms of Indigenous peoples' governance, including collective decision-making structures and practices.[68] This will require identifying any existing representative bodies of the potentially affected indigenous communities,[69] and conducting consultations through the indigenous peoples' own representative organisations and/or processes where possible.[70] Consultations should avoid creating divisions within the community.[71] Consultations should consider the impacts on *all* members of the community, and should make a point of encouraging and incorporating the views of women, children, youth and persons with disabilities.[72]

5. Establish and respect culturally appropriate timeframes that ensure full and effective participation. Conduct consultations early in the project planning or approval process,[73] to allow indigenous communities to engage in discussion, consultation, consensus or decision-making according to their own social and cultural practices.[74] Depending on the nature of the project or the impact on the community, the consultations may need to remain ongoing beyond the approval and through the duration of the project and beyond.[75]

6. Provide affected indigenous communities full information on the nature of the project and its projected impacts.[76] This information should include the nature or scope of the project, its duration and pace, reversibility, reasons for the project, areas to be affected, preliminary impact assessments (including social, cultural and environmental), and benefit sharing or offset proposals.[77] All necessary information must be provided at an early stage, in sufficient time for the communities to consider it.[78] Providing crucial data late in the process undermines the effectiveness of the consultation and the opportunity for the community to influence the decision.[79] Information must also be provided in a form that is accessible to the community, which may require translation into local languages.[80]

7. Provide affected indigenous communities adequate resources and support to participate in a full and effective manner,[81] including any technical resources – such as expert support – necessary to guarantee informed participation. Ensure that consultations do not impose additional burdens or reinforce disparities of resources and power. While consultations should often be conducted on the community's land, rather than governments or project developers expecting the communities to come to them,[82] if it is agreed that some portion of the consultations should be conducted elsewhere then the community or its representatives should be provided with financial support to enable their participation.

8. Minimise the burden on indigenous communities. In addition to providing adequate financial and technical resources, consultation timeframes must take account of the resource constraints under which indigenous communities frequently operate, and the fact that the project or consultation may not be the only issue that they are dealing with or their highest priority.[83] Consultations should take place in the time, place and manner chosen by the affected indigenous communities.[84] Authorities or others involved in the consultations should endeavour to minimise the number of consultation processes that are involved in each project or measure, which may

require coordination across government departments.[85]

[1] Northern Territory Government, Department of Environment and Natural Resources, *Environmental Regulatory Reform Discussion Paper*, May 2017 ("NT *Environmental Regulatory Reform Discussion Paper*"), https://denr.nt.gov.au/__data/assets/pdf_file/0007/413089/Environmental-Regulatory-Reform-Discussion-Paperv2.pdf.

[2] Scientific Inquiry into Hydraulic Fracturing in the Northern Territory, *Final Report*, 27 March 2018 ("*Hydraulic Fracturing Report*"), https://frackinginquiry.nt.gov.au/inquiry-reports/final-report.

[3] https://hydraulicfracturing.nt.gov.au/about-hydraulic-fracturing/government-response-to-hydraulic-fracturing-inquiry.

[4] NT *Environmental Regulatory Reform Discussion Paper*, supra note 1, pp. 4, 7, 16. The Discussion Paper also recognised that "[t]raditional environmental knowledge is an untapped resource and should be acknowledged and formally recognised within the NT's environmental impact assessment system" (p. 12).

[5] *Hydraulic Fracturing Report*, supra note 2, p. 287.

[6] *See, e.g., id.*, recommendations 11.2, 11.5, 11.6, 11.8.

[7] *Id.*, p. 283 ("The Panel's view is that cultural matters must be considered in conjunction with, and not separate from, other environmental matters.").

[8] Draft Environmental Protection Regulations, reg 84(c) and (d); see also Draft Environmental Protection Bill, s. 6 ("*Environment* means all aspects of the surroundings of humans including physical, biological, economic, cultural and social aspects."), https://denr.nt.gov.au/environment-information/environmental-regulatory-reform/consultation-on-new-environment-protection-legislation. See also NT *Environmental Regulatory Reform Discussion Paper*, supra note 1, p. 9 ("matters associated with biodiversity, land management, water … and cultural and social values").

[9] Draft Environmental Protection Regulations, reg 84(d).

[10] "Indigenous people are the primary source of information on the value of their heritage and how this is best conserved." Australian Heritage Commission, *Ask First: A guide to respecting Indigenous heritage places and values*, 2002, p. 6 ("Australian Heritage Commission, *Ask First*"), http://155.187.2.69/heritage/ahc/publications/commission/books/ask-first.html.

