



Environmental
Defenders Office

**Submission to the Senate Environment and
Communications References Committee inquiry into the
Middle Arm Industrial Precinct**

31 October 2023

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

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Submitted to:

Senate Environment and Communications References Committee

Parliament of Australia

Submitted to: [Middle Arm Industrial Precinct Inquiry](#)

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Acknowledgement of Country

The EDO recognises First Nations Peoples as the Custodians of the land, seas, and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present, and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through both Western and First Laws. In providing submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonization.

Executive Summary

Environmental Defenders Office (EDO) welcomes the Senate Environment and Communications References Committee's inquiry into the Middle Arm Industrial Precinct. EDO holds several concerns about Middle Arm, including the industries proposed for inclusion in the precinct and the process by which the assessment and approvals will take place for those facilities; the strategic assessment for the precinct and associated regulatory regime; as well as the failure of these processes to properly ensure the free, prior and informed consent of First Nations communities in the area.

Despite variously being called 'sustainable' or providing a location for 'green' facilities, it is clear the Middle Arm site is intended to house and support fossil fuel-related industries. Given the scientific consensus that the exploration and production of new gas in the Northern Territory is inconsistent with global efforts to limit global warming to 'safe' levels required to prevent runaway climate change, including the agreed temperature limit of 1.5C degrees of global heating outlined in the Paris Agreement, any actions which facilitate new gas extraction are unacceptable and should not be pursued. As such, the Middle Arm Industrial Precinct must not proceed because it is a key enabler of the ongoing use, development of and exploration for, fossil fuels.

In this context, this submission addresses **term of reference (c)**, drawing the Committee's attention to the proposed industries and projects the Middle Arm site will house and the industry expansion it will enable, and the subsequent climate, water, and biodiversity impacts resulting from these actions.

This submission also addresses the conduct, process and implications of the strategic assessment process (**term of reference (d)**) carried out under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). It is clear that deficiencies in both the EPBC Act process, but also the accredited assessment under the Northern Territory regime, will not ensure appropriate assessment and approvals for the actions proposed at Middle Arm. This is in terms of adequacy and trust in the legal processes, but also in relation to the information available about the proposed uses and industries in Middle Arm.

In addressing **term of reference (e)**, EDO recommends that regardless of the type of industry which will proceed on the Middle Arm site, the free, prior and informed consent of the relevant First Nations communities people must be obtained. This is non-negotiable for any development proceeding on the lands of, or affecting the interests of, First Nations communities in Australia.

Summary of Recommendations

Recommendation 1: The EPBC Act must be urgently reformed to incorporate consideration of climate change into strategic assessments, for example through a climate trigger. The Middle Arm assessment should not proceed until this reform is completed.

Recommendation 2: A requirement for gas development proponents to be responsible and required to avoid, mitigate or offset all lifecycle emissions from their operations must be in place before Middle Arm and associated projects can proceed.

Recommendation 3: The EPBC Act water trigger must be expanded to capture all forms of unconventional gas before Middle Arm and associated projects can proceed.

Recommendation 4: The Minister not approve any classes of action for Middle Arm to be taken in accordance with the Program while it remains an uncertain and risky proposition for assessment of impacts on MNES.

Recommendation 5: The strategic assessment process under the *Environment Protection Act 2019* (NT) must be reviewed for its suitability for the Middle Arm precinct, given the limitations of the current proposal and lack of information about future activities.

Recommendation 6: The Public Inquiry process for environmental assessment available under *Environment Protection Regulations 2020* (NT) be undertaken for Middle Arm.

Recommendation 7: The Bilateral Agreement must be updated to reflect and embed FPIC before endorsement is sought for any draft Program under the current Bilateral Agreement.

Recommendation 8: The EPBC Act must be amended to embed the principles of FPIC in all consultation requirements.

Recommendation 9: The draft Program and Terms of Reference must explicitly and adequately provide for FPIC of First Nations communities in relation to the Middle Arm Precinct and all associated activities and projects.

Contents

Introduction	6
Term of reference (c): Any climate, environmental, health or cultural heritage impacts as a result of developing the harbour and the industries seeking to establish themselves at Middle Arm.	7
The climate impacts of Middle Arm industries must be addressed under the EPBC Act	7
If proceeded with, all lifecycle emissions from gas projects related to the Middle Arm precinct must be offset.....	9
The full Impacts on water resources from Middle Arm industries must be assessed	10
Term of reference (d): The conduct, process and implications of the proposed strategic environmental assessment for Middle Arm.	12
Strategic assessment under the EPBC Act (Cth)	12
Strategic assessment under the Environment Protection Act (NT).....	15
Term of reference (e): Engagement and advocacy by industries and their representatives throughout the Middle Arm proposal, including with First Nations groups and communities adherence to the principles of free, prior and informed consent.	18
Free, prior and informed consent of First Nations communities is essential	19
Legal regimes applicable to Middle Arm fail to adequately incorporate FPIC.....	19
Conclusion	23

Introduction

EDO welcomes the Senate Environment and Communications References Committee (**the Committee**) inquiry into the Middle Arm Industrial Precinct (**Middle Arm**). EDO notes this inquiry follows a recommendation arising from the Senate Standing Committee on Environment and Communications' report on oil and gas exploration and production in the Beetaloo Basin. That report found that Beetaloo Basin projects would likely provide feedstock for a range of industries in the Middle Arm Industrial precinct that rely on gas, and recommended an inquiry proceed to consider the Middle Arm project particularly in relation to Australian Government expenditure.¹

EDO holds several concerns about the Middle Arm precinct, not least how the project will facilitate the ongoing extraction, production, and use of fossil fuels, against the clear consensus from scientists, experts and international bodies that doing so will exacerbate dangerous climate change. Despite being called a 'sustainable development precinct', it is clear the Middle Arm project in Darwin Harbour would house a number of fossil fuel-related facilities. This includes production of 'blue hydrogen', which is produced from liquified natural gas (**LNG**) with carbon capture and storage (**CCS**); export facilities for LNG; as well as supporting a range of gas-based industries which rely on petrochemicals produced using fossil gas as feedstock.²

As noted in EDO's 2022 **EDO Roadmap for Climate Reform**, any public funding or facilitation, at any level of government, which would allow an expanded fossil fuel industry in Australia is unacceptable in 2023. Our submission is drafted in this context.

International Energy Agency analysis confirms the inevitable fact that there must be no new coal and gas projects. There is only one solution to the climate crisis, and that is genuine and rapid emissions reductions. There is no credible evidence that production of Australian fossil fuels for export will reduce global emissions to safe levels, or alleviate poverty. Quite the opposite is true. Genuine or real net zero targets and pathways do not rely on these assumptions or false narratives. They do require a stop to development of new fossil fuels, and a phase out of existing fossil fuels consistent with the science.

