ENVIRONMENTAL DEFENDERS OFFICE NT – RESPONSE TO THE DRAFT ADVICE OF THE NT EPA ABOUT RECOMMENDED REFORMS FOR THE TERRITORY'S ENVIRONMENT LEGISLATION

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Executive summary

The Environmental Defenders Office NT Inc (**the EDO**) welcomes the opportunity to provide comment on the '*Draft Advice regarding Dr Allan Hawke's Review of the Northern Territory's Environmental Assessment and Approval Processes'* (**Draft Advice**). The importance of regulatory reform of the Northern Territory's (**NT**) environmental assessment regime cannot be understated, particularly with an increasing push to "develop the north". At the outset the EDO wishes to commend the NTEPA for the work it has done in preparing the Draft Advice.

In the EDO's view, the goal of the NT's reform agenda should be to develop a world leading regulatory framework for environmental assessment. There is very little to be critical of in the Draft Advice, indeed, the EDO believes that it provides a strong basis upon which to develop a world leading regulatory framework for environmental assessment.

In summary, the EDO has taken the following position on the 7 summary recommendations in the Draft Advice:

1. The EDO strongly supports Recommendations 1-3 in the Draft Advice, which urge a move to a *single environmental approval* framework in which the Environment Minister issues an overarching environmental approval for all projects, which will, or may, have a significant impact on the environment.

2. The EDO strongly supports Recommendation 4 in the Draft Advice, which recommends the urgent reform of the *Environmental Assessment Act.* Broadly speaking the EDO supports reforms which will ensure:

    a. no action in the Northern Territory has an unacceptable impact on the environment[1] now and/or into the future; and

    b. all actions in the Northern Territory, that may have a significant - direct or indirect impact - on the environment, are assessed, planned and conducted so as to avoid significant adverse impacts to the Northern Territory environment, taking into account the potential for more desirable alternatives, principles of ecologically sustainable development and ecosystem based management.

    The Draft Advice provides excellent preliminary draft instructions that go along way to achieving the aim of world leading environmental impact assessment. Particularly the EDO supports the inclusion of third party review rights, offence provisions and requirements for reasons for decisions to be made publicly available.

    While there is a lot to like about the Draft Advice preliminary drafting instructions, the EDO does make non-exhaustive recommendations in this comment which articulate an innovative approach to areas in which current environmental assessment regimes are failing, particularly with regard to the adequacy of science in EIS documents, the accountability of decision makers, the development of stringent criteria and the consideration of cumulative impacts of actions.

3. The EDO provides in principle support to Recommendation 5 in the Draft Advice. It is the EDO's view, that a well-resourced independent NTEPA (**with the necessary checks and balances on its own power**) provides an additional layer of accountability, credibility and independence in a jurisdiction, which, because of its size, is often challenged by perceptions of bias and political interference.

4. The EDO provides in principles support to Recommendations 6 & 7 in the Draft Advice but will consider those matters in greater detail during the reform process proper.

The EDO's detailed comments on the Draft Advice are provided below.

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[1] A broad definition of environment should be included in the Act, encompassing socio-economic and cultural factors.

Introduction

The Environmental Defenders Office NT (**the EDO**) welcomes the opportunity to provide its comments on the Northern Territory Environment Protection Authority's (**NT EPA**) Draft Advice about reforms recommended for the Northern Territory's (**NT**) environmental assessment legislation.

There are numerous examples, which illustrate the problems with the current NT approach to environmental assessment of projects, and the EDO agrees that comprehensive reform of the *Environmental Assessment Act* (NT) is urgently needed. This fact has been known for many years and it is disappointing that successive governments have not taken steps to address the many failings of the NT environmental assessment regime. Having said that, the EDO is heartened by the apparent momentum for change in this area.

It worth stating that while it is critical that the environment assessment regime be overhauled, it is a major reform that should not be rushed. This, as the NTEPA notes, is a "rare" opportunity for major reform. We don't want to lose the opportunity to put in place a leading framework that will stand up over the next 10-20 years because of undue haste during the reform process. What we're saying is this, the opportunity that presents itself is one in which the NT can opt to lead on environmental assessment best practice. It is an opportunity to develop new ideas that others may follow, rather than simply playing catch-up. The little-acknowledged reality is that, environmental assessment laws across Australia are failing to achieve their aims.

On the subject of reform, the EDO takes the opportunity to note our continued opposition to a bilateral agreement, which would see the Territory assume responsibility for approval of actions, which trigger the Commonwealth environmental assessment regime. The views of the EDO are captured in a recent Environmental Defenders Offices NSW article 'Australia's Environment: Breaking the One-Stop-Shop deadlock.[2]

The EDO hopes that the substantive reform process will include appropriate timeframes for public comment. In our view, 30 days will be too short a period to put forward reports/comments of real substance. Additionally, we would support the creation of a community working group with experts in the field providing input and ideas into the reform process.