[11] Joint Northern and Central Land Council, *Submission to the Northern Territory Department of Environment and Natural Resources: Environmental Regulatory Reform Discussion Paper,* June 2017, p. 6 ("Joint Northern and Central Land Council *Submission*"), https://www.clc.org.au/files/pdf/CLC-NLC_Environmental_Regulatory_Reform_submission.pdf.

[12] Special Rapporteur James Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, A/HRC/12/34, 15 July 2009 ("Anaya, *2009 Annual Report*"), para. 38, https://undocs.org/A/HRC/12/34.

[13] Anaya, *2009 Annual Report*, supra note 12, para. 40. See also EMRIP, *Progress report on the study of indigenous peoples and the right to participate in decision-making*, A/HRC/15/35, 23 August 2010 ("EMRIP, *Progress Report*"), para. 36, http://www.undocs.org/A/HRC/15/35 ("International human rights treaty bodies, such as the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights, have also clarified that the free, prior and informed consent of indigenous peoples is required in accordance with State obligations under their corresponding treaties.")

[14] International Covenant on Civil and Political Rights, UNGA Res 2200A (XXI), 16 December 1966, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, Articles 1(1) ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their eco nomic, social and cultural development."); 25 ("Every citizen shall have the right and the opportunity… a) To take part in the conduct of public affairs, directly or through freely chosen representatives"); 27 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture").

[15] International Covenant on Economic, Social and Cultural Rights, UNGA Res 2200A (XXI), 16 December 1966, https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx, Articles 1(1) ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their eco nomic, social and cultural development."); 1(2) ("All peoples may, for their own ends, freely dispose of their natural wealth and resources…. In no case may a people be deprived of its own means of subsistence"); 15(1) ("The States Parties

to the present Covenant recognize the right of everyone: (a) To take part in cultural life."). See further Committee on Economic Social and Cultural Rights, *General Comment No. 21 - Right of everyone to take part in cultural life (art 15, para. 1 (a))*, E/C.12/GC/21 (2009), paras. 36-37 ("CESCR, *General Comment No. 21*"), https://www2.ohchr.org/english/bodies/cescr/docs/gc/E-C-12-GC-21.doc.

[16] International Convention on the Elimination of All Forms of Racial Discrimination, UNGA Res 2106 (XX), 21 December 1965, https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx, Articles 2 ("States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.") and 5 ("[i]n compliance with the fundamental obligations laid down in article 2…, *States Parties undertake to prohibit and eliminate racial discrimination in all its forms* and to guarantee the right of everyone … to equality before the law, notably in the enjoyment of" the rights including cultural and economic rights"). The discrimination prohibited under ICERD includes indirect or *de facto* racial discrimination, i.e. where an "apparently neutral provision, criterion or practice would put persons of a particular racial, ethnic or national origin at a disadvantage compared with other persons." - CERD, *Concluding observations of the Committee on the Elimination of Racial Discrimination – United States of America,* CERD/C/USA/CO/6, 8 May 2008, para. 10, http://undocs.org/CERD/C/USA/CO/6.

[17] *See e.g.*, CERD*, General Recommendation 23: Rights of indigenous peoples*, A/52/18 (Annex V), 1997, http://hrlibrary.umn.edu/gencomm/genrexxiii.htm; CESCR, *General Comment No. 21*, supra note 15, paras. 36-37. *See further* Anaya, *2009 Annual Report*, supra note 12, para. 40; EMRIP, *Progress Report*, supra note 13, para. 36; Special Rapporteur James Anaya, *Extractive industries and indigenous peoples*, A/HRC/24/41, 1 July 2013, para. 27 ("Anaya, *Extractive industries and indigenous peoples*"), https://undocs.org/A/HRC/24/41.

[18] *E.g.*, International Labour Organization, *Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169)* (1989), Article 6(1)(a) ("[G]overnments shall … consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly."); Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 30 December 2009, para. 273 http://www.oas.org/en/iachr/indigenous/docs/pdf/ancestrallands.pdf ("[T]he general rule according to which the State must guarantee that indigenous peoples be consulted on any matters that might affect them…. Consultation and consent are not limited to matters affecting indigenous property rights, but are also applicable to other state administrative or legislative activity that has an impact on the rights or interests of indigenous peoples.").

[19] Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources*, supra note 18, para. 14.