EDO Roadmap for Climate Reform

Moreover, the legal approvals process for the Middle Arm development raises significant concerns about strategic assessments carried out under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), and the chosen pathway under the Northern Territory regulatory system to adequately assess and approve projects on limited information about biodiversity and water impacts. It is also apparent that the free, prior and informed consent of First Nations communities in the area, and with interests in the Middle Arm site, has not been sought in accordance with the principles of free, prior and informed consent. This must be

¹ Senate Environment and Communications References Committee, Oil and gas exploration and production in the Beetaloo Basin (Final Report, April 2023) 30.

² Northern Territory Government, Precinct Industries Fact Sheet, available at https://middlearmprecinct.nt.gov.au/_data/assets/pdf_file/0007/1204747/middle-arm-precinct-industries.pdf

remedied ahead of any approvals being granted for Middle Arm projects, and FPIC must be incorporated in the assessment process.

EDO has therefore addressed **terms of reference (c), (d) and (e)** as these fall within our remit as a legal organisation dedicated to protecting wildlife, water, culture, community and climate. In making our recommendations, particularly regarding term of reference (e), we acknowledge that EDO is a non-Indigenous community legal centre, which works alongside First Nations around Australia and the Torres Strait Islands in their efforts to protect their Countries and cultural heritage from damage and destruction.

Term of reference (c): Any climate, environmental, health or cultural heritage impacts as a result of developing the harbour and the industries seeking to establish themselves at Middle Arm.

The development of the Middle Arm Industrial Precinct is intertwined with the development of new gas fields, in direct contrast with calls from the Intergovernmental Panel on Climate Change (**IPCC**) and International Energy Agency (**IEA**) to cease fossil fuel production. CCS projects proposed for the precinct will be used to justify continued emissions growth elsewhere and therefore facilitate greenwashing,³ while petrochemical manufacturing and blue hydrogen production will increase demand for gas. The expansion of both onshore and offshore gas industries in the Northern Territory will significantly increase greenhouse gas (**GHG**) emissions. This undermines territory, national, and international emissions reduction commitments, and increases the risks from and significant impacts already being felt as a result of, catastrophic climate change. Expanded gas processing and export from Australia continues to abrogate our moral and legal obligations as a global citizen, with climate impacts around the globe reaching tipping points.⁴

The industries proposed for Middle Arm will similarly have significant impacts on groundwater, and must not be able to proceed absent the implementation of a key Federal Government commitment to assess water impacts from unconventional gas under our national environmental legal framework. This section addresses these impacts as set out in term of reference (c), and makes recommendations for federal law reform which to ensure these impacts are adequately addressed.

The climate impacts of Middle Arm industries must be addressed under the EPBC Act

The climate science could not be clearer. The IPCC Sixth Assessment Report (**IPCC AR6 Report**)⁵ confirms it is unequivocal that human influence has heated the atmosphere, ocean and land; and

³ See: [EDO submission to the UN High-Level Expert Group on the Net-Zero Emissions Commitments of Non-State Entities \(31 August 2022\)](#) 8 -9; [EDO submission to the inquiry on the Environment Protection \(Sea Dumping\) Amendment \(Using New Technologies to Fight Climate Change\) Bill 2023 \(6 July 2023\)](#).

⁴ The Guardian, 'Earth close to 'risk tipping points' that will damage our ability to deal with climate crisis, warns UN' (25 October 2023) <https://www.theguardian.com/environment/2023/oct/25/climate-crisis-threatens-tipping-point-of-uninsurable-homes-says-un>

⁵ Hoesung Lee et al., 'Synthesis Report of the IPCC Sixth Assessment Report (AR6)' (2023) IPCC, Figure 3.5, 56, https://report.ipcc.ch/ar6syr/pdf/IPCC_AR6_SYR_LongerReport.pdf (**IPCC Sixth Assessment Report**).

that this unprecedented human-induced climate change is already affecting many weather and climate extremes in every region across the globe. IPCC AR6 Report confirms that every tonne of carbon dioxide (CO₂) emissions adds to global warming, and concludes that limiting human-induced global warming to a specific level requires limiting cumulative CO₂ emissions and reaching at least net zero emissions, including driving strong reductions in other GHG emissions. This is the case regardless of whether such emissions are produced from coal, oil, or gas.

As confirmed by the IEA, there can be no new coal, oil or gas, and no expansion of existing fossil fuel infrastructure to keep the earth within the agreed temperature range set out in the Paris Agreement.⁶ There are no effective or credible pathways currently available to offset or mitigate new or expanded fossil fuels. Carbon capture and offsetting are false solutions and should not be used in place of real and rapid carbon abatement. As such, the United Nations Secretary General has warned that ‘investing in new fossil fuel infrastructure is moral and economic madness.’⁷

In direct contrast to the above conclusions, the Middle Arm Industrial Precinct and associated industries are countenanced not only on continued production from existing fossil fuel projects, but assume future expansion of the Northern Territory gas industry. Middle Arm is quite clearly not a ‘sustainable development precinct’, when the precinct has been described as a ‘new gas demand’ centre by proponents.⁸ Rather, Middle Arm has been described as a ‘key enabler’ for the export of gas from the Beetaloo Basin, as well supporting the feasibility of the proposed offshore CCS associated with the Santos Barossa offshore gas project.⁹ Announced proponents are TEH2, Fortescue Future Industries (FFI), Tivan, Tamboran Resources Limited and Aveniria.¹⁰ In addition, Tamboran Resources have announced plans to build an LNG export facility on the site with an initial capacity of 6.6 million tonnes of LNG per year, and with the potential for expansion.¹¹ According to research by the Australia Institute, this would use gas from the Beetaloo Basin and result in domestic emissions equivalent to three coal-fired power stations every year.¹²

Climate Analytics further found, in contrast to CSIRO research, that annual domestic emissions from fracking in the Beetaloo and processing at the Middle Arm industrial precinct would produce

⁶ International Energy Agency, ‘Net Zero by 2050: A Roadmap for the Global Energy Sector – Summary for Policymakers’ (May 2021), 11, <https://iea.blob.core.windows.net/assets/7ebafc81-74ed-412b-9c60-5cc32c8396e4/NetZeroBy2050-ARoadmapfortheGlobalEnergySector-SummaryforPolicymakers_CORR.pdf>.