The Hawke Review, and the Draft Advice which critiques it broadly examine two things, first (and primarily) the best structure for the environmental assessment regime in the NT, second various other reforms required to give rigour and effectiveness to the process.

The structures recommended in the Hawke Review and the Draft Advice vary markedly with each urging a different immediate way forward. Interestingly, the approach advocated in the Draft Advice is actually the "aspirational model" identified by the Hawke Review.

In our view, the simplest way to provide comment on the NTEPA's comprehensive advice is to break the work down to examine the two sections, a) the best structure for the environmental assessment process; and b) other reforms required to give rigour and credibility to the current EIA process.

[2] https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/2664/attachments/original/1457483376/IMPACT_ISSUE_97.pdf?1457483376

The starting point for any reform discussion

Before we begin our substantive comments on the Draft Advice, we think it is important to record our view that the starting point for any discussion about reform in this area should be guided by the answer to this question - ***what is it the environmental assessment regime supposed to achieve?***

Until that very simply question is answered for the NT, reform in this area will lack direction.

The EDO proposes that a sensible answer to that question would be something like:

> **The Northern Territory's Environmental Assessment regime should ensure that:**
>
> - **no action in the Northern Territory has an unacceptable impact on the environment[3] now and/or into the future; and**
>
> - **all actions in the Northern Territory, that may have a significant direct or indirect impact on the environment, are assessed, planned and conducted so as to avoid significant adverse impacts to the Northern Territory environment, taking into account the potential for more desirable alternatives, principles of ecologically sustainable development and ecosystem based management.**

The Draft Advice's first preliminary drafting instruction (**PDI**) provides some guidance on how the NTEPA believes this question should be answered. Ultimately, the Draft Advice provides that the primary objective of the Act should be "to ensure ecologically sustainable development" and then states that this objective will be achieved by:

- Applying the core objectives and principles of ecologically sustainable development
- Application of the avoid, mitigate, offset hierarchy
- Establishing risk management as a fundamental component of environmental assessment and management processes
- Adopting processes that require impacts to be reduced to 'as low as reasonably practicable' (ALARP) and to be acceptable.
- Implementing an environmental approval issued by the Minister for the Environment following an environmental impact assessment.
- Ensuring appropriate protection of the environment from the impacts of waste and pollution through, for example, licencing and a general duty of environmental management and protection.

The EDO commends the PDI, however, it recommends that the Acts objective should be, first and foremost to ensure that no development has an unacceptable environmental impact and where development occurs, that it is ecologically sustainable development.

Consideration could be given to the desirability and utility of articulating various principles in greater detail than set out in PDI 1, for example, see section 1B-1L of the *Environment Protection Act* 1970 (Vic).

[3] A broad definition of environment should be included in the Act, encompassing socio-economic and cultural factors.

PART 1: THE EDO's VIEW ON THE PROPOSED ENVIRONMENTAL IMPACT STRUCTURAL REFORM

Single environmental approval or sectoral approval [4]

The EDO is strongly in favour of the Northern Territory moving, as quickly as is reasonably possible, to a *single environmental approval* framework as proposed in the Draft Advice. The EDO sees no benefit whatsoever in an interim move to a *sectoral environmental approval* (**Sectoral framework**) framework as proposed by the Hawke Review.

The Draft Advice sets out clearly the disadvantages of both the current regime and the Hawke proposed, Sectoral Framework. Broadly, the Draft Advice identifies that the current system and the Sectoral Framework:

- are highly fragmented across numerous inconsistent pieces of legislation and a patchwork of different agencies with different aims;
- promote inefficiency and ineffectiveness;
- feature unacceptable conflicts of interest/perceived conflicts of interest; and
- results in/is likely to result in the continued ineffectiveness of environmental assessment in the NT.

The EDO accepts and agrees with the criticism the Draft Advice makes of the Sectoral Framework. We also agree that it is difficult to understand the rationale for the Sectoral Framework which will require more work, generate greater uncertainty and will fail to eliminate many of the problems (particularly related to conflicts) with the current regime.

The EDO agrees with the benefits of the *single approval framework*. Particularly, this framework will provide a clear line of accountability, remove the current conflicts which plague the current system and will essentially provide a far simpler arrangement for environmental assessment in the NT.

