Environmental Defenders Office

Submission on the draft Northern Territory Assessment Bilateral Agreement

29 January 2021

Submitted via online submission at Northern Territory Assessment Bilateral Agreement | Have Your Say - Agriculture, Water and the Environment (awe.gov.au)

Executive summary

1. The Environmental Defenders Office (**EDO**) welcomes the opportunity to provide comment on the new draft assessment bilateral agreement between the Commonwealth of Australia and the Northern Territory (**Draft Agreement**) under *the Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

2. The EDO is an independent community legal centre specialising in public interest environmental law. The EDO advocates for strong environmental laws and effective compliance and enforcement of the regulatory frameworks that protect our important natural assets and unique landscapes.

3. The EDO supports a strong Commonwealth role in efficient and effective implementation of the EPBC Act to protect Australia's unique biodiversity and heritage. The Commonwealth is responsible for our international obligations to protect the environment, which the EPBC Act implements. Australia's environment cannot be protected without strong federal environmental laws.

4. We have reviewed the Draft Agreement. Triggered by the introduction of the *Environment Protection Act 2019* (NT) (**EP Act**), the Draft Agreement proposes that the Northern Territory's (**NT**) Environment Protection Authority (**EPA**) will assess various classes of actions that, but for the Draft Agreement, would normally require assessment under the EPBC Act. The effect of the Draft Agreement is that certain classes of action will not be assessed under the EPBC Act and will instead be assessed under the EP Act.

5. For the reasons set out in this letter, the EDO does not support the Draft Agreement or any assessment of matters of national environmental significance (**MNES**) under NT laws. Our key concerns are that:

    a. the NT laws do not meet the national environmental standards under the EPBC Act and are not appropriate for assessing the impacts of actions on MNES;

    b. the NT Government (**NTG**) is substantially under resourced and does not have capacity for the additional burden that will be imposed upon it under the Draft Agreement;

    c. the Draft Agreement does not address the potential for conflicts of interest in NTG assessments where the NTG has an interest in the outcome of the assessment; and

d. the timing of the Draft Agreement is premature given the NTG's ongoing environmental law reforms and the pending reforms proposed by the Final Report of the EPBC Act 10-year review.[1]

NT laws do not meet national environmental standards

6. While the passing of the EP Act in 2019 was a welcome first step towards modernising the NT legal framework, the NT's environmental laws are not capable of addressing the suite of national environmental standards under the EPBC Act that are required to protect MNES.

7. A key feature of the EP Act is the new environmental approval process. Where a proposed development has the potential to have a significant impact on the environment, it needs to proceed through the environmental impact assessment (**EIA**) process and require an environmental approval, regardless of the type of development. For the first time the Minister for Environment, on the advice of the NT EPA, issues these approvals, imposing conditions to manage the environmental impacts of the projects – and can follow up with compliance action if an approval is not adhered to. Importantly, the NT EPA also has the power to recommend a project be refused if it has unacceptable impact. If the Minister accepts that recommendation, the approval must be refused.

8. However, the commencement of improved EIA regime under the EP Act does not necessarily mean that environmental impacts of an activity are now manageable. A key focus of the EP Act is to facilitate development rather than enhance environmental protection. An illuminating example of how the EP Act prioritises development over environmental protection is shown by a simple comparative analysis of the objects of the EP Act against the EPBC Act:

   a. The EP Act includes an object that refers to ecologically sustainable development (**ESD**) which seeks to promote ESD "*so that the wellbeing of the people of the Territory is maintained or improved without adverse impact on the environment of the Territory*". The language of this ESD object is firmly directed to the well-being of people. Contrastingly, the EPBC Act ESD object is to promote ESD through the "*conservation and ecologically sustainable use of natural resources*".

[1] Available at: Final report | Independent review of the EPBC Act (environment.gov.au), published 28 January 2021.

b. The EP Act does not have a single objective directed to conservation, whereas the EPBC Act has multiple objectives directed to the protection and conservation of biodiversity.

9. The above examples, coupled with the highly discretionary way the principles of ESD[2] are to be applied under the EP Act, make it abundantly clear that development will continue to be prioritised under the EP Act. The EP Act is simply not drafted to conserve or protect the environment and is certainly not capable of providing an assessment framework for MNES in lieu of assessment under the EPBC Act.

10. In our 2020 comparative analysis of NT laws against the national environmental standards, we concluded that NT laws meet only 2 out of 14 national standards: see the **enclosed** table at Appendix A.[3] Further, in order for those two national standards to be upheld under NT laws, there would need to be significant governance reform and resourcing at multiple levels of government to ensure that national standards are consistently applied and enforced on the ground at the project level.

