

**SUPERCEDED by the Northern Territory
Environment Protection Authority's
*Roadmap for a Modern Environmental
Framework for the Northern Territory***

**DRAFT ADVICE REGARDING DR ALLAN HAWKE'S
REVIEW OF THE NORTHERN TERRITORY'S
ENVIRONMENTAL ASSESSMENT AND
APPROVAL PROCESSES**



SUPERCEDED

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EXECUTIVE SUMMARY

The Northern Territory Environment Protection Authority (NT EPA) (an independent statutory authority of the Territory government) is pleased to contribute to the government's proposed and long-required reform of the Northern Territory's environmental management framework and processes. The government's intention for the reform is broad ranging and of profound significance for future custodianship of the Territory's environment. Reforms at the scale proposed are necessarily rare events. It is a welcome opportunity for the NT EPA to help ensure the Territory will have the best environmental management system. This advice is focussed on achieving that goal.

The NT EPA views reform of the existing processes of environmental impact assessment, environmental and project approval and management as being urgent and essential. The current system is highly fragmented across numerous inconsistent pieces of legislation and a patchwork of different agencies with different aims. Examples of the overall system's inadequacies include regulatory failings associated with the implementation of environmental assessment recommendations and environmental management at the Redbank Copper Mine in the Territory's Gulf country, past failures to undertake any environmental impact assessment of sand mining in the Howard sand plains, an inability to undertake formal environmental impact assessment when there is no responsible minister and inadequate environmental impact assessment of a number of recent development projects.

The Territory government sought a review of the existing environmental assessment and approval framework and advice on its reform from Dr Allan Hawke AC. Dr Hawke provided that advice in his *Review of the Northern Territory's Environmental Assessment and Approvals Process* (the review) delivered to government in November 2015.

The Honourable Gary Higgins, Northern Territory Minister for the Environment, sought advice from the NT EPA under Part 3 of the *Northern Territory Environment Protection Authority Act* (NT EPA Act) about Dr Hawke's review.

The minister specifically sought comment on:

- each of the review's 22 recommendations
- a model for a single environmental approval, as envisaged in the review, that is appropriate for the Northern Territory, and including options for a process to implement the model
- a process for transition from a sectoral environmental approval to a single environmental approval.

A *single environmental approval* is an environmental approval by the Minister for the Environment after environmental impact assessment of a project by the NT EPA. The existing environmental framework does not include an environmental approval by the Minister for the Environment. The review viewed a single environmental approval (the review's option 2) as the 'aspirational regime' for environmental management that might be implemented following temporary implementation of the review's sectoral environmental approval model (the review's option 3).

A *sectoral environmental approval* is an environmental approval provided for a project by a sectoral Minister (e.g. the Minister for Mines and Energy) as a part of a general project approval (e.g. a new mine). These approvals follow environmental impact assessment by the NT EPA. This is the only existing environmental approval for projects following environmental impact assessment.

The review recommended continuation of sectoral environmental approvals, with two modifications and one addition. One modification would restrict the granting of a sectoral environmental approval to Ministers whose sectoral legislation, and other high level regulatory tools have been accredited to do so by the Minister for the Environment. Not all sectors have project approvals, and not all agencies may choose to gain accreditation of legislation and high level processes from the Minister for the Environment. In these cases the review recommended the addition of an environmental approval to be granted by the Minister for the Environment. The second modification was that implementation of sectoral approvals be subject to periodic independent assurance monitoring (checking to see whether the legislation and other high level processes were being followed). The two modifications were proposed to ameliorate concerns about the existing sectoral environmental approvals' framework.

The review and each of its recommendations for reform are reviewed and assessed by the NT EPA according to objectives for the review's proposed reforms and the OECD (2014), *The governance of regulators, OECD best practice principles for regulatory policy* (OECD publishing) (see Appendix B).

To properly serve Northern Territory people into the future, the review's reforms must alleviate the causes of public and industry concern with the existing system and not create additional concern. Each objective for the assessments reflects a public and/or industry concern with the existing environmental management framework. Recommendations and structural reform options that do not meet the objectives (i.e. would not eliminate concerns) are unacceptable. The review's reforms will eliminate concern if they:

- are efficient and effective by being responsive, outcomes and risk focussed, reward good practice and hold the polluter to account
- instil public trust and confidence by being free of actual or perceived conflicts of interest in the application of environmental assessment, approval and management
- apply environmental assessment and management equally for each industry, thus providing certainty for industry and the community
- meet the Northern Territory's national and international obligations

and

- deliver ecologically sustainable development (ESD) outcomes for the people of the Northern Territory (government's 'Balanced Environment' initiative).

Conflict of interest can be defined as a real, apparent, or potential conflict between a duty owed to one in a matter and a duty owed to another regarding the same matter. For example, this would occur when a regulatory agency is responsible for ensuring a particular industry is promoted, supported and growing, and at the same time is required to approve, and to ensure compliance with and enforcement of environmental requirements.

Some of the review's recommendations would alter agencies' roles and responsibilities. The proposed changes would particularly impact on the independence and functions of the NT EPA. These recommendations were assessed in terms of the OECD (2014, page 49) recommendations that an independent regulator is most appropriate when:

- 'there is a need for the regulator to be seen as independent, to maintain public confidence in the objectivity and impartiality of decisions

- both government and non-government entities are regulated under the same framework and competitive neutrality is therefore required

or

- the decisions of the regulator can have a significant impact on particular interests and there is a need to protect its impartiality’.

These circumstances apply to the NT EPA’s operations and are the reason the NT Government established the NT EPA as an independent authority.

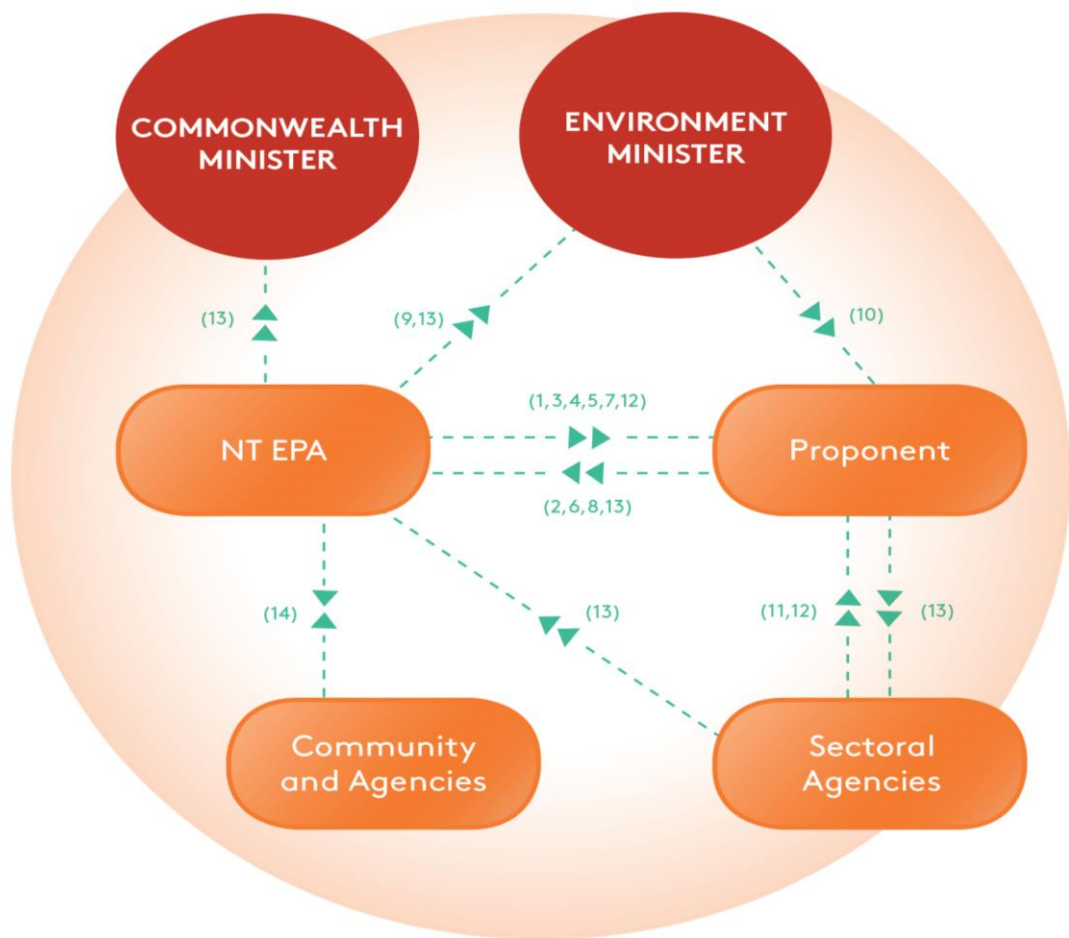
Frameworks for a single environmental approval and a sectoral environmental approval, and legislative changes required to implement recommendations for reform are developed from the review’s descriptions and optimised, where possible, to ensure compliance with the objectives for the reforms and OECD (2014). A transition from the review’s proposed sectoral to a single environmental approval is considered.

For the reasons explained in this advice, implementation of a single environmental approval is the easiest and most practical path for reform. It would achieve the reform’s objectives, engender Territorians’ trust and confidence, and provide certainty for industry and sound environmental outcomes for the Territory’s unique environment. These outcomes are the linchpins of the Territory’s future prosperity and the Territory lifestyle.