⁷ UN Secretary-General Antonio Guterres, ‘Secretary-General Warns of Climate Emergency, Calling Intergovernmental Panel’s Report ‘a File of Shame’, While Saying Leaders ‘Are Lying’, Fuelling Flames’ (Media Release SG/SM/21228, 4 April 2022)’ (2022) United Nations, <<https://press.un.org/en/2022/sgsm21228.doc.htm>>.

⁸ ABC News, ‘Business case for Middle Arm Sustainable Development Precinct triggers climate concerns from critics’ (29 December 2022) abc.net.au/news/2022-12-29/nt-middle-arm-sustainable-development-precinct-climate-concerns/101809178.

⁹ The Guardian, ‘Darwin’s ‘sustainable’ Middle Arm development is key to huge fossil fuel projects, documents show’ (18 May 2023) <https://www.theguardian.com/environment/2023/may/18/darwins-sustainable-middle-arm-development-is-key-to-huge-fossil-fuel-projects-documents-show>.

¹⁰ Northern Territory Government, ‘Middle Arm Sustainable Development Precinct - Industries’ (last updated 8 September 2023), available at <https://middlearmprecinct.nt.gov.au/Industries>.

¹¹ ABC News, ‘Tamboran Resources, Fortescue Future Industries among companies assigned land at Middle Arm precinct’ (9 June 2023) <https://www.abc.net.au/news/rural/2023-06-09/middle-arm-precinct-tamboran-resources-fortescue/102461860>

¹² The Australia Institute, ‘Proposed LNG plant emissions equivalent to 12 coal-fired power stations’ (7 August 2023).

up to 49 million tonnes of CO₂e, equivalent to 11% of Australia’s total emissions in 2021. This would produce more emissions than the entire reduction goal under the recently reformed Safeguard Mechanism.¹³

The precinct would clearly support the continued demand for fossil gas, with the draft program submitted on referral to the Northern Territory Environment Protection Authority describing products to be produced at the site including [non-renewable] hydrogen, LNG, carbon capture and storage, gas to liquids (**GTL**), minerals processing, and gas derived petrochemicals like urea and ammonia.¹⁴ These industries remain within the scope of the strategic assessment (discussed further below).

These industries are incompatible with Australia’s moral and legal obligations to address climate change and limit global heating to 1.5C as set out in the Paris Agreement. However, our national environmental legal framework, the EPBC Act, fails to explicitly, clearly and comprehensively address the threat of climate change, including the climate change impacts arising from such highly polluting projects. This includes assessment of the cumulative climate impacts of multiple projects, for example as part of a strategic assessment.

EDO therefore recommends the EPBC Act should expressly require decision-makers to consider climate change mitigation and adaptation opportunities in strategic assessments, in line with our national and international legal obligations. A ‘climate trigger’ as envisioned by EDO would require the Act to expressly provide for consideration of climate mitigation and adaptation in strategic planning processes, and take into account cumulative emissions from new projects.¹⁵ The Middle Arm precinct assessment should not proceed until our national environmental framework is fit for purpose and climate-ready, and incorporates these features.

Recommendation 1:

The EPBC Act must be urgently reformed to incorporate consideration of climate change into strategic assessments, for example through a climate trigger. The Middle Arm assessment should not proceed until this reform is completed.

If proceeded with, all lifecycle emissions from gas projects related to the Middle Arm precinct must be offset

Given the likely large emissions profile of the industries proposed by the Middle Arm Industrial Precinct, as well as sources of gas (from the Beetaloo Basin) for the petrochemical production at the site, it is crucial that adequate regulatory requirements are in place for any expected emissions.

¹³ Climate Analytics, [The Beetaloo gas field is a climate bomb. How did CSIRO modelling make it look otherwise?](#) (31 October 2023)

¹⁴ [Middle Arm Sustainable Development Precinct Draft Program January 2022.](#)

¹⁵ [EDO submission to the Inquiry into the Environment Protection and Biodiversity Conservation Amendment \(Climate Trigger\) Bill 2022 \(13 October 2022\).](#)

In 2018, the Northern Territory’s Scientific Inquiry into Hydraulic Fracturing (**Pepper Inquiry**) recommended that ‘the NT and Australian governments seek to ensure that there is no net increase in the life cycle GHG [greenhouse gas] emissions emitted in Australia from any onshore shale gas produced in the NT’.¹⁶ The NT Government committed to implementing all recommendations before approving production licences for onshore gas projects.¹⁷ In May 2023, the NT Government announced all Pepper Inquiry recommendations were complete, however it is clear recommendation 9.8 has not been implemented.¹⁸

Reforms to the Safeguard Mechanism passed earlier this year address direct emissions from new gas developments,¹⁹ however the Federal Government committed to referring indirect and end-use consumption emissions to the Energy and Climate Change Ministerial Council.²⁰ EDO understands this to mean the Energy and Climate Change Ministerial Council will be tasked to consider how indirect and domestic end-use emissions from gas projects in the Beetaloo Basin are to be reduced, relevantly for the Middle Arm industries. At this stage, neither the Northern Territory or Federal Governments appear to have determined how the scope 2 emissions will be offset from new production in the Territory.

To accord with the Pepper Inquiry recommendation, and indeed the commitment and announcement by the NT Government that the recommendation has been fulfilled, no onshore gas projects should proceed without a plan for ensuring all lifecycle emissions are accounted for. This responsibility must lie with the project proponents and not the wider community. The Middle Arm project, where many fossil gas end use industries will be based, should not proceed until this is made clear by both levels of government.

Recommendation 2:

A requirement for gas development proponents to be responsible and required to avoid, mitigate or offset all lifecycle emissions from their operations must be in place before Middle Arm and associated projects can proceed.

The full Impacts on water resources from Middle Arm industries must be assessed

Similarly, reforms to implement the commitment to expand the ‘water trigger’ under the EPBC Act are critical before any further development of the onshore gas industry in the Northern Territory can proceed.

¹⁶ Rachel Pepper, *The Scientific Inquiry into Hydraulic Fracturing in the Northern Territory: Summary of Final Report* (2018) https://frackinginquiry.nt.gov.au/_data/assets/pdf_file/0011/494327/Summary-Report_April-2018_WEB.pdf, 35. (**Pepper Inquiry**)

¹⁷ ABC News, ‘Northern Territory government moves to legalise the sale of fracking exploration gas from next year’ (17 November 2022) <<https://www.abc.net.au/news/2022-11-17/nt-legal-sale-of-fracking-exploration-gas-beetaloo-basin/101609008>> .

¹⁸ EDO, ‘[NT Government failing “spectacularly” on Pepper Review recommendations](#)’ (3 May 2023)

¹⁹ National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015 s 35A.

²⁰ See, Commonwealth, *Parliamentary Debates*, Senate 30 March 2023, 1 (Senator the Hon Jenny McAllister, Assistant Minister for Climate Change and Energy).