[20] *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, 2 October 2007 ("UNDRIP"), https://undocs.org/A/RES/61/295. Such "territories" "include lands that are in some form titled or reserved to them by the State, lands that they traditionally own or possess under customary tenure (whether officially titled or not), or other areas that are of cultural or religious significance to them or in which they traditionally have access to resources that are important to their physical well-being or cultural practices." Anaya, *Extractive industries and indigenous peoples*, supra note 17, para. 27.

[21] United Nations Human Rights Council, *Study of the Expert Mechanism on the Rights of Indigenous Peoples – Free, Prior and Informed Consent: a human rights-based approach*, A/HRC/39/62, 10 August 2018 ("EMRIP, *2018 Study on Free Prior and Informed Consent*"), para. 14 (emphasis added), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/245/94/PDF/G1824594.pdf.

[22] Special Rapporteur James Anaya, *Situation of human rights and fundamental freedoms of indigenous people*, A/65/264, 9 August 2010 ("Anaya, *2010 General Assembly Report*"), para. 62, http://unsr.jamesanaya.org/docs/annual/2010_ga_annual_report_en.pdf.

[23] Anaya, *2009 Annual Report*, supra note 12, para. 38 ("[T]he duty of States to consult with indigenous peoples on decisions affecting them finds prominent expression in [UNDRIP], and is firmly rooted in international human rights law.").

[24] EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para. 3. See similarly, United Nations Department of Economic and Social Affairs, *United Nations Declaration on the Rights of Indigenous Peoples: Historical Overview*, https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (the Declaration "elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples"); Australian Human Rights Commission, *Declaration Dialogue Series Paper No. 3: We have a right to participate in decisions that affect us*, July 2013, p.4 ("AHRC, *We have a right to participate*"), https://www.humanrights.gov.au/sites/default/files/2014_AHRC_DD_3_Consent.pdf.

("The Declaration does not contain any new human rights or international standards. Rather it reflects existing legal obligations sourced in international human rights treaties. It simply provides the lens through which to apply these rights and standards to the lives and circumstances of Indigenous peoples and their communities.").

[25] Anaya, *2010 General Assembly Report*, supra note 22, para. 63 (emphasis added).

[26] EMRIP, *Expert Mechanism advice No. 11 on indigenous peoples and free, prior and informed consent* (Annex to EMRIP, *2018 Study on Free Prior and Informed Consent,* supra note 21), para. 15 ("EMRIP, *Expert Mechanism advice No. 11*"), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/245/94/PDF/G1824594.pdf.

[27] *See, e.g.,* Australian Heritage Commission, *Ask First*, supra note 10, p. 6 ("Consultation and negotiation are central to the Indigenous heritage management process outlined in this document."); Australian Government, Department of the Environment, *Engage Early: Guidance for proponents on best practice Indigenous engagement for environmental assessments under the Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, February 2016 ("Dept of Environment, *Engage Early*"), pp. 3-4, http://www.environment.gov.au/system/files/resources/3201a986-88e8-40f3-8c15-6e659ed04006/files/engage-early-indigenous-engagement-guidelines.pdf ("The EPBC Act recognises that Indigenous peoples play an important role in the conservation and sustainable use of Australia's natural environment. It also recognises the importance of a co-operative approach between the Government, community, landholders and Indigenous peoples (Section 3(1)). Consultation with Indigenous peoples should not just be limited to matters of cultural heritage. Indigenous peoples should also be consulted on other protected matters that are likely to be impacted by the proposed action.").

[28] In April 2009, the Australian government (having previously been one of four nations to vote against the adoption of the UNDRIP) "gave its support" to the declaration; https://www.abc.net.au/news/2009-04-03/aust-adopts-un-indigenous-declaration/1640444.

[29] Dept of Environment, *Engage Early*, supra note 27, p. 3.

[30] Government of Australian, *Submission to the United Nations Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) – study on free, prior and informed consent* (2018), p. 1 https://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/FPIC/Australia.pdf.

[31] EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, paras. 6-10.

[32] Expert Mechanism on the Rights of Indigenous Peoples ("EMRIP"), *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, A/HRC/21/55, 16 August 2012, para. 8, https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-55_en.pdf.

[33] UNDRIP, supra note 20, Art 32(2) (emphasis added).

[34] See AHRC, *We have a right to participate*, supra note 24, pp. 6, 8. Anaya, *2009 Annual Report*, supra note 12, paras. 41, 42 and 62. *See also* Special Rapporteur James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples*, A/HRC/21/47, 6 July 2012 ("Anaya, *2012 Annual Report*"), para. 49 ("[P]rinciples of consultation and consent together constitute a special standard that safeguards and functions as a means for the exercise of indigenous peoples' substantive rights. It is a standard that supplements and helps effectuate substantive rights."), https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-47_en.pdf.