The EDO is in favour of a framework where the Minister for the Environment provides an overarching 'environmental approval' for all actions, which trigger the environmental assessment process (we will discuss our view on how the assessment regime should be triggered in Part 2). Obviously, other operational approvals will still be required, but the Minister for the Environment will, quite deliberately, have a far more powerful role under this framework – as is the case with the Commonwealth environmental assessment regime.

Who should decide if a project needs assessment? Who should do the assessment work?

If appropriate constraints on the exercise of power - related to decisions in the assessment process - are built into the legislation, then the question of who undertakes the assessment work (Whether the NT EPA (as is the case in Western Australia) or the Department of the Environment (as is the case in New South Wales)) becomes less important. Therefore, the critical considerations for the reform are the constraints, guidance and criteria that need to be applied by whoever the decision maker is. The Draft Advice makes excellent recommendations in this regard (albeit from the standing assumption that it will be the NTEPA who undertakes the assessment work.)[5] These recommendations, and the EDO's views, are discussed in Part 2 of this comment below.

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[4] The EDO opposes any move to hand Commonwealth environmental approvals to the NT. https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/2664/attachments/original/1457483376/IMPACT_ISSUE_97.pdf?1457483376

[5] It is the EDO's view, that a well-resourced independent NTEPA (with the necessary checks and balances on its own power) would provide an additional layer of accountability, credibility and independence in a jurisdiction, which, because of its size, is often challenged by perceptions of bias and political interference.

PART 2: THE EDO's VIEW ON THE SUPPORTING RECOMMENDATIONS MADE IN THE DRAFT ADVICE

Part 2A: The three time points

There are three points in time during the assessment regime, which seem to us more critical than all the others. At each of these three points, the legislation must set out effective criteria for decision making, provide a transparent framework and have in place accountability mechanisms. We have assessed the Draft Advice's effectiveness in relation to these three critical points in time below:

1. The act of referral. How a project is directed into the regime.
2. The decision about whether an assessment is required for a matter and at what level.
3. The decision whether or not to approve the matter and, if approved, what conditions to impose.

Accountability factors important at more than one time point

Third Party Review Rights

The EDO strongly supports the Draft Advice's apparent support for third party merits review to the Northern Territory Civil and Administrative Tribunal throughout the assessment process.

1. PDI 88 recommends that the Act should provide for appeals directed to the Northern Territory Civil and Administrative Tribunal. Appeals should be on decisions made by the NTEPA, and the by the Minister for the Environment.

   In the EDO's view PDI 88 should be amended to specifically note the intention for decisions to be subject to merits review by the Tribunal and also to specifically allow third party appeals for a broad cross-section of the community. This could be achieved by providing for broad standing provisions, e.g. open or expanded standing[6], or standing for anyone who has made a submission, is a person aggrieved or has a relevant interest.

   The EDO notes that in addition to 'assessment decisions' (made by the NTEPA) and 'approval' decisions (by the Minister) a right of merits review should also be available to the power outlined in PDI 71 to allow significant amendment of an approval or condition.

   This particular PDI is critical because it provides a legislated procedure to challenge an approval and any "no significant impact" finding on its merits.

2. The EDO recommends that the timeframe for bringing a merits review of any decision under the act be at least 45 days (preferably 60), rather than 28 days.

Adequacy of reasons

3. PDIs 20 & 71 require that reasons be published publicly in relation to 'assessment decisions' and approval decisions, respectively. The Act should do more than require a statement of reasons. It should require that a statement of reasons be adequate to allow the reader to understand the intellectual process that underpinned the decision.

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[6] See section 487 of the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) for an example 'expanded standing' provision, albeit for judicial review proceeding rather than merits review proceedings.

The EDO recommends that the Act adopt similar wording to that found in the Administrative Decisions Judicial Review Act (Cth), that is the provisions of reasons "setting out the findings of fact, referring to the evidence or other material on which those findings were based and giving reasons for the decision". [i]

Time point 1 – the Act of referral

4. The Draft Advice outlines comprehensively the current regime's difficulties with ensuring projects are referred for assessment when required. Indeed the Draft Advice notes that a number of projects, which should have been referred, have not.

   To rectify the above failures, the EDO agrees with PDIs 4 – 8 set out in page 99 of the Draft Advice.

5. The Act should provide for "any person" to seek an injunction restraining a person from undertaking work where that person has, by contravening the Act, has caused, is causing or will cause damage to the environment. Specifically this provision should be used to restrain a proponent that has begun work without the referral of a matter.

Time point 2 – assessment decision

As noted in the Introduction, it is crucial that the 'gateway' to the environmental assessment process be attended by transparency, stated criteria and accountability mechanisms for the decision maker. In the EDO's view the reforms recommended in the Draft Advice PDIs generally achieve those things. The EDO's opinions and suggested additions, amendments are detailed below.