11. EDO has been involved in numerous projects over the years which continue to illustrate the failure of the NT laws to operate as a proper safeguard including:

    a. the approval, despite a recommendation of 'unacceptable impact', of the conversion of the controversial McArthur River Mine into an open cut mine which, in requiring the diversion of the McArthur River, has triggered numerous significant mine management and environmental problems that continue to this day;

    b. the construction of Port Melville, off the coast of Darwin, without an NT environmental impact statement or approval, despite its potentially significant impacts on threatened species habitat; and

    c. the Pastoral Land Board's approval of over 20,000ha of clearing of native vegetation at Maryfield Station without any formal EIA process, despite this clearing potentially amounting to 18.5% of the NT's annual greenhouse gas emissions.

12. Unfortunately, the introduction of the EP Act will not prevent environmentally problematic approvals, such as the examples set out above. We have already observed a concerning

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[2] Part 2, Div 1, *Environment Protection Act 2019* (NT).

[3] Extracted from *Devolving Extinction: The risks of handing environmental responsibilities to state & territories*

trend where proposed actions are not being refer to the NT EPA for assessment because, on the assessment of the proponent, the impacts of the relevant actions are not considered to be "significant". While the EP Act is a substantial improvement compared to the previous regime, it does not contain all the necessary safeguards and objective processes to effectively protect MNES.

The NT government is not adequately resourced

13. A key finding of the Australian National Audit Office report into Referrals, Assessments and Approvals of Controlled Actions under the EPBC Act was that governance arrangements to support the administration of referrals, assessments and approvals of controlled actions are not sound, efficient or effective.[4] This is frequently due to the lack of resourcing and oversight of the administering department in undertaking its duties. This weakness will be exacerbated even further by requiring the NTG to continue assessment of actions that may impact MNES without any resources being provided to assist them in undertaking this important role.

14. The NTG's budget crisis is well documented and is forecast to worsen in the short to medium term.[5] The NT EPA has not been shielded from this crisis with the NT Budget allocation for the NT EPA continuously decreasing year on year since 2018.[6] The effect of this is that NT EPA faces an ever shrinking and continuous significant lack of resourcing to adequately assess and monitor compliance. Without additional resources, the additional burden of undertaking the expanded assessment under the EP Act of impacts to MNES will not deliver sound environmental outcomes.

15. To take over the job (and potentially the liability) of the Federal Government in assessing impacts to MNES, the NT EPA needs considerable resourcing assistance. To date no resourcing has been committed to by the Federal Government to take on this extra, important work.

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[4] The Auditor-General Auditor-General Report No.47 2019–20 Performance Audit, "Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999"

[5] Before the pandemic, there was a budget crisis. Was the NT Government fixing it? - ABC News and Why is the Northern Territory in so much debt? - ABC News

[6] NT Government Agency Papers 2018 and 2020.

Potential conflicts of interest in decision making

17. The NTG should not be solely responsible for determining applications that would have huge impacts on important World Heritage and Ramsar sites when there is a clear role for the Federal Government, including in relation to its international obligations, to protect these areas.

18. The Commonwealth is best placed provide national leadership on national environmental issues, strategic priorities and increased consistency. Conversely, the NTG is not mandated to act (and does not act) in the national interest. Further, NT environmental laws and enforcement processes do not consider the cross-border, cumulative impacts of state-based decisions.

19. State and Territory governments often have conflicting interests – as a proponent, sponsor or beneficiary of the projects they assess. While some of these risks may now be partly ameliorated in the NT because of the new role of the NT Environment Minister, risks about regulatory capture remain, especially if the EP Act is not utilised. Our early experiences indicate that the NTG's application of the new EIA regime under the EP Act is highly discretionary and fragmented. There also remains excessive discretion on the part of the NT EPA in relation to some of its key decisions under the EP Act, especially in determining whether an action will have a significant impact.

20. Disappointingly, the NTG decided not to include vital third-party merits appeal rights in the EP Act, nor a broad open standing provision for judicial review, which together would support accountable decision-making, reduce corruption risks and support the rule of law and access to justice.

Timing of Draft Agreement not appropriate

21. In our view, entering into the Draft Agreement now is premature.

22. The EP Act is only the first stage of a suite of environmental reforms proposed by the NTG. The NTG has said that it will be reforming regulatory systems for managing wastes, pollution, land clearing, and environmental impacts from mining activities. We note that NTG is currently inviting submissions on its consultation paper "*Regulation of mining activities: Environmental Regulatory reform*". That consultation paper observes that since the EP Act was introduced, the NTG is:

> … now focussed on putting in place legislation to ensure the effective environmental oversight of industry and development in the NT, commencing with the mining industry. This will require concurrent amendments to both the EP Act and the *Mining Management Act 2001* (MMA), and the migration of all environmental management provisions to the new EP Act.[7]

23. As is evident from the above extract, the proposed mining reforms will relate directly to the way in which mining development is assessed under the EP Act. Considering this and the other impending environmental reforms that will occur in the NT, and acknowledging that these reforms will necessitate further or amended draft agreements, any draft agreement should be deferred at least until those reforms have taken place. Until that occurs, all actions potentially impacting MNES should be assessed at the Commonwealth level.