The EPBC Act currently requires Federal assessment and approval of coal seam gas developments and large coal mining developments, if those developments have, will, or are likely to have, a significant impact on a water resource.²¹ This means any project of this type which impacts water resources must be referred to the Federal Minister for the Environment to be assessed on the basis of its impacts on that water resource. This is known as the ‘water trigger’ and was implemented as a Matter of National Environmental Significance (**MNES**) in 2013. Importantly, as it currently operates, the water trigger will not capture, and thus require federal assessment of, other forms of unconventional gas, even where those projects may have a significant impact on water resources.

In 2018 the Pepper Inquiry recommended that ‘the Australian Government amends the EPBC Act to apply the ‘water trigger’ to onshore shale gas development.’²² This action has been marked as ‘completed’ on the Northern Territory Government’s response to the Pepper Inquiry,²³ despite no amendments to the EPBC Act having passed the Federal Parliament.²⁴ The Federal Government’s Nature Positive Plan, released in late 2022, outlines the priorities for reform of the EPBC Act and commits the Government to amending the water trigger to:

[E]nsure the appropriate management and protection of water resources from all forms of unconventional gas (e.g. shale and tight gas), in addition to coal seam gas and large coal mining developments, to include new forms of gas extraction that had not been contemplated when the water trigger was initially developed’.²⁵

In April 2023 the Committee’s Inquiry into oil and gas exploration and production in the Beetaloo Basin recommended that, consistent with the Pepper Inquiry, the Australian Government bring forward legislation to amend the EPBC Act to expand the water trigger to include all forms of unconventional gas, to be in operation by 31 December 2023.²⁶ This recommendation is directly relevant for the industries seeking to expand and use the Middle Arm precinct for the proposed gas reliant activities.

Given the large number of potential negative environmental and social impacts arising from gas extraction that was identified by both this Committee’s Inquiry into the Beetaloo Basin and the Pepper Inquiry, and the lack of scientific certainty in relation to the extent of potential harm to the environment particularly in relation to water take and contamination, decision-makers should utilise the precautionary principle in making any decisions that relate to the expansion of the gas industry in the NT.²⁷ This means all relevant gas projects, which may affect groundwater resources and which will provide feedstock to the Middle Arm industries, must be adequately assessed on

²¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 24D(1)(b)(i and ii) (**EPBC Act**).

²² Pepper Inquiry (2018) r 7.3.

²³ Northern Territory Government, Onshore Gas in the Northern Territory - Action Item 7.3, available at <https://hydraulicfracturing.nt.gov.au/action-items/7.3>.

²⁴ In October 2023 Dr Sophie Scamps MP, and Senator Sarah Hansen Young introduced legislation into the House of Representatives and the Senate (respectively) to amend the existing water trigger in line with the Government’s commitments to cover all forms of unconventional gas, but neither bill has passed. See, Environment Protection and Biodiversity Conservation Amendment (Expanding the Water Trigger) Bill 2023.

²⁵ DCCEEW, *Nature Positive Plan: better for the environment, better for business* (December 2022) 15.

(Nature Positive Plan)

²⁶ Senate Environment and Communications References Committee, Oil and gas exploration and production in the Beetaloo Basin (Final Report, April 2023) r 3.

²⁷ [EDO NT, Submission to the Independent Scientific Inquiry into Hydraulic Fracturing \(2017\)](#)

their water impacts. The water trigger must be expanded to include all unconventional gas production before any form of expansion of the gas industry proceeds, including the facilities which will stimulate demand as proposed for the Middle Arm Industrial Precinct.

Recommendation 3:

The EPBC Act water trigger must be expanded to capture all forms of unconventional gas before Middle Arm and associated projects can proceed.

Term of reference (d): The conduct, process and implications of the proposed strategic environmental assessment for Middle Arm.

The proposed strategic assessment for Middle Arm will ‘streamline’ approval processes for actions proposed to be taken in the precinct. The strategic assessment removes the need for individual referrals and assessments under the EPBC Act where the actions fit within an approved class,²⁸ thereby ‘switching off’ federal project-level approvals by relying on the accredited process. Similarly, strategic assessments under Northern Territory law reduce project-level oversight and assessment. This section addresses the process by which strategic assessments are carried out, and outlines for the Committee several concerns with how the strategic assessment for Middle Arm is falling short of best practice.

Strategic assessment under the EPBC Act (Cth)

The EPBC Act sets out nine matters of national environmental significance, including world heritage sites, listed threatened species and water resources (as described above), which are protected under the Act. Where an action (such as a project, development, or activity) will have a significant impact on one of these MNES, it will be referred for assessment and approval under the Act. Part 10 of the EPBC Act however sets up an alternative scheme, whereby a ‘policy, plan program’ may instead allow for the approval of actions of classes of actions under section 146B of the EPBC Act – instead of the usual approvals process.

EDO has long been concerned about accreditation processes under the EPBC Act, including strategic assessments, where the assessment process used does not adhere to robust environmental and consultation standards.²⁹ As pointed out in the Final Report of the Independent Review of the EPBC Act by Professor Graeme Samuel AC (**Samuel Review**), strategic assessments have several identified shortcomings under the current Act, including the inability to vary a program once endorsed means strategic assessments are unable to change or adapt in response to new information, and the fact strategic assessments give approval for yet-unidentified proponents to undertake the approved actions within a class. As such there is no specific approval

²⁸ EPBC Act, Part 10.

²⁹ [EDO Submission to the 10 year review of the EPBC Act \(April 2020\)](#) 76.

holder, this makes it difficult to vary conditions of, revoke or suspend Part 10 approval.³⁰ EDO is of the view strategic assessments should be used to identify data about the environment of a region or area, identify acceptable thresholds of impact, and create clear decision rules for project level assessment. They should not however displace the need for case-by-case assessments.

In addition, the proposed National Environment Standards (as outlined in the *Nature Positive Plan* and currently under development with limited consultation) will apply to strategic assessments and require all accredited bodies and processes to be held to specific outcome-focused, 'nature positive' standards.³¹ We understand regional plans, strategic assessments and other strategic planning will be required to consider climate change and include environmental adaptation and resilience measures. Therefore in line with the Samuel Review, EDO is concerned that any strategic assessment and Part 10 approval of Middle Arm which progresses before the passage of the changes to the EPBC Act and associated National Environmental Standards, will be subject to fixed and inadequate assessment and approval conditions. See **Recommendation 1**.