Assessment and comments on the PDI

6. PDI 2: This PDI notes the need to define '*significant impact*'. It is important to note that this term escapes easy definition and has been the subject of various consideration by courts. A potential option would be to use the definition as interpreted by the Federal Court in various cases[7] and referenced in the EPBC Act Significant Impact Guidelines, namely a significant impact is one that is "important, notable or of consequence, having regard to its context and intensity". The EDO notes that the current NTEPA Draft Guideline would be a poor template to use for constructing an appropriate definition.[8]

   The EDO suggests it is also important to include a definition of "impact", albeit preferably one with greater simplicity than the definition of impact set out in section 527E of the EPBC Act. This definition should make it clear that impacts of an action extend to impacts that do not directly arise from the action itself. Additionally consideration will need to be given to how the definitions encompass short, medium and long-term impacts, an impact that could be insignificant in the short term could be substantial in the long term. Cumulative impacts should also be considered, particularly where strategic impact assessment has not been conducted. Significant work on these definitions will be required.

7. The EDO is generally supportive of PDI 3, however it will need to be the subject of detailed consideration and community engagement during the reform process.

8. The EDO is generally supportive of PDIs 11-16. Notably, PDI 7 & 8 are critical accountability mechanisms, the absence of offence provisions in the current regime, along with the necessity for a 'responsible minister', are two of the biggest failings of the current regime.

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[7] See for example Booth v Bosworth [2001] FCA 1453

[8] See the EDO's recent comment on the Draft Guideline for 'Significant Impacts'.

PDI 9 is in our view, still a little unclear. In the EDO's view it would be simpler and more consistent to adopt the definition of '*action*' found in the EPBC Act. Additionally, the EDO suggests that (similar to provisions found in Victoria) the amendment of a planning scheme should be explicitly mentioned in the Act as a matter, which can attract the assessment provisions of the Act.

PDI 11 promotes flexibility and efficiency and it is sensible to remove the provisions related to PER as recommended in PDI 12.

9. PDI 19: The EDO suggests more detail be required in terms of the kinds of impacts that need to be covered. These should include a requirement to specifically recognise impacts that arise through opportunity costs (potentially to stop more desirable alternative land uses), impacts to air quality, impacts to health, socio-economic and cultural impacts.

   These additions will provide greater scope for the NTEPA (or other decision maker) to assess whether an environmental assessment is required.

10. PDI 24: The EDO is generally supportive of the increased use of Strategic Impact Assessments and ecosystem based management strategies.

11. PDI 62: There should be powers for the NT EPA to extend timeframes unilaterally where:

    i. the proposal is of such significant impact or public interest that the NTEPA is of the opinion that additional time is required (reasons should be given for forming this opinion).
    ii. Insufficient information is provided to enable the NTEPA to make recommendations; or
    iii. Where agreed in consultation with the proponent.

    EDONT note: This safeguard is important to allow flexibility. Particularly it redresses the problems that may arise where the NTEPA (or other decision maker) can be inundated with EIS material but is forced to comply with strict timeframes.

    The EDO notes that the reformed act will need a strong definition of "substantially commenced". Problems associated with this have been observed in other jurisdictions.

Ideas for consideration and potential addition to reform

12. The Act should specify matters, which must be included in an EIA. This could be done by way of schedule, or regulation. This will provide strong minimum standards and requirements for the conduct of EIAs, clarifying their definition, scope and content. This would include mandating the requirement to consider and outline possible more desirable alternatives and a proponents (and any subsidiary's) *environmental history* both within this jurisdiction and outside of it.

13. The current Draft Advice doesn't adequately deal with cumulative impacts and adaptive management of projects. These topics will require significant attention during the reform process.

Time point 3 – approval decision

In a single environmental approval framework the approval decision is, quite obviously, the most important one. So, again, the decision maker (in this case the Minister) must be guided by criteria which allows flexibility, but not complete discretion that might be influenced by political rather than merits based considerations. It is equally important that the Minister must provide reasons for his/her decision and that there are accountability mechanisms available.

Generally speaking the EDO is in favour of the reforms proposed by the Draft Advice's PDIs as they relate to the approval decision. We do, however, have a number of comments/recommendations.

Assessment and comment on specific PDIs

14. PDI 64. The EDO does not understand the necessity of PDI 64. If the draft environmental approval, or draft statement of unacceptability is provided to the proponent and relevant government agencies for comment, then that opens up the possibility for the Minister to be 'lobbied' by both a proponent or a relevant government agency or other Minister prior to having seen the NTEPA's recommendations. The proposed PDIs don't seem to contemplate amendments to the draft environmental approval or statement of unacceptability following its provision to the proponent/government agencies.