The two environmental approval frameworks

A single environmental approval framework

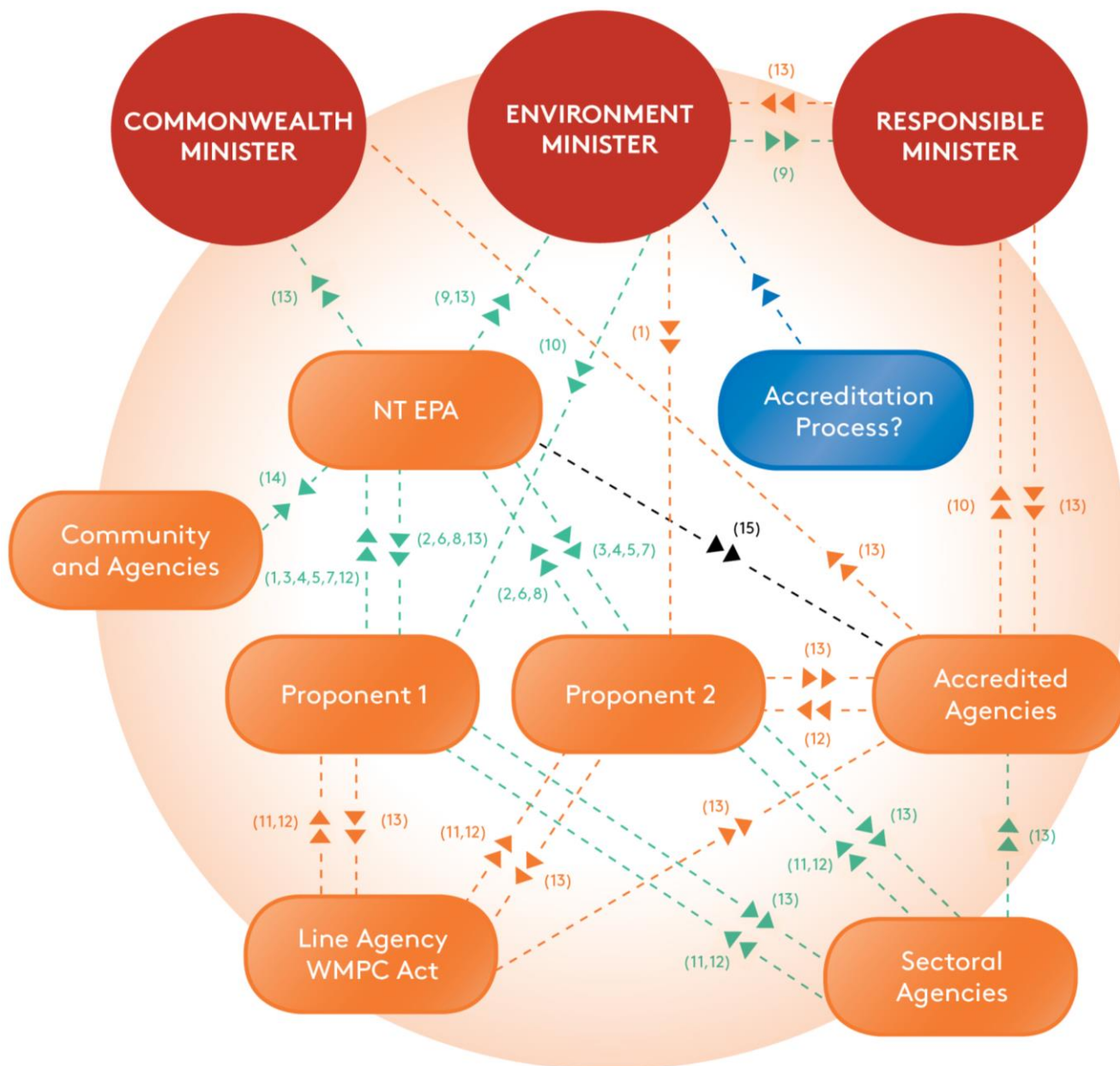
The following model for a *single environmental approval* meets the objectives for the proposed reforms and complies with OECD (2014). It has no conflicts of interest among individual agencies’ regulatory roles and responsibilities or structural inefficiencies. It has been modified from the single environmental approval framework described in the review’s recommended reforms to ensure that the objectives are met (see Appendix B).



The arrows in the single environmental approval framework indicate the direction of actions for the assessment, approval and implementation processes. Each arrow is associated with a number or numbers indicating particular actions/processes. The numbers reflect the order of the steps in the assessment and approvals process where, in order, NOI stands for a notice of intent from a proponent (a proposer of a project) to inform the NT EPA about a new project and call-in powers for the NT EPA to request an NOI when one has not been provided, an assessment of an NOI informs the proponent whether or not an EIS or other impact assessment is required, terms of reference provide the proponent with the NT EPA's required scope for an EIS, an adequacy report relates to the NT EPA providing a preliminary review of a draft EIS prior to submission to allow the proponent time to correct deficiencies, EIS stands for environmental impact statement, comments are provided on the draft EIS by the public and agencies, a supplement contains the proponent's responses to the comments, an assessment report is the NT EPA's formal response with recommendations to the minister concerning an EIS, and sectoral agencies provide specialist approvals as required by the environmental approval conditions e.g. concerning management of threatened species (1 = NOI call-in powers; 2= NOI; 3 = Assessment yes/no; 4 = Terms of Reference; 5 = Adequacy report; 6 = Draft EIS; 7 = Comments on EIS; 8 = Supplement; 9 = Assessment report; 10 = Environmental approval; 11 = Sectoral approvals; 12 = Compliance & enforcement; 13 = Reporting; 14 = Consultation). Green arrows indicate that all objectives are achieved.

A sectoral environmental approval framework

The model of the sectoral environmental approval framework below is as described in the review's recommended reforms (see Sections 4.3.1 and Appendix B). It is modified where possible to comply with the objectives for the reform and OECD (2014). Removal of all conflicts of interest and structural inefficiencies inherent in the dual environmental approval and industry promotion roles of sectoral environmental approving agencies is not possible without eliminating the option as a whole. A sectoral environmental approval is always associated with responsibility for the promotion, support and growth of a particular industry sector. Other conflicts of interest are documented in section 4.3.1.



Arrows in the sectoral environmental approval framework indicate the direction of actions for the assessment, approval and implementation processes. Each arrow is associated with a number or numbers indicating actions/processes. The numbers reflect the order of the steps in the assessment and approvals process where, in order, NOI stands for a notice of intent from a proponent (a proposer of a project) to inform the NT EPA concerning a new project and call-in powers allow the NT EPA to request an NOI when one has not been provided, an assessment of an NOI informs the proponent whether or not an EIS or other impact assessment is required, terms of reference provide the proponent with the NT EPA's required scope for an EIS, an adequacy report relates to the NT EPA providing a preliminary review of a draft EIS prior to submission to allow the proponent time to correct deficiencies, EIS stands for environmental impact statement, comments are provided on the draft EIS by the public and agencies, a supplement contains the proponent's responses to the comments, an assessment report is the NT EPA's formal response with recommendations to the minister concerning an EIS, and sectoral agencies provide specialist approvals required by the environmental approval conditions e.g. concerning management of threatened species (1 = Call-in powers; 2 = NOI; 3 = Assessment decision; 4 = Terms of Reference; 5 = Adequacy report; 6 = Draft EIS; 7 = Comments on EIS; 8 = Supplement; 9 = Assessment report (draft approval); 10 = Environmental approval; 11 = Sectoral approvals; 12 = Compliance & enforcement; 13 = Reporting; 14 = Consultation; 15 = Assurance monitoring). The responsible minister is the minister for a sectoral agency that has been accredited by the Minister for the Environment to provide a sectoral environmental approval. The accreditation process is indicated but too little is known about how this occurs to include it in the figure. DLPE is the current Department of Lands, Planning and the Environment. Proponent 1 is not subject to accredited sectoral legislation and receives an environmental approval from the Minister for the Environment. Proponent 2 is subject to accredited approval legislation and receives a sectoral environmental approval from the responsible minister. Orange arrows indicate potential for conflict of interest. The black arrow indicates an action/role/process that is inefficient, ineffective and does not promote equity. The blue represents an undefined process. The green arrows meet the objectives.

Conflicts of interests, inefficiency and ineffectiveness are the basis of the sectoral approval framework. This framework does not meet the objectives for the review's recommended reforms or OECD (2014). It would perpetuate the inadequacies and uncertainties of the existing environmental management framework.

Implementing a single environmental approval

Benefits of a single environmental approval

Aligns with the Commonwealth bilateral agreements' processes

The Northern Territory currently has a bilateral agreement with the Commonwealth that allows the NT EPA to conduct environmental impact assessments on behalf of the Commonwealth. This allows a proponent to do one impact assessment, rather than two; one by the Commonwealth and one by the NT EPA. The Northern Territory could potentially enter into a second bilateral agreement with the Commonwealth that would allow the Northern Territory government to provide an environmental approval that would meet the needs of the Territory's and the Commonwealth's environmental legislation. This would provide additional simplification of processes for proponents.

Under the single environmental approval, the NT Minister for the Environment is the decision maker for accepting or rejecting the NT EPA's recommendations and draft approval conditions for projects that are assessed at the level of an environmental impact statement (EIS) or other forms of environmental impact assessments. This mirrors the Commonwealth's environmental approval process, which is vested in the Commonwealth Minister for the Environment. As the review itself recognises, the single environmental approval is the most direct means of addressing Commonwealth requirements under the existing assessment bilateral agreement and the proposed approvals bilateral agreement. The single environmental approval provides a clear decision maker, a clear and enforceable environmental approval decision, and clear, consistent implementation of the bilateral reporting arrangements with the Commonwealth.

Conversely, under the sectoral environmental approval, the Commonwealth would have to work with possibly three or more separate Northern Territory sectoral agencies as well as the NT EPA. This would be onerous for the Commonwealth, involve multiple reporting arrangements with the Commonwealth that would lead to costly time delays in assessment and approvals and inevitably lead to different industries being subject to differing environmental approval conditions and differing implementation of approval conditions. These factors would undermine the streamlining that bilateral agreements provide to proponents, undermine the credibility of the agreements, and put the Territory at a disadvantage in attracting new industry.

Regulatory integrity

The single environmental approval avoids the current actual and perceived conflicts of interest that occur in the existing environmental approval framework and are a fundamental characteristic of the proposed sectoral environmental approval framework.

The independence of the NT EPA from government eliminates sectoral conflicts of interest and strengthens public trust and confidence in the regulatory system. It leverages the NT EPA's specialist expertise in making judgements about environmental significance, which is especially important in a small jurisdiction where every sectoral agency cannot have the required environmental experts.