24. In our view, any new agreement should also be deferred given the significant reforms proposed to national environmental law by Professor Graeme Samuel in the Final Report of the independent 10-year EPBC Act Review.[8] The Final Report confirms the current laws are failing and recommends a comprehensive package of reforms including strong improvements to standards and assurance under the EPBC Act. New national environmental standards are the centrepiece of the proposed reforms, and the Final Report proposes interim standards that should be implemented in the short term, with an initial tranche of amendments to the EPBC Act. This is to be followed by further tranches of substantial reform. Professor Samuels sets out an accreditation model based on new standards involving related reforms for independent oversight, improved compliance, enforcement, data, information and community and First Nations engagement. In the absence of the full suite of detailed environmental and assurance standards needed to deliver environmental outcomes under a reformed framework, it is premature to accredit NT laws. As noted, current NT laws do not meet existing EBPC Act requirements, and on our analysis, current NT laws do not meet the proposed interim standards either.

25. At the very least, any Draft Agreement should not be finalised until the first tranche of amendments are made establishing the applicable national environmental standards that must be met by NT laws in order to be accredited.

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[7] https://depws.nt.gov.au/__data/assets/pdf_file/0011/956891/regulation-of-mining-activities-consultation-paper-122020.pdf P.1

[8] Available at: Final report | Independent review of the EPBC Act (environment.gov.au)

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Yours sincerely

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Annexure A

	EPBC Act core standard	Assessment against NT laws
1.	Does the NT law explicitly refer to the principles of ESD in objects?	**Yes**
2.	Does state planning law explicitly refer to the World Heritage Convention?	**No**
3.	Does state law specifically refer to the Ramsar (Wetlands) Convention?	**No**
4.	Does state threatened species list include all federally listed species and communities?	**No**[9]
5.	Does state planning law specifically refer to the Convention on Biological Diversity?	**No**
6.	Does state threatened species list include all federally listed migratory species?	**No**[10]
7.	Does state law specifically refer to Convention on Migratory Species, JAMBA, CAMBA, ROKAMBA?	**No**
8.	Does state law prohibit the approval of nuclear actions?	**No**[11]
9.	Does state law provide equivalent standing for third parties[12] to bring proceedings in relation to major projects?	**Partly**[13]
10.	Do state offset standards meet Commonwealth standards regarding 'like for like' and limited use of indirect offsets?	**No**[14]
11.	Is the state environment minister responsible for approving major projects?	**Yes**
12.	Does state appoint independent decision makers for state-proposed projects?	**No**[15]
13.	Do state laws provide special procedures for early refusal where project impacts are 'clearly unacceptable'?	**Partly**

[9] Some species listed on both NT and Commonwealth lists (although the category of listing seems to vary); and some species are listed nationally, but not at the NT level. See also: <https://nt.gov.au/environment/animals/threatened-animals> and here https://nt.gov.au/environment/native-plants/threatened-plants>.

[10] At least one federally listed migratory species is listed here <https://nt.gov.au/ environment/animals/threatened-animals>.

[11] However the Northern Territory Minister for Primary Industry and Resources can only grant uranium exploration and mining approvals and exercise powers in accordance with the advice of the Commonwealth Minister administering the Atomic Energy Act 1953 (s 187, Mineral Titles Act 2010 (NT)).

[12] For example, 'interested persons' or 'persons aggrieved' (see EPBC Act sections 475(6); 487) or better (e.g. 'open standing').

[13] Section 230 of the Environment Protection Act 2019 (NT) provides that a person who is affected by an alleged act or omission that contravenes or may contravene the Act may apply for an injunction, while section 276 provides that a person directly affected by a decision, or a person who has made a genuine and valid submission during an environmental impact assessment and environmental approval process under the Act to which the decision relates may seek judicial review of the decision. While there are third party merits review rights provided for under section 17 of the Planning Act 1999 (NT), they are heavily curtailed by Part 4 of the Planning Regulations 2000 (NT) and generally are available only in relation to residential zones.

[14] Section 125 and 126 of the EP Act provide for an environmental offsets framework to be established and allow the Minister to publish guidelines for that framework, and consideration f offsets are integrated through other sections, e.g. s 26 and s 76. The NT government is still in the process of developing the offsets guidelines and policies, so it is unlikely that the NT offsets standard meet commonwealth standards at present.

[15] Where a proposal has the potential to have a significant impact on the environment (which may include state-proposed projects), the Northern Territory Environment Protection Authority (an independent body) will assess the project and make recommendations to the Minister of Environment who is the final decision maker on approvals under the Environment Protection Act 2019.