[35] AHRC, *We have a right to participate*, supra note 24, p. 10.

[36] Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources,* supra note 18, para. 273.

[37] EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para 11.

[38] On the importance of cultural rights, especially in the context of land and indigenous communities, see e.g. CESCR *General Comment No. 21*, supra note 15, para. 36; UNDRIP, supra note 20, Articles 8, 11, 12, 13 and 25; Anaya, *2012 Annual Report*, supra note 34, para. 50.

[39] See e.g. Australian Heritage Commission, *Ask First*, supra note 10, p. 8: "Investigate whether the interests of Indigenous people from surrounding areas may also be affected by a project or activity. For example activities that affect water flows will require consultation with communities downstream of the project or activity".

[40] The Australian Heritage Commission highlights this aspect in *Ask First: A guide to respecting Indigenous heritage places and values*, which explicitly delineates "Traditional Owners" and "Other Indigenous people with interests", and includes both as "The relevant Indigenous people" (at p. 4).

[41] EMRIP, *Expert Mechanism advice No. 11*, supra note 26, para. 6: "States should ensure that consent is always the objective of consultations, bearing in mind that in certain cases consent will be required." See also AHRC, *We have a right to participate,* supra note 24, pp. 12-13; UN Human Rights Council, *Final study on indigenous peoples*

and the right to participate in decision making: Report of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/EMRIP/2011/2, 26 May 2011, Annex para 9 ("EMRIP, *Study on Right to Participate in Decision Making*"), http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/AEVfinalreportStudyIPRightParticipate.pdf.

[42] Anaya, *2009 Annual Report*, supra note 12, para. 49.

[43] EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, paras. 15-16.

[44] UN Special Rapporteur on the rights of indigenous peoples James Anaya concludes that "[a] significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent." Anaya, *2009 Annual Report*, supra note 12, para. 47.

[45] EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para. 32; Anaya, *Extractive industries and indigenous peoples*, supra note 17, para. 27 ("The Declaration and various other international sources of authority, along with practical considerations, lead to a general rule that extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent."); Anaya, *2012 Annual Report*, supra note 34, para. 65 ("indigenous consent is presumptively a requirement for those aspects of any extractive operation that takes place within the officially recognized or customary land use areas of indigenous peoples, or that has a direct bearing on areas of cultural significance.").

[46] UNDRIP, for example, explicitly recognises two situations in which a State must obtain the consent of the indigenous peoples concerned before a project may go forward: where a project either will result in the relocation of a group from its traditional lands, or involves the storage or disposal of toxic waste within indigenous lands. UNDRIP, supra note 20, Articles 10 and 29(2).

[47] EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para. 34; see generally paras. 33-35 and examples in following paragraphs. The Australian Human Rights Commission has taken a similar approach: "[T]here appears to be a range of circumstances where States have an obligation to obtain the free, prior and informed consent of those affected. These circumstances range from cases in which States seem to have a simple duty to consult with Indigenous peoples, to cases where *consent is required with respect to development projects or projects concerning the extraction of natural resources on their lands*, to contemplating a more general duty to require consent before taking any decisions directly relating to their rights and interests…. [W]ith respect to cultural rights, *when the essence of [an indigenous peoples'] cultural integrity is at significant risk, obtaining the free, prior and informed consent of the indigenous peoples concerned becomes mandatory*." (AHRC, *We have a right to participate*, supra note 24, p. 10; see examples of where actual consent is required at pp. 11-12).

[48] The "business risks of going forward with a large-scale project in a community without its acceptance can threaten commercial or financial viability of the project; addressing issues of community concern before the project begins is likely to be more successful and cost-effective than responding to community opposition later on; and talks that do not resolve a community's reasons for opposition or achieve consent will provide little assurance against potentially costly and disruptive conflict." Food and Agriculture Organization, *Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities (Manual for Project Practitioners)*, p. 37, http://www.fao.org/3/a-i6190e.pdf (citing World Resources Institute, *Report on why FPIC makes good business sense*).

[49] Dept of Environment, *Engage Early*, supra note 27, p. 7.

[50] NT *Environmental Regulatory Reform Discussion Paper*, supra note 1, p. 7, 12.

[51] Draft Environmental Protection Regulations, reg 84(c) and (d); see also Draft Environmental Protection Bill, s. 6; see further NT *Environmental Regulatory Reform Discussion Paper*, supra note 1, p. 9.