The single environmental approval also avoids the structural inefficiency and ineffectiveness of the review's recommendations for accreditation of sectoral high level processes and assurance monitoring (see Appendix B and sections 3.2.1 and 4.3.1), and meets the objectives of the reforms and of the OECD (2014). None of these desired outcomes can be achieved with a sectoral environmental approval.

A level playing field

It is good regulatory practice for regulation to be applied consistently across the economy, regardless of industry sector. Accordingly, significant environmental impacts, regardless of the industry causing them, should be subject to a single regulator that provides consistent scrutiny and approval conditions (i.e. the NT EPA), and not different regulators (i.e. various sectoral bodies) as is currently the case in the Northern Territory. A single environmental approval framework provides this consistency and fairness, which meets the objectives of the reforms.

In a sectoral environmental approval framework (the current process or that recommended in the review) sector-specific environmental approvals with different conditions are granted for the same environmental effects in different industries e.g. waste and pollution under the *Waste Management and Pollution Control Act* (WMPC Act), *Mining Management Act*, *Pastoral Lands Act* and *Fisheries Act*. Even if the legislation provided for regulatory consistency, variations among sectoral approving agencies in the design of approval conditions, and ensuring implementation, monitoring and compliance with those approval conditions will inevitably lead to regulatory inconsistency among industry sectors. This does not meet the objectives for the reforms or of OECD (2014).

Legislative steps to implement a single environmental approval

Implementing a single environmental approval would involve amending the *Environmental Assessment Act* (EA Act) and the Environmental Assessment Administrative Procedures (EAAP). It is estimated that this could be achieved within nine to 12 months.

No other legislation would need to be amended.

The simplicity of the amendments required for a single environmental approval framework is not evident in the amendments required to implement the review's sectoral environmental approval framework. Implementing the sectoral environmental approval framework would involve a series of amendments to each sectoral approving act to reflect changes required in the EA Act, and amendment of the EA Act and the sectoral legislation to provide for uniform minimum standards, the accreditation process, assurance monitoring, uniform environmental regulation and in some cases an environmental approval. It is estimated that amendments to the EA Act and one sectoral Act would take two to three years. Amending other sectoral Acts could take longer than this.

A transition from a sectoral environmental approval framework, implemented as recommended in the review, to a single environmental approval framework would be straightforward. The sections of the amended EA Act and sectoral legislation that specifically related to the sectoral environmental approval would be removed.

It would be simpler, more efficient, meet the objectives for the reform, and provide better environmental and economic outcomes if the review's 'aspirational regime' was immediately adopted as the preferred model (i.e. a single environmental approval).

Amendments to reform the *Environmental Assessment Act* and *Environmental Assessment Administrative Procedures*

The EA Act and EAAP have numerous deficiencies. These include:

- difficulties with ensuring projects are referred (Notices of Intent, NOI) to the NT EPA for assessment when it is required
- there being no mechanism to call-in a project NOI when there is no responsible minister and limited capacity to enforce a call-in even where there is a responsible minister
- difficulties in understanding when an NOI is required
- difficulties with what is required of an NOI
- no mechanism that places a clear onus on the proponent to provide adequate information in an EIS should one be required (that is, low quality EISs that do not meet their terms of reference)
- uncertainties in the meaning of the EAAP
- no mechanism for quickly assessing and gaining environmental approval for substantial projects that may not require an EIS
- no mechanism for providing an environmental approval when there is no responsible minister
- no mechanism for ensuring development of appropriate approval conditions based on EA Act assessment report recommendations
- no mechanism for ensuring appropriate implementation of EA Act assessment report recommendations when these have been adopted as approval conditions
- uncertain compliance with environmental approval conditions
- lack of transparency in decision making and reporting
- absence of means to effectively meet national obligations and agreements
- the absence of ESD as an objective.

Only some of the deficiencies are recognised in the review. The NT EPA has developed 89 recommendations to correct the deficiencies (see Appendix E). Addressing the deficiencies is an essential part of the reform and its implementation. The reform would be compromised if the recommendations in Appendix E were not adopted. Some of the NT EPA's recommendations on the EA Act will require additional consideration prior to submission for drafting.

The following dot points summarise some of the NT EPA's major proposed amendments to the EA Act as these would apply to assessment of a project leading to a requirement for an EIS. The recommended amendments are used in developing the model for the single environmental approval provided above.

1. A requirement is to be implemented for the proponent (proposer of a project) to notify the NT EPA of any proposed action that has the potential for a significant effect on the environment. Government decision-makers will have the option to

provide a notification of the action when they are aware that a proponent has not done so.

2. The NT EPA is to have the power to require a proponent to provide a notification when appropriate and enforce non-compliance.
3. The NT EPA is to determine whether the environmental significance of the proposed action is such that additional assessment is required. When the NT EPA decides that assessment is necessary, it would make public a statement of reasons defining the potentially significant effects of the proposal or otherwise.
4. Assessment decisions are to be made according to one of three tiers:
 - no assessment required
 - assessment is required as
 - assessment on proponent information (API)
 - environmental impact statement (EIS)
 - strategic impact assessment (SIA)
 - public inquiry
 - the action as proposed is environmentally unacceptable.
5. The proponent would prepare an EIS in accordance with terms of reference provided by the NT EPA in consultation with the community and agencies and submit it to the NT EPA for release for public consultation.
6. The proponent must provide adequate responses to the public's (including agencies') comments about the EIS in a supplement to the draft EIS submitted to the NT EPA. This would be made public. The NT EPA would then prepare its assessment report for submission to the Minister for the Environment. It would contain any recommendations and draft conditions of approval.
7. The NT EPA would consult with the proponent and relevant sectoral agencies on the recommendations and draft conditions prior to submitting its report to the Minister for the Environment.
8. The Minister for the Environment would consult with other ministers and decision-makers, or with whomever he/she determines concerning the recommended conditions, and subsequently issue an environmental approval to protect the environment from significant impacts. Other decision-makers can then, and only then, issue their project-specific, sectoral approvals.
9. The NT EPA's assessment reports and the minister's environmental approval and statement of reasons are to be made public.
10. The NT EPA would enforce compliance with the conditions of the Minister for the Environment's approval, including developing and implementing any environmental management plan (EMP).
11. The proponent may require approvals under other legislation, e.g. a licence under the WMPC Act. These would be required to be consistent with the Minister for the Environment's primary approval and conditions.

12. Project approvals of sectoral agencies (e.g. planning approvals or project approvals under the *Mining Management Act*) would be required to be consistent with the Minister for the Environment's primary approval and conditions. Sectoral project approvals could include conditions related to less significant environmental impacts.
13. Sectoral agencies would continue to be responsible for developing and enforcing compliance with the conditions of their respective sectoral approvals.
14. The proponent would be expected to provide annual compliance reports on implementation of the environmental approval conditions, signed by the CEO or their delegate. These reports are to be made public.
15. An environmentally unacceptable action would be one that is viewed as fundamentally and fatally flawed. That is, the consequences of its implementation are viewed by the NT EPA as catastrophic, extremely serious or irreversible and cannot be successfully mitigated, or there is little confidence in the likely success of mitigation measures. Information would be assessed for an NOI, API, EIS or SIA (as defined in point four above), and if environmental impacts were found to be unacceptable, a draft statement of unacceptability would be developed and provided to the Minister for the Environment after consultation with the proponent. The Minister for the Environment would be required to make a decision, in consultation with the portfolio minister and others as he or she chooses, on whether the action is unacceptable, or direct the NT EPA to assess the action with an EIS or other level of assessment.

The nature of the single environmental approval would allow a sectoral agency to focus on its core responsibilities (e.g. planning approvals or exploration and development of resources) and provide regulatory oversight and management of environmental issues that are not significant. The specialist and independent environmental regulator, the NT EPA, would focus on regulatory oversight of environmental impacts that are judged to be significant.

Roles and governance of the NT EPA

The review's background material and recommendations include proposed changes to the roles and governance of the NT EPA and, in consequence, changes in the roles of other agencies. The proposed changes in governance of the NT EPA are contrary to the OECD (2014) recommendations for an independent regulator and best practice for governance of independent regulators. The review's proposed changes are also contrary to the government's intention to establish the NT EPA as an independent specialist environmental agency and to the objectives for the review's reforms.

The capacity of an independent EPA to deliver a balanced approach between environmental protection and economic development is well demonstrated by the NT EPA, which required EISs for an average 19 per cent of notifications per year over the past four years.

Securing the ongoing independence of the NT EPA is central to government's development and retention of public credibility in the environmental management system and the ability of proponents to develop industries that are not opposed by the general public.

Summary recommendations for improving the environmental management framework

NT EPA recommendation 1

Government should, following consultation with industry and the community, consider the urgent implementation of the NT EPA's model for a single environmental approval framework.

NT EPA recommendation 2

A sectoral approval framework cannot be optimised to remove conflicts of interest, inefficiencies and ineffectiveness, and it should not be implemented.

NT EPA recommendation 3

The NT EPA's model for a single environmental approval framework should be implemented to ensure the reforms are more efficient, less arduous, less expensive and provide for more certain implementation of a credible model framework than the review's recommended 'aspirational regime' for an environmental framework, or a staged transition from a sectoral approval framework to a single environmental approval framework.

NT EPA recommendation 4

The urgent need for comprehensive reform of the EA Act can be met by implementing the recommendations provided in Appendix E.

NT EPA recommendation 5

The NT EPA should:

- remain an independent authority with a full-time Chair
- retain its administrative roles in relation to environmental impact assessment, waste management and pollution control
- have an enhanced role in providing policy advice to the minister, including development of legislation, statutory implements and guidelines related to its core business
- continue to control the operational activities of the staff provided
- not have its operations compromised by staff being required to concurrently or sequentially perform similar functions for the Department of Lands, Planning and the Environment (DLPE)
- have its public credibility and uncompromised independence enhanced by making it a fully independent authority with the capacity to manage its own finances and staff.