    A preferable approach would be to provide the draft approval or statement of unacceptability and allow the Minister for the Environment to seek comment on particular aspects of an approval – for example, he may wish to ascertain, in any event, this seems to be covered adequately and appropriately in PDI 66. Alternatively, any comments provided in response to the draft environmental approval or statement of unacceptability, by a proponent or relevant government agency should be made public to avoid any perception of over-reach into the process.

15. PDI 82. The EDO supports a requirement that prohibits decision makers from issuing project specific sectoral approvals that are in conflict with the Minister's environmental approval and conditions.

Ideas for consideration and potential addition to reform

16. The NT Act should provide specific criteria which the Minister must consider before issuing an approval. This should include specific requirements for the Minister to consider:

    b. The object of the Act;

    c. The potential cumulative impacts of the proposal considering the nature and location of the action;

    d. The societal distribution of burdens and benefits associated with a proposal;

    e. The opportunity cost of approving a project and the potentially more desirable alternatives to the project;

    f. The impacts of climate change on the project, and the project's impact on climate change; and

    g. a proponent's *environmental history.* As noted above, the EDO believes that a statement of environmental history should be included as part of the EIS document.

17. The approval decision should always build in a requirement for adaptive management of the approval. So, where appropriate, an approval should require the monitoring of key environmental indicators, reporting provisions and trigger points which will see the adjustment or termination of an approval to ensure environmental impacts are limited to those that have been approved. This will be just as important in responding to a changing climate as it will be for ensuring a proponent's compliance with its environmental approvals.

Part 2B Additional matters of importance throughout the framework

The adequacy of the scientific information presented in the EIS

It is difficult to think of other circumstances in which major scientific reports are presented as fact without peer review, yet this is the case for EIS documents. It is a major concern given the enormous reliance that is placed upon the science presented in any given EIS. Often members of the public, and indeed government agencies will have insufficient expertise to make an adequate assessment of the reliability and accuracy of data presented in an EIS.

18. To address these issues, the EDO supports:

    - PDI 34 - which introduces the concept of an adequacy report.
    - PDI 44 – which gives the NTEPA power to establish a panel of experts or require certain information to be peer reviewed at the cost of the proponent.

In addition to the above, the EDO recommends that:

19. The Act introduce provisions, similar to those found in the *Environment Protection and Biodiversity Conservation Act* 1999, which make it an offence to provide false or misleading information.

20. The Act introduce one or all of the following accountability mechanisms for consultants undertaking EIS related work:

    i. The Act specifically identify that environmental consultants are a person who can be prosecuted for providing false, or misleading information in an EIS; and/or

    ii. Consultants used to undertake EIS work require some form of accreditation; and/or

    iii. The introduction of a panel of accredited consultants in various areas, who will be randomly, allocated work by the government. This will break the direct nexus between proponents and their environmental consultants.

Offences & non-compliance

21. In relation to the PDIs relating to offences (PDI 6 (failure to comply with a call in direction), PDI 8 (commencing work prior to decision on referral) PDI 75 (failure to comply with an approval or commencing work without approval & 83 (failure to comply with standards). However, we would suggest that where work commences in the absence of an environmental approval, this office should be an offence of *absolute liability offence* under the *Northern Territory Criminal Code.* So, while there might be guidelines, a proponent takes the risk totally of their own volition if they choose not to refer a project. If they get it wrong and their action is later found to have been an action that did require referral, they have committed an offence – regardless of any statements they may make about the application of guidelines. Indeed, this is one of the dangers of guidelines.

22. PDI 76: The EDO supports the NTEPA having powers to enforce the environmental approval on behalf of the Minister for the Environment. These enforcement powers should be guided by a clearly defined enforcement policy.

Public comment & transparency provisions

23. The EDO supports the inclusion of public comment periods throughout the assessment process and written into the Draft Advice, however, timeframes for public comment should be at a minimum 45 days, preferably 60 days.
24. The EDO also notes the importance of PDI 62, which provides for the NTEPA to unilaterally extend timeframes. The EDO also suggests that this mechanism be expanded to allow for specified classes of people, including peak environmental NGOs to request extensions of time for making comment in exceptional circumstances.

EMPs

25. The EDO supports PDIs 79-81 which deal with environmental management plans (**EMP**), however, the EDO suggests that an addition could be made to PDI 81 to include 'subsistence management plans' as an additional matter than can be included in an EMP.

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[i] Section 13, *Administrative Decisions (Judicial Review) Act* 1977 (Cth)