The Middle Arm strategic assessment process under the EPBC Act

A Bilateral Agreement has been signed by the Commonwealth Minister for the Environment and the Chief Minister of the Northern Territory per section 146 of the EPBC Act, which sets out the intention to create a Program for endorsement by the Federal Environment Minister. A Middle Arm Sustainable Development Precinct Draft Program (**draft Program**) was released in January 2022.³² Once this draft Program has been endorsed, the Minister can approve an action, or a class of actions, which is essentially an overarching approval for actions taking place at the site where in line with the Program.³³

The Agreement additionally sets out the intention to develop terms of reference for an Environmental Impact Statement (**EIS**) which assesses the impact of implementing the Program on environmental factors including MNES. At this stage, neither the draft Program nor the draft terms of reference appear to have been endorsed by the Commonwealth Environment Minister.³⁴

The Minister may endorse the draft Program if satisfied that the EIS adequately addresses the impacts of implementing the draft Program, including the impacts of an action or class of actions on protected matters under the EPBC Act. In considering whether to endorse the draft Program, the Minister will have regard to the criteria for endorsement, set out in Attachment 2 to the Bilateral Agreement.³⁵ If endorsed, the Department of Industry, Planning and Logistics (**DIPL**) of the Northern Territory will assess impacts on matters of national environmental significance in the Middle Arm industrial precinct in the EIS.³⁶ Given all that is certain about the proposed activities at Middle Arm is a list of industries the 'Precinct is designed to attract' and a handful of announced

³⁰ Professor Graeme Samuel AC, Independent Review of the EPBC Act – Final Report (October 2020) 78.

³¹ Nature Positive Plan (2022) 18.

³² Middle Arm Sustainable Development Precinct Draft Program January 2022.

³³ EPBC Act s 146B.

³⁴ See EPBC Act s 146(1B) which sets out the requirements for what must be included in the Agreement.

³⁵ Strategic Assessment of the impacts of actions taken in the MASDP on matters protected by Part 3 of the EPBC Act – section 146 Agreement. (Bilateral Agreement) cl 9.

³⁶ The NT Environment Protection Agency (**EPA**) is then responsible for approval of the proposal on the basis of the information provided by DIPL, at the Territory level.

proponents,³⁷ EDO holds several concerns about the Minister's ability to be satisfied these criteria have been met, and thus make an adequate decision about endorsement of the Program, without a full understanding of Program activities and impacts.

The Program cannot clearly identify the existing environment as it may be affected by activities at Middle Arm.

The Bilateral Agreement requires the draft Program to identify protected matters (MNES identified by the EPBC Act) relevant to the Program.³⁸ Clearly the relevance of any MNES to Middle Arm cannot be determined until the activities and how they interact with the existing environment at Middle Arm is known. Further, some activities may have impacts on matters of national environmental significance beyond the spatial limits of the Middle Arm peninsula that should be considered, however this cannot be determined for inclusion without understanding the activities to be undertaken at Middle Arm.

DIPL refers to how '[m]ore than 200 studies have already been undertaken to inform the design and advancement of the Precinct.'³⁹ However this is not sufficiently targeted for a baseline assessment under the program. No matter the number of studies undertaken to-date, studies undertaken at this stage do not address the specific activities to be carried out at Middle Arm and are therefore limited in assessing impacts on matters of national environmental significance.

The Program cannot reasonably assess impacts of potential activities at Middle Arm.

The Bilateral Agreement requires DIPL to assess the environmental impact of the projects that will occur at Middle Arm on matters of national environmental significance. For example, this includes the outcomes and commitments for the conservation of protected matters, based on the 'avoid, mitigate and offset' hierarchy of principles; and requirements the Program summarise the expected duration, extent and likely severity of the impacts of implementing the Program on protected matters; as well as demonstrate how the cumulative impacts to protected matters of all proposed activities identified in the EIS will be avoided and mitigated.⁴⁰

It is not currently clear what the proposed activity undertaken by each announced proponent in the short-term or to the end of the 50-year period will involve, and the risk, risk quantum, and even source of all environmental impacts at the Middle Arm site is currently unknown. The expected duration, extent and likely severity of impacts on protected matters is therefore unclear. The Referral Report by the NT EPA provides only a list of '[p]reliminary potential impacts and/or benefits' at this stage.⁴¹ Moreover, the assessment of cumulative impacts requires even greater certainty about the activities proposed at the site, and how their impacts may be avoided and mitigated. The program of Middle Arm is not certain enough to allow for assessment of environmental impacts on MNES.

³⁷ Northern Territory Government, 'Middle Arm Sustainable Development Precinct - Industries' (last updated 8 September 2023), available at <https://middlearmprecinct.nt.gov.au/Industries>.

³⁸ Bilateral Agreement, attachment 2, cl 3(a).

³⁹ Northern Territory Government, 'Middle Arm Sustainable Development Precinct – the Precinct' (last updated 8 September 2023), available at <https://middlearmprecinct.nt.gov.au/about-the-precinct>.

⁴⁰ Bilateral Agreement, cl 5 (3)(c); attachment 2, 3 (b), 3 (c)

⁴¹ Northern Territory Government, Middle Arm Sustainable Development Precinct Referral Report (2019 January 2022), section 6, Table 6-1.

A ‘class of action’ approval is inappropriate for Middle Arm actions on the basis of the Program

As noted above, if the program is endorsed by the Commonwealth Minister then the EIS set out under the Program can provide the basis for approval of classes of actions under section 146B of the EPBC Act.⁴² An approval of classes of actions means the endorsed program and its EIS process would supplant the usual assessment process under Part 8 of the Act. The Bilateral Agreement anticipates the program will be endorsed and a subsequent approval of classes of actions for projects at Middle Arm will be given.

Given the concerns outlined above regarding the lack of information about the projects proposed for the Middle Arm site, a ‘class of action’ approval is inappropriate for the Middle Arm precinct. The approval of an action or class of actions would occur at a later stage than the endorsement of the Program. Because of this it may be that the program is endorsed with limited certainty of the types of activities to be undertaken at precinct, and subsequent approvals of the projects at Middle Arm once they are identified will be fast-tracked as an approval under section 146B of the EPBC Act. With a class of actions approval, federal oversight of individual projects is effectively limited, including the assessment of each project’s impacts on MNES. This is concerning. Any decision-making process that substitutes approval under Part 3 of the EPBC Act,⁴³ should as a matter of policy afford the same level of assessment of impact on MNES as the controlling provisions under Part 3 and assessment provisions under Part 8 of the EPBC Act.

EDO is also of the view that a strategic assessment process is inappropriate for any new fossil fuel related projects, actions or infrastructure. All new fossil fuel projects must be fully assessed under a reformed and climate-ready EPBC Act, at the national level. This is particularly relevant given the uncertainty of the Middle Arm proponents and projects, including the potential for new fossil fuel industries.