NT EPA recommendation 6

All waste management and pollution legislation should be consolidated into the WMPC Act to cover all land tenures, and it should be administered by the NT EPA.

NT EPA recommendation 7

Consideration should be given to enhancing the public credibility of the environmental management framework by consolidating the EA Act, the WMPC Act, and regulation of

other environmental matters (e.g. land clearing, marine pollution) into a single environment protection Act.

The NT EPA's future contribution to the new environmental framework

The NT EPA has considerable professional and practical expertise in environmental regulation. This can be drawn on to assist in implementing the single environmental approval framework. The NT EPA would be pleased to participate in an implementation steering group that develops drafting instructions on reform of the EA Act for the Northern Territory's Parliamentary Counsel.

1 INTRODUCTION

1.1 Background

The Northern Territory Government has stated its commitment to developing the north in a way that protects our precious environment and lifestyle. Developing a robust, efficient and effective environmental management framework is essential to achieving this goal and to building public and industry confidence in the system.

The Northern Territory Environment Protection Authority (NT EPA) views reform of the existing processes of environmental impact assessment, environmental and project approval and management as being urgent and essential. The current system is highly fragmented across numerous inconsistent pieces of legislation and a patchwork of different agencies with different aims. Examples of the overall system's inadequacies include regulatory failings associated with the implementation of assessment recommendations and environmental management at the Redbank Copper Mine in the Territory's Gulf country, past failures to undertake any environmental impact assessment of sand mining in the Howard sand plains, an inability to undertake formal environmental impact assessment when there is no responsible minister and inadequate environmental impact assessment of a number of recent development projects. Rectifying the causes of system failures requires rigorous review of existing legislation and processes across the system, as well as the structure of the environmental management framework.

The Northern Territory Government sought direction for the reform process by commissioning Dr Allan Hawke AC to undertake a *Review of the Northern Territory's Environmental Assessment and Approvals Processes* (the review). The review was designed to provide advice on restructuring the environmental assessment and approval processes, to ensure:

- cost effective, transparent and efficient implementation
- the requirements necessary for implementation of the Commonwealth's 'one stop shop' policy initiative for environmental assessments and approvals are catered for
- structural and administrative efficiencies are maximised
- appropriate environmental standards are delivered with reduced regulatory timeframes, duplication and uncertainty.

The review, released in November 2015, examines two options for reform of the environmental management system (a third involving incremental improvement of the status quo was discarded). It also provides 22 recommendations for implementing a reformed structure for environmental management and much-needed amendment of the *Environmental Assessment Act* (EA Act).

The NT EPA assesses the two options for reform of the environmental management framework and all 22 recommendations. The government expressed its support for one of the structural options (option 3, a sectoral approval framework). It noted potential for moving from this sectoral approval framework to a single environmental approval framework at a later time.

A sectoral approval framework can be defined as a single, overarching, accredited environmental approval administered under sectoral legislation (e.g. mining legislation). It would include conditions of approval based on recommendations in an assessment report under the EA Act and accepted by the responsible minister. Where necessary, it

would require secondary approvals as required under other relevant acts (e.g. the *Heritage Act*). Accreditation of the sectoral environmental approval by the Minister for the Environment was proposed as a mechanism for dealing with inadequacies in the existing environmental management framework while strengthening the existing sectoral, 'one-stop-shop' project approval process. A one-stop-shop is theoretically a single agency promoting and supporting a sector of industry while also providing all regulatory approval, compliance and enforcement roles). With this option, the Minister for the Environment can issue a single environmental approval when there is no accredited sectoral environmental approval (e.g. when there is no responsible minister).

A single environmental approval framework (review option 2) is an environmental management framework based on an environmental approval given by the Minister for the Environment for projects subject to assessment under a reformed EA Act. This approval, a primary approval, would be provided to proponents and may contain conditions of approval associated with significant effects on the environment. It may include requirements for secondary approvals under other Acts (e.g. the *Heritage Act*). Project decision makers under sectoral legislation, such as portfolio ministers, would be able to impose additional, complementary conditions of approval about any relevant matters subject to the conditions imposed being consistent with the conditions of the environmental approval.

The review concluded that a single environmental approval framework is the goal and recommended a transition away from the sectoral approval framework over time.

The Minister for the Environment, the Honourable Gary Higgins, wrote to the NT EPA (December 2015) (Appendix A) seeking the following advice concerning the review:

- "The Hawke Review. Specifically, a formal response that can be published by the Territory Government and NT EPA that identifies the NT EPA's position in relation to the structural reform options identified by Dr Hawke, a response to each of the 22 recommendations contained in the Review and any related issues or recommendations not addressed in the Review that should inform Government's consideration; and
- A model for a single environmental approval as envisaged in Option 2 of the Review that is appropriate for the Northern Territory, and including options for a process to implement the model."

The Minister for the Environment also requested that when preparing the advice, the NT EPA consider:

- "Government's strategic policy and initiatives, including Framing the Future, the Northern Territory Economic Development Strategy, the draft Balanced Environment Strategy and the Red Tape Reduction Strategy;
- The Memorandum of Understanding between the Northern Territory and Australian governments for a 'one-stop-shop' to streamline environmental impact assessment and approval processes;
- Government's commitment to the responsible management of the Territory's natural resources; and
- Government's commitment to ensuring that legislative frameworks are in place to accommodate new environmental challenges that may arise as the Territory continues its industrial development."

The Minister for the Environment requested the advice on the review under section 25 of the *Northern Territory Environment Protection Authority Act* (NT EPA Act).

The NT EPA is pleased it was asked to provide this advice under section 25 of the NT EPA Act and to perform its obligations under section 26. The NT EPA recognises that a healthy environment underpins a productive economy and the Territory lifestyle, and it provides the advice considering the government's strategic and economic policy and its priorities for the Territory.

This advice provides:

- advice to the Minister for the Environment about the review's recommendations
- advice on the process for possible implementation of the review's sectoral approval framework based on an examination of what implementation may require and any uncertainties, additional considerations or unexpected blockages that may need resolution
- suggestions for the structures of a sectoral approval framework and a single environmental approval framework and how these might be implemented, including a transition from a sectoral environmental approval framework to a single environmental approval framework.

1.2 The advice

1.2.1 Assessment of the recommendations

The NT EPA assessed each of the review's recommendations and its associated background material and the two proposed approval frameworks. Where appropriate, the NT EPA determined its position on each recommendation or examined each in terms of its intent and the review's recommendation to implement the intent. Additional information, alternatives or considerations are provided where they may be useful in determining the final reforms. The following were considered in providing this advice:

- objectives for the reforms
- the Organisation for Economic Cooperation and Development's (OECD) seven principles of governance of regulators (OECD 2014. *The governance of regulators, OECD Best practice principles for regulatory policy*, OECD publishing)
- long-needed amendments to the environmental assessment, approval and management processes viewed as essential by the NT EPA.

1.2.2 Objectives for the review's reforms

To properly serve Northern Territory people into the future, the review's reforms must alleviate the causes of public and industry concern with the existing system and not create additional concern. Each objective for the assessments reflects a public and/or industry concern with the existing environmental management framework.

Recommendations and structural reform options that do not meet the objectives (i.e. would not eliminate concerns) are unacceptable. The review's reforms will eliminate concern if they:

- are efficient and effective by being responsive, outcomes and risk focussed, reward good practice and hold the polluter to account

- instil public trust and confidence by being free of actual or perceived conflicts of interest in the application of environmental assessment, approval and management
- apply environmental assessment and management equally for each industry, thus providing certainty for industry and the community
- provide certainty and confidence for industry and the community in the implementation of environmental assessment and management
- meet the Northern Territory's national and international obligations
- deliver ecologically sustainable development (ESD) outcomes for the people of the Northern Territory (government's 'Balanced Environment' initiative).

The review highlighted public concern about the problem of conflicting interests (referred to in the review as 'sectoral capture'). Avoiding conflicts of interest is a key component of the OECD's (2014) seven principles of governance of regulators. A conflict of interest can be defined as a real, apparent, or potential conflict between a duty owed to one in a matter and a duty owed to another regarding the same matter. For example, this would occur when a regulatory agency is responsible for ensuring a particular industry is promoted, supported and growing, and at the same time is required to approve, and to ensure compliance with and enforcement of environmental requirements.

Creating a level playing field for industry—treating all industries equally in environmental regulation and management—is an important objective for the proposed reform because some industry groups are concerned that some industries receive more intense environmental scrutiny than others.

Delivering ecologically sustainable development outcomes for the people of the Northern Territory is a crucial part of the reforms because some members of the Territory community are concerned that community interests are not adequately met through existing processes (such as the community being affected by industry effluent).

1.2.2.1 OECD'S best-practice principles

The review's recommendations propose changes in the roles and responsibilities of participants in the Territory's environmental management framework. These changes would particularly affect the roles and responsibilities of the NT EPA.

The review's recommendations proposing these changes are reviewed in relation to the OECD's (2014) recommendations on governance of regulators. These recommendations include a significant level of guidance on roles and responsibilities of independent regulators and advice on formulating policy, transparency and maintaining independence. This advice examines the proposed changes that are likely to affect the NT EPA's independence or that have the potential to raise conflicts of interest in any agency or role.

OECD (2014, page 49) recommends that an independent regulator is most appropriate when:

- 'there is a need for the regulator to be seen as independent, to maintain public confidence in the objectivity and impartiality of decisions
- both government and non-government entities are regulated under the same framework and competitive neutrality is therefore required

or

- the decisions of the regulator can have a significant impact on particular interests and there is a need to protect its impartiality’.

These circumstances apply to the NT EPA’s operations and are the reason the NT Government established the NT EPA as an independent agency.