[52] Joint Northern and Central Land Council *Submission*, supra note 11, p. 7.

[53] Anaya, *2009 Annual Report*, supra note 12, paras. 41, 42. *See also* AHRC, *We have a right to participate*, supra note 24, pp. 5-6.

[54] See for example Dept of Environment, *Engage Early*, supra note 27, p. 4 (in the context of consultations under the *Environmental Protection and Biodiversity Conservation Act 1999*). Similarly, *Expert Mechanism advice No. 11* reiterates that effective consultation "should not be confused with public hearings for environment and regulatory statutes", supra note 26, para. 6.

[55] See Joint Northern and Central Land Council *Submission*, supra note 11, p. 6.

[56] EMRIP, *Expert Mechanism advice No. 11*, supra note 26, para. 5.

[57] Including UNDRIP, supra note 20; EMRIP, *2018 Study on Free Prior and Informed Consent,* supra note 21; EMRIP, *Expert Mechanism advice No. 11*, supra note 26; and Anaya, *2009 Annual Report,* supra note 12.

[58] Dept of Environment, *Engage Early,* supra note 27; Australian Heritage Commission, *Ask First,* supra note 10.

[59] AHRC, *We have a right to participate,* supra note 24.

[60] Joint Northern and Central Land Council *Submission,* supra note 11.

[61] AHRC, *We have a right to participate*, supra note 24, p. 5; EMRIP, *Expert Mechanism advice No. 11*, supra note 26, para. 11 ("States should engage broadly with all potentially impacted indigenous peoples."); Dept of Environment, *Engage Early*, supra note 27, p. 3 ("The Australian Government considers that best practice consultation includes: identifying and acknowledging all relevant affected Indigenous peoples and communities."), 7-8 ("Identifying the Indigenous peoples, communities and representative organisations relevant to your proposal is a crucial element to ensuring the engagement process is effective for all parties. It is especially important in situations where there is more than one relevant Indigenous community or traditional owner group."); Australian Heritage Commission, *Ask First*, supra note 10, p. 8.

[62] AHRC, *We have a right to participate*, supra note 24, pp. 12-13, 16 (Appendix 1, principle 1); EMRIP, *Expert Mechanism advice No. 11*, supra note 26, para. 6; EMRIP, *Study on Right to Participate in Decision Making*, supra note 40, Annex para 9.

[63] EMRIP, *Expert Mechanism advice No. 11*, supra note 26, para. 6; *Hydraulic Fracturing Report*, supra note 2, p. 283, recommendation 11.2.

[64] Contrast AHRC, *We have a right to participate*, supra note 24, p. 13, 16 (Appendix 1, principle 3); Joint Northern and Central Land Council *Submission*, supra note 11, p. 6.

[65] Anaya, *2009 Annual Report*, supra note 12, para. 47; EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para. 32.

[66] AHRC, *We have a right to participate*, supra note 24, p.16 (Appendix 1, principle 2); Australian Heritage Commission, *Ask First*, supra note 10, p. 10 (recommending involving the community in setting terms of reference and selecting any consultants); *Hydraulic Fracturing Report*, supra note 2, p. 293, recommendation 11.8; EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para. 20(d); Anaya, *2009 Annual Report*, supra note 12, paras. 50, 51, 68.

[67] Joint Northern and Central Land Council *Submission*, supra note 11, p. 6-7; EMRIP, *Expert Mechanism advice No. 11*, supra note 26, para. 8, 9; EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para. 20(c); Dept of Environment, *Engage Early*, supra note 27, p. 3 ("best practice consultation includes: … demonstrating cultural awareness."), p. 8. This may, for example, require identifying particular issues that cannot be discussed in an open meeting of all stakeholders, or protocols for treating sensitive information that might include preparation of separate versions of documents for particular sections of the community (Dept of Environment, *Engage Early*, supra note 27, p. 8; Australian Heritage Commission, *Ask First*, supra note 10, p. 10).

[68] AHRC, *We have a right to participate*, supra note 24, p. 8, 12-13; Dept of Environment, *Engage Early*, supra note 27, p. 8.

[69] Dept of Environment, *Engage Early*, supra note 27, p. 7-8.

[70] UNDRIP, supra note 20, Articles 18-19; AHRC, *We have a right to participate*, supra note 24, p. 18 (Appendix 1, principle 10); EMRIP, *Expert Mechanism advice No. 11*, supra note 26, para. 11; EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para. 23; Anaya, *2009 Annual Report*, supra note 12, para. 69.