Recommendation 4:

The Minister not approve any classes of action for Middle Arm to be taken in accordance with the Program while it remains an uncertain and risky proposition for assessment of impacts on MNES.

Strategic assessment under the Environment Protection Act (NT)

To-date in the NT no other project has been assessed under strategic assessment.⁴⁴ EDO is concerned that DIPL has not made a compelling case for assessment of the activities proposed to make-up Middle Arm using the novel strategic assessment process under the *Environment Protection Regulations 2020* (NT) and *Environment Protection Act 2019* (NT); and that the effect of undertaking a strategic assessment instead of individual project assessments will result in poorer outcomes.

⁴² Bilateral Agreement, cl 10.1 and 10.2.

⁴³ The notion of an approval under section 146B constituting a substitute decision-making process was accepted by the Full Federal Court in *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 at para [44].

⁴⁴ Northern Territory EPA Environmental Impact Assessment register, available at: [Environmental impact assessments register | NTEPA](#)

The justification for strategic assessment under the NT Act is inadequate

A proponent can refer an action under section 49 of the *Environment Protection Act 2019* (NT) (**EP Act**) for a strategic assessment if the action or a group of proposed actions in combination will have ‘the potential to have a significant impact on the environment’ or meet a referral trigger under the Act. This threshold is not a high bar for referral for undertaking a strategic assessment. It mirrors the test in section 48 of the EP Act for a standard assessment with only the additional element of a group of proposed actions being able to be referred together. It appears that based on the type of possible future activities at Middle Arm any action may be equally suitable for standard assessment under the test in section 48 of the EP Act. There is little justification contained in the EPA ‘Notice of Recommendation and Statement of Reasons’ given on 17 August 2022 for why the strategic assessment proposal is preferred.⁴⁵

Regulation 59 of the *Environment Protection Regulations 2020* (NT) gives the criteria for recommending a method of assessment. Given that this will involve environmental impact to be assessed without clear understanding of what projects will eventually exist at Middle Arm, the justifications given by the EPA in making its recommendation with reference to regulation 59 of the *Environment Protection Regulations 2020* (NT) are lacking. Where the EPA recommendation refers to the strategic assessment proposal being assessed by EIS as ‘an appropriate method to resolve the high level of uncertainty regarding the proposal including the industries proposed for the precinct,⁴⁶ this could instead be read as an argument for why strategic assessment is unsuitable. Given the absence of clarity in what projects will occur at Middle Arm and the uncertainty in the potential impacts of those projects, the criteria at regulation 59 indicate a strategic assessment is in fact not the correct approach.

Strategic assessment under the NT Act may result in weaker regulatory standards and worse environmental outcomes

Given the intention of strategic assessment is to streamline assessment processes and minimize the need for certain assessments,⁴⁷ it is concerning to note that proceeding with the strategic assessment proposal for Middle Arm could have an opportunity cost in that future activities may be assessed on a shorter timeframe, with less rigour or potentially without a referral for assessment at all, than if each were assessed in a complete manner, with all relevant information on the proposed project available, individually. The EPA may be limited in its future capacity to assess environmental impact of activities because of an earlier approval under the strategic assessment process. If the future approvals scheme operated in this way it would be in tension with the principle of evidence-based decision-making expressed in section 20 of the EP Act and the expectation that the best relevant and reliable evidence, including current evidence obtained through iterative assessment processes, is before the decision maker under the Act.

The Terms of Reference document for the NT EIS acknowledges, at section 2.5.4 that knowledge gaps may exist in scientific understanding and says that assumptions may be made in assessing

⁴⁵ Northern Territory EPA, Notice of Recommendation to Minister and Statement of Reasons (17 August 2022), 4.

⁴⁶ Notice of Recommendation to Minister and Statement of Reasons, 4.

⁴⁷ See Department of Infrastructure, Planning and Logistics, Terms of Reference for strategic assessment by an EIS (September 2022) 6.

potential impacts.⁴⁸ Given the future activities at Middle Arm are unclear, there will obviously be knowledge gaps and assumptions made. However to acknowledge these knowledge gaps and assumptions while at the same time closing-off future assessment of activities to rigorous assessment with full consideration of all relevant and current evidence, risks undermining the principles of ecologically sustainable development, including the precautionary principle.⁴⁹

If the strategic assessment, in effect, provides for future approvals by less rigorous assessment, this would risk the regulatory scheme achieving the stated object of strategic assessment in achieving 'better environmental outcomes through a more comprehensive assessment.'⁵⁰

Concerningly this may also make assessment difficult to achieve in accordance with the principles of environment protection and management set out in Division 1, Part 2 of the *Environment Protection Act 2019*.

Recommendation 5:

The strategic assessment process under the *Environment Protection Act 2019* (NT) must be reviewed for its suitability for the Middle Arm precinct, given the limitations of the current proposal and lack of information about future activities.

A public inquiry process should be undertaken for Middle Arm

With the limited knowledge available of the activities to occur at Middle Arm, EDO considers that a public inquiry process under the *Environment Protection Regulations 2020* (NT) should be undertaken as part of any environmental impact assessment process. Noting the proximity of Middle Arm to Palmerston and Darwin and the extent of potential impacts from future activities (be those impacts on cultural heritage, human health, climate change, biodiversity, water quality and marine uses or loss of amenity), a public inquiry should be instated to ensure adequate public consultation on the precinct.

One of the elements of the Terms of Reference is 'broad public participation with affected people and communities to inform decision-making.'⁵¹ Section 3 of the Terms of Reference sets out the public consultation requirements to achieve this. This does give the public an opportunity to participate, with a standard EIS feedback window of 30 to 60 business days.⁵² There is a reference to engaging in a manner consistent with the EPA stakeholder engagement and consultation guidance,⁵³ and the guidance document itself sets out the relevant principles and methodologies for stakeholder engagement that a proponent is recommended to adopt.⁵⁴

However, as noted above, the strategic assessment is the first of its kind undertaken in the NT. The general duty of DIPL under section 43 of the *Environment Protection Act 2019* requires public

⁴⁸ Terms of reference for strategic assessment by an EIS, 42.

⁴⁹ *Environment Protection Act 2019* (NT) Part 2, Div 1.

⁵⁰ Terms of reference for strategic assessment by an EIS, 6.

⁵¹ Terms of reference for strategic assessment by an EIS, 12.

⁵² Terms of reference for strategic assessment by an EIS, 43.

⁵³ Terms of reference for strategic assessment by an EIS, 43.