1.2.2.2 Reform of the environmental assessment approval and management process

Reform of the EA Act is the principal focus of the review. The major failings of the EA Act include:

- difficulties with ensuring projects are referred (submission of an NOI) to the NT EPA for assessment when it is required
- there being no mechanism to call-in a project NOI when there is no responsible minister and limited capacity to enforce a call-in even where there is a responsible minister
- difficulties in understanding when an NOI is required
- difficulties with what is required of an NOI
- no mechanism that places a clear onus on the proponent to provide adequate information in an EIS should one be required (that is, low quality EIS’s that do not meet their terms of reference)
- difficulties in interpreting and applying the Environmental Assessment Administrative Procedures (EAAP)
- no mechanism for quickly assessing and gaining environmental approval for substantial projects that may not require an EIS
- no mechanism for providing an environmental approval when there is no responsible minister
- failures to implement EA Act assessment report recommendations
- inconsistent application of EA Act assessment report recommendations when these have been adopted as approval conditions
- uncertain compliance with environmental approval conditions
- lack of transparency in decision making and reporting
- absence of means to effectively meet national obligations and agreements
- the absence of ESD as an objective.

The review’s reforms must be able to address these problems urgently. The NT EPA recognises that while the review seeks to address these specific issues, not all aspects of an optimum reform are addressed in the review’s recommendations. Identifying additional failings and their solutions will help develop the optimal reform package.

1.2.2.3 Issues associated with implementation of reforms

This advice highlights important issues in implementing the review's proposed reform of the environmental management framework. These are:

- deficiencies in the existing environmental framework are longstanding and in urgent need of correction
- the proposed reform is a large undertaking and will involve significant time and resources
- some of the review's recommendations require additional consideration in relation to their intent, the proposed means of implementing the intent, and/or supporting information and consideration of possible alternatives
- there is a lack of clarity about the precise nature of some recommendations
- the proposed reforms involve significant legislative change, affecting the six Acts identified in the review and an undetermined number of other Acts
- the opportunity for such a large-scale reform does not occur very often making it essential that adopted reforms provide the best solutions for existing inadequacies.

These reforms are complex and significant and must urgently address many existing and potential issues. The NT EPA's comments are designed to facilitate this outcome and, where possible, find solutions that minimise the costs (dollars, people and time) of finalising and operating the reformed environmental management framework.

1.2.3 Reform of the *Environmental Assessment Act*

The review's proposed reforms of the EA Act were assessed as a whole in relation to the six objectives outlined in section 1.2.1. This was done by grouping the proposed reforms of the Act into the following components:

- accreditation of environmental approvals
- assurance monitoring
- notices of intent (referrals)
- environmental assessment processes
- environmental approval by the Minister for the Environment
- assessment recommendations and conditions of approval
- compliance with approved environmental conditions
- ESD as an objective.

When the objectives for the review's reforms are not met, the NT EPA provides revised recommendations, alternatives or suggestions where possible.

1.2.4 Options for structural reform

The advice evaluates the review's sectoral environmental approval framework and single environmental approval framework in relation to both the existing regulatory environment

the options would have to operate in and the six objectives of the reform provided in section 1.2.1.

Where appropriate, the advice modifies review recommendations to avoid potential barriers to achieving the objectives for the reforms. It is not possible to modify all the review's recommendations on structural reform so that they meet the objectives.

Potential steps required to implement each of the frameworks (optimised or otherwise) are described.

2 ASSESSMENT OF THE REVIEW

2.1 Assessment of the review's recommendations

The NT EPA's comments on each of the review's 22 recommendations are included at Appendix B. Recommendations and/or dot points included in recommendations are reviewed against the objectives for the reforms listed in section 1.2.1 (and, where appropriate, other recommendations and best-practice principles of the OECD (2014)) to ensure existing causes for concern with the environmental management framework are corrected and no additional causes for concern are created. Where possible, alternatives are provided for recommendations and/or dot points that do not meet the objectives of the reforms.

2.2 Summary assessment of the review's recommendations

Each recommendation and each dot point of each recommendation is assessed against each objective and receives a yes (Y), a no (N), or is regarded as existing practice/legislation or not requiring legislative amendment (E) (Appendix C). Recommendations and their associated dot points are treated separately because a recommendation's intent could fail to meet the objectives, but some dot points may meet them. This is because some dot points deal with matters somewhat divorced from the recommendation as a whole. Evaluation of only the overarching 22 recommendations and excluding the dot points would provide an overly negative view of the review's outcomes.

A large proportion of the review's recommendations and dot points fail to meet the objectives of the reforms (65 per cent of 83). Twenty per cent meet all six objectives. Fifteen per cent of the recommendations and dot points are regarded as either conforming to existing practices/legislation or do not require any legislative reform.

The main reasons review recommendations do not meet the objectives are because many promote inefficiency and ineffectiveness (65 per cent of recommendations/dot points), and/or conflicts of interest (already existing in the environmental management framework or adding additional conflicts of interest—51 per cent of recommendations/dot points).

An ineffective, inefficient recommendation or one that involves a conflict of interest inevitably causes a loss of certainty and credibility in that recommendation and limits the ability to provide for appropriate implementation of national obligations and provision of ESD.

It is emphasised that in many cases, non-compliant recommendations and dot points can be amended to better comply with the objectives. Alternative proposals are provided in the comments on the review's recommendations (Appendix B) where appropriate and possible.

3 THE REVIEW'S PROPOSED LEGISLATIVE REFORM

3.1 Reform of the *Environmental Assessment Act*

Reform of the EA Act is the review's central consideration. The reforms will fail if the recommendations and dot points do not give industry and the community certainty, timeliness and credibility.

The deficiencies in the EA Act are outlined in section 1.2.1.2 and summarised into eight functional components of the EA Act in section 1.2.2 (Table 1).

The review provides 14 recommendations (63 per cent of the recommendations) for reform of the EA Act and establishment of a sectoral approval framework. Other recommendations may not require any legislative amendment because the proposed actions are catered for in existing legislation or would not affect the EA Act.

Each of the 14 recommendations is classified according to the functional components of the review's proposed revision of the EA Act (see section 1.2.2). Individual recommendations or associated dot points often affect more than one functional component.

Each of the review's recommendations affecting each functional component is assessed against each objective for the review's reform using the information provided in appendices B and C. Each recommendation is given a yes (Y) or no (N) to denote compliance or otherwise with each objective for the reform (Table 1). A 'yes' does not imply that all dot points in a recommendation apply to a particular functional component or that all dot points in a recommendation meet the objectives. A 'yes' means that the intent and implementation of a review's recommendation and/or a relevant dot point meets an objective for the reform. See appendices B and C for detailed assessments of each of the review's recommendations and associated dot points).

Table 1: Functional components of the EA Act and the review's recommendations in relation adherence to the objectives for the reforms

Functional components & review recommendations by number	Effective & efficient	No conflict of interest	Promotes equity	Provides certainty & credibility	Helps meet national obligations	Promotes ESD
<i>Accreditation of processes</i>						
1	N	N	N	N	N	N
18	N	N	N	N	N	N
20	N	N	N	N	N	N
<i>Assurance monitoring</i>						
1	N	Y	N	N	N	N
3	N	Y	N	N	N	N
11	N	Y	N	N	N	N

Functional components & review recommendations by number	Effective & efficient	No conflict of interest	Promotes equity	Provides certainty & credibility	Helps meet national obligations	Promotes ESD
Notices of intent						
4	N	N	N	N	Y	N
7	Y	Y	Y	Y	Y	Y
19	N	Y	N	N	N	N
Environmental assessment processes						
5	Y	Y	Y	Y	Y	Y
8	Y	Y	Y	Y	Y	Y
9	N	Y	Y	N	N	N
An environmental approval from the Minister for the Environment						
1	Y	Y	Y	Y	Y	Y
Assessment report, draft conditions and approvals						
1	Y	Y	Y	Y	Y	Y
10	Y	Y	Y	Y	Y	Y
14	Y	Y	Y	Y	Y	Y
18	N	N	N	N	N	N
Compliance and enforcement						
1	Y	Y	Y	Y	Y	Y
10	Y	Y	Y	Y	Y	Y
18	N	N	N	N	N	N
Ecologically sustainable development						
1	Y	Y	Y	Y	Y	Y
Total yes	10 (48%)	15 (71%)	11 (52%)	10 (48%)	11 (52%)	10 (48%)

As with the individual recommendations and associated dot points in the review (Appendices B and C), the recommendations affecting the functional components of the EA Act need to be amended if they are to comply with the reform's objectives.

3.2 Changing roles and responsibilities

Recommendations 3 and 12 and the associated documentation focus on changing the roles and responsibilities of the NT EPA.

These changes include:

- the NT EPA to undertake assurance monitoring (independent checking on implementation) of the proposed sectoral environmental approval framework
- the NT EPA to report to the Minister for the Environment on the bilateral agreements with the Australian Government
- the NT EPA to act in accordance with ESD principles
- having the NT EPA focus only on environmental impact assessment, and not retain responsibility for pollution and waste
- administration of the WMPC Act being transferred to a line agency
- removal of the capacity of the NT EPA to manage the operations of the staff servicing its functions and place it with the NT Department of Lands, Planning and the Environment (DLPE)
- the NT EPA ceases to give the Minister for the Environment policy advice based on its own initiative.

The first dot point was reviewed in section 3.1 (Table 1). It is not in accordance with the reform objectives.

The second and third dot points are supported by the NT EPA; however, adopting the sectoral environmental approval framework would place the NT EPA in a position where it would likely be insufficiently informed to make a valid appraisal of the functioning of the bilateral agreements. Under the NT EPA Act, the NT EPA is already obliged to act according to the objectives and principles of ESD, and the NT EPA supports the inclusion of this requirement in the EA Act. These two dot points are in keeping with the objectives of the reforms.

The fourth, fifth and sixth dot points would restrict the NT EPA to environmental impact assessment and transfer WMPC Act responsibilities to a line agency. Consistency would demand that responsibility for the *Environment Protection (Beverage Containers and Plastic Bags) Act* also be transferred to a line agency. These dot points also propose to remove NT EPA control over staff operations. The NT EPA Act currently requires the responsible line agency (currently DLPE) to provide staff and resources to allow the NT EPA to perform its duties, with the Chair of the NT EPA provided with sole control over the staff in the performance of their duties for the NT EPA.