[71] EMRIP, *Expert Mechanism advice No. 11*, supra note 26, para. 12.

[72] EMRIP, *Expert Mechanism advice No. 11*, supra note 26, para. 11 ("consulting with them through their own representative decision-making institutions, in which they are encouraged to include women, children, youth and persons with disabilities, and bearing in mind that the governance structures of some indigenous communities may be male dominated. During each consultation, efforts should be made to understand the specific impacts on indigenous women, children, youth and persons with disabilities."); EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para. 23; Australian Heritage Commission, *Ask First*, supra note 10, p. 8.

[73] Dept of Environment, *Engage Early*, supra note 27, p. 3 ("The Australian Government considers that best practice consultation includes: … committing to early engagement at the pre-referral stage; building trust through early and ongoing communication"), p. 7; AHRC, *We have a right to participate*, supra note 24, p. 16 (Appendix 1, principle 4); EMRIP, *Expert Mechanism advice No. 11*, supra note 26, para. 6 ("Consultations should start at the planning phase (i.e., prior to the State or enterprise committing to undertake a particular project or adopting a particular measure, such as the licensing of a project) so indigenous peoples can influence final decisions."); EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para. 21(a).

[74] AHRC, *We have a right to participate*, supra note 24, pp. 8, 12-13, 17; EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para. 21(b); Dept of Environment, *Engage Early*, supra note 27, pp. 3, 7, 8 ("best practice consultation includes: … setting appropriate timeframes for consultation").

[75] AHRC, *We have a right to participate*, supra note 24, p. 16 (Appendix 1, principle 4); EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para. 21(b), 43; Dept of Environment, *Engage Early*, supra note 27, p. 3 ("best practice consultation includes: … building trust through early and ongoing communication for the duration of the project, including approvals, implementation and future management").

[76] AHRC, *We have a right to participate*, supra note 24, p. 18 (Appendix 1, principle 11); EMRIP, *Expert Mechanism advice No. 11*, supra note 26, para. 7; EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para. 22(a)-(b).

[77] EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para. 22(b), 44; Australian Heritage Commission, *Ask First*, supra note 10, p. 9.

[78] *Hydraulic Fracturing Report*, supra note 2, p. 283, recommendation 11.2; Anaya, *2009 Annual Report*, supra note 12, para. 53.

[79] Joint Northern and Central Land Council *Submission*, supra note 11, p. 6.

[80] AHRC, *We have a right to participate*, supra note 24, p. 18 (Appendix 1, principle 11); Joint Northern and Central Land Council *Submission*, supra note 11, p. 7; EMRIP, *Expert Mechanism advice No. 11*, supra note 26, para. 6; *Hydraulic Fracturing Report*, supra note 2, pp. 283, 289, recommendation 11.5; EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para. 22(c); Dept of Environment, *Engage Early*, supra note 27, p. 8.

[81] EMRIP, *Expert Mechanism advice No. 11*, supra note 26, para. 9-10; AHRC, *We have a right to participate*, supra note 24, p. 14, 16-17 (Appendix 1, principle 5 – "The capacity of Aboriginal and Torres Strait Islander communities to engage in consultative processes can be hindered by their lack of resources. Even the most well-intentioned consultation procedure will fail if Aboriginal and Torres Strait Islander peoples are not resourced to participate effectively. Without adequate resources to attend meetings, take proposals back to their communities or access appropriate expert advice, Aboriginal and Torres Strait Islander peoples cannot possibly be expected to consent to or comment on any proposal in a fully informed manner"); UNDRIP, supra note 20, Article 39; *Hydraulic Fracturing Report*, supra note 2, p. 293, recommendation 11.8; EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para. 22(c); Anaya, *2009 Annual Report*, supra note 12, para. 51.

[82] AHRC, *We have a right to participate*, supra note 24, p. 17 (Appendix 1, principle 9); Joint Northern and Central Land Council *Submission*, supra note 11, p 6.

[83] Australian Heritage Commission, *Ask First*, supra note 10, p. 6.

[84] EMRIP, *2018 Study on Free Prior and Informed Consent*, supra note 21, para. 20(e); Dept of Environment, *Engage Early*, supra note 27, p. 8 ("Respect Indigenous peoples' right to choose the time and location of the meetings"); Australian Heritage Commission, *Ask First*, supra note 10, p. 9.

[85] AHRC, *We have a right to participate*, supra note 24, p. 17 (Appendix 1, principle 8).