⁵⁴ Northern Territory EPA, Stakeholder Engagement and Consultation, EIA Guidance for Proponents (6 January 2021).

engagement. Taking the uncertainty of the nature of future activities at Middle Arm, the risks potentially involved and the novel assessment process, it would be reasonable to apply section 43 in a manner that leads to the greatest public participation. The public inquiry form of assessment is clearly intended to create a mechanism for complex or contentious proposals to be assessed thoroughly and with a high level of public participation.⁵⁵ As such, the strategic assessment should be undertaken by public inquiry.

Recommendation 6:

The Public Inquiry process for environmental assessment available under *Environment Protection Regulations 2020 (NT)* be undertaken for Middle Arm.

Term of reference (e): Engagement and advocacy by industries and their representatives throughout the Middle Arm proposal, including with First Nations groups and communities adherence to the principles of free, prior and informed consent.

The media has reported that the Traditional Owners of the Darwin area, the Larrakia people, are publicly calling for Middle Arm to be halted due to concerns with the consultation process, the risk of cultural heritage damage and destruction, and the failure of communication by governments and regulators. With Middle Arm the site of several sacred and archaeological features, and located close to petroglyphs, Larrakia people are warning of ‘another Juukan Gorge-style scenario’.⁵⁶ Traditional Owners have stated that governments have failed their own protocols, and that early engagement on the Middle Arm proposal did not happen with Larrakia families.⁵⁷

EDO is a legal organisation that has represented First Nations people articulating the standard of consultation and engagement when industry seeks to consult on projects with environmental and cultural impacts, but is not a First Nations organisation. Our law reform work is informed by this background.⁵⁸ As such, we have limited our comments to law reform recommendations which relate to the implementation of free, prior and informed consent of First Nations communities as it relates to the Middle Arm precinct and applicable regulatory regimes.

This section sets out the content of the duty of free, prior and informed consent and compares the content of this duty with the consultation requirements with First Nations communities for approvals under Commonwealth and Northern Territory law that are most relevant to Middle Arm. This analysis makes clear that assessment and approval processes at both the Federal and Territory level are inadequate when it comes to ensuring FPIC for First Nations communities. The regulatory regimes are therefore insufficient to approve the Middle Arm project, particularly in

⁵⁵ See, [Environment Centre NT, Submission on the Middle Arm Industrial Development NTEPA Referral \(10 June 2022\)](#).

⁵⁸ For example, *Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2)* [2022] FCA 112 and *Santos NA Barossa Pty Ltd (Santos) v Tipakalippa* [2022] FCAFC 193.

circumstances where it is being assessed as a strategic assessment (see discussion above). Due to these deficiencies, the process under the draft Program and Terms of Reference must explicitly and adequately provide for FPIC.

Free, prior and informed consent of First Nations communities is essential

The duty to obtain free, prior and informed consent (**FPIC**) is drawn from article 32(2) of the UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**), adopted by Australia on 3 April 2009. FPIC is grounded in the fundamental rights to self-determination and to be free from racial discrimination guaranteed by at least three treaties that Australia is a party to: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.⁵⁹ When a First Nations person or community is identified as a relevant person to be consulted on a project under the law or regulation, those consultations should be based on FPIC.

The process by which FPIC is obtained must be ongoing, with decision-makers seeking input throughout the decision making process.⁶⁰ Through FPIC, First Nations people should be able to influence the outcome of decision-making processes affecting them which is more than a ‘mere right to be involved’ or to simply ‘have their views heard’.⁶¹ This means that through consultations, First Nations people must have the ability to alter the decision at issue or to develop accommodations of which they are satisfied meet their interests at stake.

EDO would be pleased to provide the Committee with further resources which outline how best practice elements of FPIC – relating to scope, manner, information, assurances and timing of consultation – should be implemented, and are reflected in international law.

Legal regimes applicable to Middle Arm fail to adequately incorporate FPIC

This section assesses the various approval and licencing regimes which may apply to Middle Arm industries, as measured against the FPIC principles. EDO notes, as discussed above, that it still unclear at this stage the full scope of activities to be taken at Middle Arm once the strategic assessment process is complete.

Assessment under the Bilateral Agreement

As described above, the Bilateral Agreement between the NT and Commonwealth provides for the assessment of impact on matters of national environmental significance. This is undertaken through an agreed upon Program, endorsed by the Commonwealth Environment Minister, and subsequently prepared by DIPL. That approval operates as, and stands in the place of, the

⁵⁹ Human Rights Council, *Study of the Expert Mechanism on the Rights of Indigenous Peoples, Free, prior and informed consent: a human rights-based approach*, UN Doc A/HRC/39/62, (10 August 2018) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/245/94/PDF/G1824594.pdf?OpenElement>> [3].

⁶⁰ See for example, Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Mexico*, CERD/C/MEX/CO/16-17 (4 April 2012) [16]-[17]. (“effective” consultations must be carried out “at each stage of the process”).

⁶¹ Human Rights Council, *Study of the Expert Mechanism on the Rights of Indigenous Peoples, Free, prior and informed consent: a human rights-based approach*, UN Doc A/HRC/39/62, (10 August 2018) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/245/94/PDF/G1824594.pdf?OpenElement>> [15].

approvals process usually followed under the EPBC Act for controlled actions that would have a 'significant impact' on matters of national environmental significance.⁶²

Attachment 2 of the Bilateral Agreement provides an endorsement criteria for a draft Program. The endorsement criteria does not mention First Nations communities and provides no requirements for consultation or consent of First Nations communities.

Recommendation 7:

The Bilateral Agreement must be updated to reflect and embed FPIC before endorsement is sought for any draft Program under the current Bilateral Agreement.

Assessment under the EPBC Act

As noted above, EDO recommends Middle Arm be assessed under the EPBC Act through public inquiry, in order to ensure the highest level of public scrutiny and input. While currently Middle Arm is likely to be assessed under the Bilateral Agreement, if any proposed action at Middle Arm were to be assessed under the EPBC Act, Part 3 and 8 of the EPBC Act would require amendments to ensure they are FPIC compliant.

Part 3 of the EPBC Act creates the requirement for the environment approvals for controlled actions, including actions that will have or is likely to have a significant impact on First Nations' heritage values.⁶³ Part 8 then sets out the methods of assessment under the EPBC Act. Each method allows for a period where the public may make a comment on the assessment in writing.⁶⁴ However none of these methods embed the consultation with or consent of First Nations people as part of the assessment and decision-making process.

This is a flaw in the EPBC Act more broadly, and EDO has long advocated for better consultation and participation procedures to be embedded through the EPBC Act decision-making processes.⁶⁵ With reform of the Act currently underway, EDO is of the view integrating FPIC into environmental decision-making at the national level must be a high priority. This should complement the ongoing development of new laws to protect First Nations cultural heritage at the national level.