Transfer of responsibility for waste and pollution to a line agency and line agency control over the operations of staff servicing the NT EPA are contrary to the OECD (2014) recommendations about when an independent regulatory authority is appropriate (see comments under recommendations 3 and 12, Appendix B). The changes reduce the skills available for environmental assessment and increase the level of conflict of interest within the environmental management framework. Implementation of these dot points would lower the NT EPA's credibility with the NT public by significantly undermining the independence of the NT EPA. These review recommendations are contrary to the objectives of the reforms. The NT EPA does not support these changes.

The NT EPA recognises that there are practical difficulties with the current arrangements for providing policy advice to the Minister for the Environment, but these are in accordance with the OECD (2014) principles of governance for independent regulatory authorities. These issues could be resolved by amending the NT EPA Act to allow the NT EPA to provide informed policy advice (including bilateral arrangements) as described in the Western Australian *Environment Protection Act 1986*, or the Victorian *Environment Protection Act 1970*. These arrangements are transparent and in keeping with the objectives of the reforms and the OECD (2014) principles.

The independence of the NT EPA's operational roles and its policy provision roles are diminished by staff concurrently or sequentially servicing NT EPA roles and DLPE functions. It places staff in the difficult position of being affected by inevitable conflicts of interest. This could be avoided by making the NT EPA a completely independent body with control over its finances and staff. This would require amendment to the NT EPA Act. This would be in accord with OECD (2014).

3.3 Reform of other Acts

3.3.1 Reform of the *Mining Management Act*

The review identifies the *Mining Management Act* (MM Act) as a likely candidate for accreditation under the sectoral approval framework. This process, as described in the review's recommendation 1 and other recommendations, would require legislative amendment of the MM Act. Amendments to the MM Act would complement some of the amendments the review proposed for the EA Act. These are legislative amendments required to implement the sectoral environmental approval framework and are evaluated in section 4.3. The amendments to sectoral legislation, as proposed in the review, are inevitably subject to continuing sectoral conflicts of interest that promote inequity, undermine the certainty and credibility of the environmental management system, detract from accuracy of reporting under bilateral arrangements with the Australian Government, and do not foster ESD.

Two other recommendations may require amendment of the MM Act: recommendations 18 and 20.

Recommendation 18 provides for minimum performance standards. If this recommendation is implemented in a sectoral environmental approval framework, it would inevitably create sectoral conflict of interest, inequity, not foster sound reporting under bilateral agreements with the Australian Government and not foster ESD (see Appendix B).

Recommendation 18 could be implemented without conflict of interest if it were based on an environmental approval by the Minister for the Environment with independently enforced environmental conditions relating to significant impacts. This is contrary to the intent of recommendation 18 and the proposed sectoral environmental approval framework.

Recommendation 20 provides for variable periods of approval for mining management plans (MMP) to reward sound past performance and focus management attention on poorly performing proponents. This would meet all the objectives if it were confined to mining matters only. It would not meet the objectives if it included management of significant environmental effects based on the conditions of a sectoral environmental approval. The objectives would be met if the recommendation were implemented under an environmental approval by the Minister for the Environment and independently enforced conditions relating to significant environmental effects. Inclusion of

environmental matters in MMPs based only on sectoral consideration and approval does not meet the objectives of the proposed reforms.

3.3.2 Reform of the *Planning Act*

The review implies that the *Planning Act* is a likely candidate for accreditation under the sectoral approval framework. This would require amending the *Planning Act*, and this is evaluated in section 4.3. The amendments to sectoral legislation, as proposed in the review, are inevitably subject to sectoral conflicts of interest that promote inequity, undermine the certainty and credibility of the environmental management system, detract from the accuracy of reporting under bilateral arrangements with the Commonwealth, and not foster ESD.

Recommendations 15, 16 and 17 relate to strategic planning and may require amendment to the *Planning Act*. All three recommendations involve a form of environmental impact assessment. All should require use of strategic impact assessment (SIA) as proposed for the EA Act (see Appendix E: recommendations 13, 22 and 23) as the impact assessment approach. The intent is supported by the NT EPA if SIA were used. The implementation of recommendations 15, 16 and 17 would not meet the reform's objectives unless the SIA was used rather than some form of impact assessment conducted under the *Planning Act*.

3.3.3 Additional legislative change

The review recommends two additional, significant reforms.

Recommendation 21 proposes that the WMPC Act be amended to provide a single, regulatory basis for waste management and pollution control, regardless of land tenure. This is supported by the NT EPA if the Act continues to be administered by an independent authority and its implementation is structured so it is compatible with the environmental framework adopted by government (see section 4.2.3).

A single regulatory approach to waste and pollution management cannot be achieved without removal of waste discharge licensing from the *Water Act*. These requirements would maintain and strengthen the regulatory equity, certainty and transparency gained from the establishment of the NT EPA.

The intent of the recommendation would be undermined if these proposed changes were not included (i.e. implementation would not meet the required objectives of the reforms).

Recommendation 14 proposes amendment to the *Territory Parks and Wildlife Conservation Act* (TPWC Act) to provide for improved management of threatened species. The NT EPA supports this proposal, but it needs to include improved management of biodiversity in general, as well as threatened species and threatened ecological communities. Any such amendments to the TPWC Act would reduce existing levels of conflict of interest in threatened species and biodiversity management. The amendments are likely to meet the required objectives.

4 THE PROPOSED STRUCTURAL REFORMS

4.1 The regulatory environment

Evaluation of the two proposed options for structural reform of the environmental management framework must be undertaken in the context in which the reforms will operate (i.e. the entire regulatory environment for development). Every environmental impact assessment, environmental approval and implementation of conditions of an

environmental approval involves proponents having to conform to the requirements of a variety of different legislation.

Figure 1 provides some indication of the potential complexity proponents face. This figure does not purport to include all potential legislative matters that may impact on a development. Nor does it purport to indicate that all developments or any development might be subject to legislation controlling all these matters. What it provides is an overall picture of the complexity of our regulatory environment faced by proponents.