Recommendation 8:

The EPBC Act must be amended to embed the principles of FPIC in all consultation requirements.

⁶² EPBC Act, s 67, 67A; Division 1, Part 3; *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 at para [44].

⁶³ EPBC Act, ss 15C and 15B.

⁶⁴ See for example EPBC Act, ss 93, 95, 98

⁶⁵ See e.g. [EDO legal update, Urgency and ambition more important than ever for national nature law reform \(July 27, 2023\)](#).

Assessment under the Environment Protection Act (NT)

The EP Act requires assessment of actions by the NT EPA where the action has or will have a significant impact on the environment, or meets another referral trigger. As laid out above, the NT Government plans to assess Middle Arm as a strategic proposal under the EP Act and *Environment Protection Regulations 2020* (NT).

Under the EP Act, there are two general duties on proponents of actions that reflect some elements of FPIC, namely the duties ‘to consult with affected communities, including Aboriginal communities, in a culturally appropriate manner’ and ‘to address Aboriginal values and the rights and interests of Aboriginal communities in relation to areas that may be impacted by the proposed action’.⁶⁶ There is also a reference in the objects of the Act at, section 3(e), to recognise ‘the role that Aboriginal people have as stewards of their country as conferred under their traditions and recognised in law, and the importance of Aboriginal people and communities in environmental decision-making processes’. These duties, and statement of objects of the Act, do not however give rise to FPIC obligations.

The NT EPA has produced a document which gives proponents guidance on stakeholder engagement and consultation.⁶⁷ It states that FPIC is an ‘important consideration’ when proponents are consulting with Aboriginal communities about their proposal and sets out the steps proponents should take when consulting with Aboriginal people, which largely reflect FPIC principles.⁶⁸ These efforts must be reported back on within a Supplementary Environmental Report or Environmental Impact Statement. The key inconsistency of this guidance with FPIC is that First Nations people do not have the right to alter the outcome of decision-making under the EP Act.⁶⁹

Once referred for strategic assessment under the EP Act, the *Environment Protection Regulations 2020* (NT) guide the NT EPA’s recommendations and Minister’s decision on accepting the referral, the level of assessment and approval.⁷⁰ Public consultation is embedded through each of these steps.⁷¹ There is no specific provision for consultation with First Nations people or communities.

Rezoning and subdivision under the Planning Act 1999 (NT)

According to the NT Government, Middle Arm is likely to need approvals under the *Planning Act 1999* (NT) for the ‘rezoning of land and subdivision’.⁷² People or bodies may make submissions

⁶⁶ *Environment Protection Act 2019* (NT) (**EP Act**), s 43. Note; EDO acknowledges that there is a legacy of writing about First Nations Peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term First Nations. However, the Environment Protection Act (NT) uses the term Aboriginal, which is used in this section where referencing the legislation directly, to accurately reflect the law.

⁶⁷ Northern Territory EPA, *Stakeholder Engagement and Consultation*, EIA Guidance for Proponents (6 January 2021).

⁶⁸ Northern Territory EPA, *Stakeholder Engagement and Consultation*, EIA Guidance for Proponents (6 January 2021) 14-18.

⁶⁹ See also, [EDO submission on Stakeholder Engagement and Consultation Guidance under the Environment Protection Act 2019 \(July 2020\)](#).

⁷⁰ *Environment Protection Regulations 2020* (NT).

⁷¹ *Environment Protection Regulations 2020* (NT), regs 52, 85, 102, 122, 133, 139.

⁷² *Middle Arm Sustainable Development Precinct Draft Program January 2022* 7-8.

about proposals for rezoning to the Planning Commission.⁷³ Subdivisions may be requested in several ways, including through an application for a development permit or exceptional development permit.⁷⁴ Development permits and exceptional development permits application processes make provision for written submissions.⁷⁵

None of these public submission requirements – nor any other requirements under the *Planning Act 1999* (NT) reflect the principles of FPIC.

Other relevant Northern Territory legislation and licence processes

Middle Arm and the associated industrial activities at the site may require several other licences and approvals under Northern Territory law to operate. For example, a groundwater extraction licence or waste discharge licence may be required under the *Water Act 1992* (NT); or for activities involving storage and handling of listed wastes, approvals or licences under the *Waste Management and Pollution Control Act 1998* (NT). EDO has identified that approval processes under these regulatory regimes insufficiently incorporate FPIC principles, and recommends the Northern Territory urgently amend these acts to better implement FPIC.

Proponents at Middle Arm may additionally require a certificate under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) to enable them to undertake work on or near sacred sites. While the process by which a certificate is granted provides some protection to sacred sites and may stop proponents from doing works without one, the act does not specify how the Aboriginal Areas Protection Authority (which governs the process) must conduct their consultation with Custodians. The process does not ensure compliance with the principles of FPIC throughout the decision-making process, including after the certificate is issued, and EDO recommends this be amended by the Northern Territory Government.

The above analysis demonstrates the inadequacy of the regulatory regimes which govern Middle Arm when it comes to the free, prior and informed consent of First Nations communities. These inadequacies are of course not limited to application to Middle Arm, but illustrate the need for wider reforms at the Territory level. However, for the purposes of the Committee's inquiries into Middle Arm, EDO is of the view that the draft Program, and Terms of Reference, must compensate for these deficiencies by clearly requiring FPIC for Middle Arm, and all associated projects and activities. This includes the requirement for a comprehensive cultural heritage assessment. EDO recommends these be amended to explicitly require FPIC, prior to any reforms of the EPBC Act to incorporate FPIC into national level assessments, to ensure best practice in line with UNDRIP.

Recommendation 9:

The draft Program and Terms of Reference must explicitly and adequately provide for FPIC of First Nations communities in relation to the Middle Arm Precinct and all associated activities and projects.

⁷³ *Planning Act 1999* (NT), s 22.

⁷⁴ *Planning Act 1999* (NT), ss 38, 40(4A), 44.

⁷⁵ *Planning Act 1999* (NT), ss 17(1), 49.

Conclusion

EDO is concerned about the legislative processes which have allowed Middle Arm to proceed, and which will be used for further assessment and approval of the industrial precinct. The Middle Arm Industrial Precinct, while of particular concern for its climate, environmental, and cultural impacts, also serves to illustrate the myriad problems with national and territory level approval regimes.

EDO calls on the Committee to ensure significant law reform is undertaken by governments at all levels, to prevent both Middle Arm (in its current form), and future projects with destructive impacts on climate, environment, and First Nations cultural heritage, from proceeding.

Thank you for the opportunity to make this submission.

Please do not hesitate to contact our office should you have further enquiries.