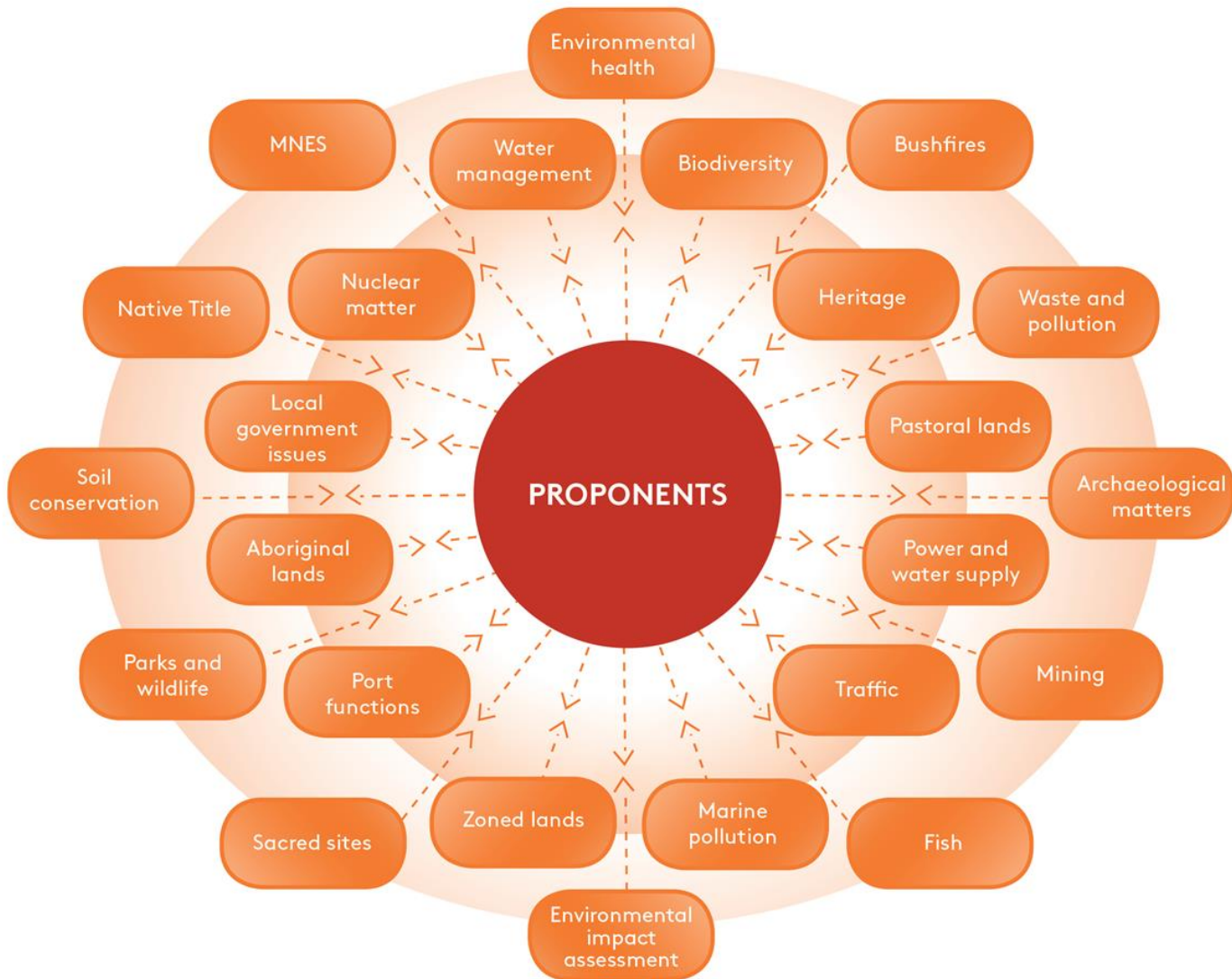


Figure 1: The regulatory environment faced by developers

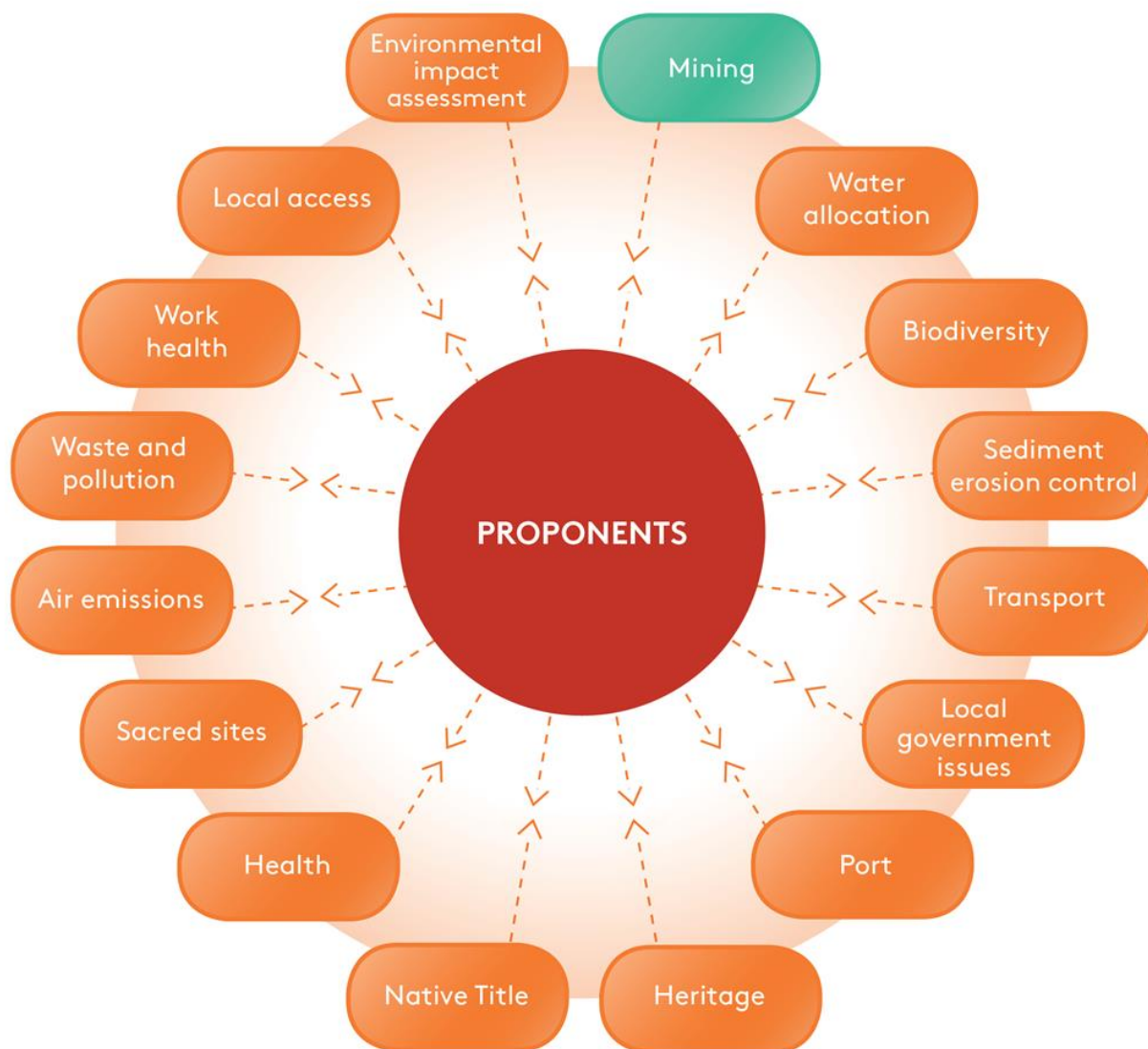


Figure 2: A hypothetical depiction of a new development's regulatory environment

A list of the agencies and relevant legislation involved in many sectoral approvals is provided at Appendix D.

There is also potential for non-controlling, temporary or ongoing, influential interactions with:

- Department of the Chief Minister
- Department of Local Government and Community Services
- Department of Housing
- Department of Business
- Land Development Corporation.

The list is not necessarily complete and will vary depending on the particular project and site. A list of external influences on projects approved under the *Planning Act* would be very similar.

Even under a sectoral approval model, the concept of a 'one-stop shop' is not 'a single shop'. It is a shopping centre with a lot of highly dispersed speciality shops that have specialised staff providing necessary sectoral advice and approvals. It would generate high levels of conflict of interest should each accredited project approval agency be required to administer a number of these roles. For example, sectoral approval of sectoral matters and heritage management would inevitably lead to significant conflicts of interest. It would also be impractical for a small jurisdiction to provide all sectoral environmental approval agencies with the skills required to manage the required diversity of regulatory requirements (Figure 1). The shopping centre of sectoral approvals is necessary and would not change under the sectoral approval framework.

The complexity of the regulatory environment is an inevitable outcome of the breadth of matters that modern society considers it needs to regulate and the needs for specialist agencies, staff and approvals to implement that regulation. No one agency can provide all these services. No one agency is able to maintain staff specialised in all, or even a significant number, of these specialities.

The potential structure of an efficient and effective environmental management framework is constrained by the need for specialist sectoral agencies, staff and approvals. This is particularly so for a small jurisdiction such as the Northern Territory, where the number of specialist staff of a particular kind will always be relatively small and necessarily grouped to ensure the critical mass needed to maintain that speciality and deliver the required service.

An optimal environmental management framework will necessarily have to make the most efficient and effective use of government's specialist approvals and services in order to achieve the objectives of the proposed reforms.

4.2 The single environmental approval framework

4.2.1 The single environmental approval framework as described in the review

The review's description of the single environmental approval framework and the recommendations as written in the review indicate that this option has:

- the Minister for the Environment using a call-in power when a notice of intent has not been submitted when it is appropriate to do so, as well as a number of associated powers and responses to call-in situations
- the NT EPA providing the Minister for the Environment with an assessment report containing recommendations and draft approval conditions
- the NT EPA consulting with the proponent, community and agencies on the draft recommendations and approval conditions prior to submission of the assessment report to the Minister for the Environment
- a single environmental approval provided by the Minister for the Environment
- DLPE undertaking the implementation, monitoring, compliance and enforcement, and reporting on implementation of approval conditions
- secondary sectoral approvals where appropriate

- a line agency that administers the WMPC Act
- direct reporting on the bilateral agreements with the Australian Government (presumably reporting to the Minister for the Environment and the Commonwealth minister).

It is assumed that secondary sectoral approvals and their implementation are undertaken in accordance with the objectives and requirements of the relevant Acts, and the conditions approved by the Minister for the Environment.

Potential conflicts of interest identified in the review's single environmental approval involve the ministerial call-in power for NOIs, a line agency administering the WMPC Act, the DLPE administering management of the conditions of approval (compliance and enforcement) and all reporting generated through these conflicts of interest. These are described in the NT EPA's comments on the review's recommendations (Appendix B). In all cases, these actions/roles/processes are contrary to the objectives of the reform and OECD (2014) recommendations about when a regulatory role is most appropriately provided by an independent regulator.

4.2.2 An optimised single environmental approval framework

Figure 3 is constructed using the criteria provided in the review, except that it eliminates conflicts of interest by incorporating the NT EPA's alternatives (as provided in comments on the review's recommendations, Appendix B). These are that call-in and associated powers be implemented by the NT EPA rather than the Minister for the Environment; the NT EPA rather than the DLPE administers the implementation, monitoring, compliance, enforcement and reporting functions; and the NT EPA retains administration of the WMPC Act.

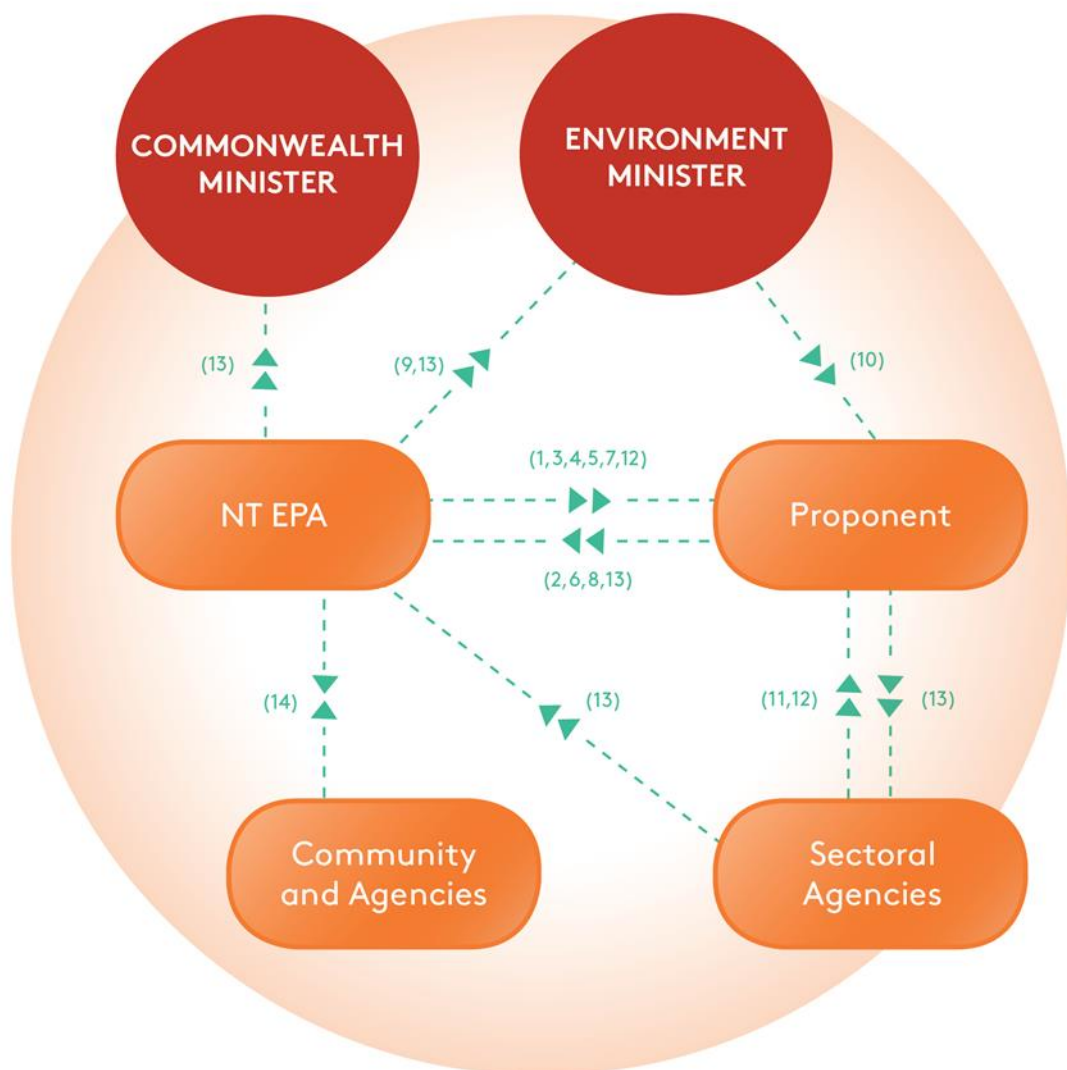


Figure 3: The arrows in the single environmental approval framework indicate the direction of actions for the assessment, approval and implementation processes. Each arrow is associated with a number or numbers indicating particular actions/processes. The numbers reflect the order of the steps in the assessment and approvals process where, in order, NOI stands for a notice of intent from a proponent (a proposer of a project) to inform the NT EPA about a new project and call-in powers for the NT EPA to request an NOI when one has not been provided, an assessment of an NOI informs the proponent whether or not an EIS or other impact assessment is required, terms of reference provide the proponent with the NT EPA's required scope for an EIS, an adequacy report relates to the NT EPA providing a preliminary review of a draft EIS prior to submission to allow the proponent time to correct deficiencies, EIS stands for environmental impact statement, comments are provided on the draft EIS by the public and agencies, a supplement contains the proponent's responses to the comments, an assessment report is the NT EPA's formal response with recommendations to the minister concerning an EIS, and sectoral agencies provide specialist approvals as required by the environmental approval conditions e.g. concerning management of threatened species (1 = NOI call-in powers; 2= NOI; 3 = Assessment yes/no; 4 = Terms of Reference; 5 = Adequacy report; 6 = Draft EIS; 7 = Comments on EIS; 8 = Supplement; 9 = Assessment report; 10 = Environmental approval; 11 = Sectoral approvals; 12 = Compliance & enforcement; 13 = Reporting; 14 = Consultation). Green arrows indicate that all objectives are achieved.

This optimised model for the single environmental approval framework is more effective and efficient than the review's version. This is achieved by the proponent and the impact assessor (the NT EPA) having a relationship with the project and each other that continues into the implementation and reporting phases of a project. There is no disruption of an established relationship, and there is continuity of knowledge and understanding of the project extending into implementation and reporting. This would also avoid the need to duplicate scarce specialist staff resources.

The optimised single approval framework has no known potential for conflicts of interest generated by the structure and meets all the objectives of the proposed reforms.

4.2.3 Legislative implementation of the optimised single approval framework

Implementation of the optimised single approval framework would involve:

- Amendments to the EA Act as provided by the NT EPA in response to review's recommendations (Appendix E).
- No amendments to existing sectoral Acts. Any amendments to these Acts would be related to existing needs for amendment and reform rather than being generated by changes to the EA Act. For example, there may be a need for amendments providing and/or improving the capacity of these Acts to provide for management of less significant environmental effects that would not be provided for under a single environmental approval. Sectoral Acts that may require these latter amendments include the:
 - *Mining Management Act*
 - *Petroleum Act*
 - *Planning Act*
 - *Fisheries Act*
 - *Pastoral Land Act*.
- Amendment to the WMPC Act to allow for regulation of waste management and pollution control under a single piece of legislation and by the independent NT EPA. Application of the proposed amendments would need to vary according to whether or not a sector had legislation suitable for pollution control and waste management, and the significance of the environmental impact. Sectors with suitable legislation would be subject to the proposed amended Act for management of significant pollution and waste effects subject to conditions of a single environmental approval, but not non-significant effects. Sectors without suitable pollution and waste legislation would be subject to the amended Act irrespective of whether there was a single environmental approval or the significance of the effect.
- Amendment of the *Water Act* to remove waste discharge licensing.
- Amendment of the TPWC Act to better provide for the management of threatened species, threatened ecological communities and biodiversity in general.

The only major legislative amendments would be to the EA Act.

There would need to be a realignment of bureaucratic resources to cater for the proposed changes (primarily associated with NT EPA administration of approval conditions and the expanded role of the WMPC Act).

4.2.4 A timetable for the legislative amendments

It is estimated that amendment of the EA Act as described above would take between nine and 12 months to complete. It could be achieved in nine months if a dedicated resource were provided for drafting the amendments. It is estimated that 12 months would be required without dedicated drafting.

4.3 The sectoral approval framework

4.3.1 The sectoral environmental approval framework as described in the review

The review's description of this framework and the recommendations, as written, indicate that this option has:

- environmental approvals provided by sectoral responsible ministers providing sectoral project approvals
- the ability to provide a sectoral environmental approval to be based on the Minister for the Environment providing accreditation of sectoral legislation and high-level minimum standards
- reporting on the bilateral agreements with the Australian Government (presumably reporting by the sectoral agency to the responsible minister and to the Commonwealth minister)
- the Minister for the Environment having powers to require an NOI when one should have been provided, plus additional associated powers
- the NT EPA providing the Minister for the Environment with an assessment report containing recommendations and draft approval conditions
- the NT EPA consulting with the proponent, community and agencies on the draft recommendations and approval conditions prior to submission of the assessment report to the Minister for the Environment
- the accredited agency undertaking implementation, monitoring, compliance and enforcement and reporting on implementation of approval conditions
- a line agency that administers the WMPC Act
- the NT EPA undertaking regular assurance monitoring of the responsible ministers' and accredited sectoral agencies' adherence to the accredited, high-level minimum standards
- the Minister for the Environment providing environmental approvals when there is no accredited sectoral approval process
- the DLPE monitoring, enforcing and reporting on compliance with conditions of environmental approvals when the Minister for the Environment has to provide an environmental approval
- each accredited agency and the DLPE reporting to the Australian Government minister on implementation of bilateral agreements
- secondary sectoral approvals where appropriate.

Figure 4 provides the sectoral approval framework as described in the review and its recommendations. The figure includes the sectoral approval process based on

accreditation of high-level processes and assurance monitoring of implementation of the processes as well as the parallel processes of an optimised single environmental approval process for projects that do not have sectoral approvals. The structure of the single environmental approval component of the sectoral approval has been optimised by eliminating conflicts of interest—as for the optimised single environmental approval discussed above. The review's accreditation process is too poorly defined to allow for complete depiction other than to note that this requirement exists. A version of the accreditation process is provided in Appendix B (comments on recommendation 1). Inclusion of this version of accreditation, or likely any other version, in the figure would have made the model for the sectoral environmental approval framework far more complex than in Figure 4.

It is assumed that sectoral secondary approvals and their implementation are undertaken in accordance with the objectives and requirements of the relevant Acts.

Potential conflicts of interest identified in Figure 4 are those described in the NT EPA's comments on the report's recommendations (Appendix B). In all cases, these actions/roles/processes are contrary to OECD (2014) recommendations on when a regulatory role is most appropriately provided by an independent regulator. It is assumed that actions/roles/processes potentially liable to a conflict of interest have an equal likelihood of resulting in conflicted chains of reporting.

Environment. Proponent 1 is not subject to accredited sectoral legislation and receives an environmental approval from the Minister for the Environment. Proponent 2 is subject to accredited approval legislation and receives a sectoral environmental approval from the responsible minister. Orange arrows indicate potential for conflict of interest. The black arrow indicates an action/role/process that is inefficient, ineffective and does not promote equity. The blue represents an undefined process. The green arrows meet the objectives.

The network of roles, responsibilities and actions is clearly defined in the review. It provides an option with significant structural complexity. This alone may provide a low level of certainty for proponents and the rest of the community.

The sectoral environmental approval framework, as described in the review, is subject to inadequacies. These include numerous conflicts of interest that undermine the credibility of the proposal, and ineffective and inefficient processes exacerbated by a requirement for extensive, additional bureaucratic inputs.

One conflict of interest (sectoral capture) affects the performance of an accredited sectoral agency's responsible minister when providing the environmental approval and associated conditions.

A second impacts the accredited sectoral agency's administration, enforcement of approval conditions and reporting on proponent performance (i.e. the implementation of and reporting on conditions of approval are potentially subject to conflicts of interest).

The two additional causes of conflicting interests are those caused by a line agency administering the WMPC Act, and the Minister for the Environment having the call-in powers for NOIs (as discussed under the single environmental approval framework).

The sectoral approval framework is fundamentally dependent on an onerous and unresponsive accreditation process that may not be possible to implement (see comments under recommendation 1, Appendix B). That process is not efficient or effective, does not promote equity among industries and does not provide certainty or credibility for the community (see comments under recommendation 1, Appendix B and Table 1).

This framework's other fundamental component is assurance monitoring. That process is inefficient and ineffective, does not promote equity among industries and does not provide certainty or credibility for the public (see comments under recommendation 1, Appendix B and Table 1).

The two separate processes for environmental approvals and the multiple sources of environmental approvals will inevitably cause inequity among proponents in different industries, provide uncertainty in reporting to the Australian Government (under bilateral agreements) and consequently fail to foster ESD.

The sectoral environmental approval framework as described in the review does not meet the objectives of the proposed reforms.

There would need to be a realignment of bureaucratic resources to cater for the proposed changes associated with a sectoral approval framework. These are associated with the accreditation process, assurance monitoring, line agency management and realignment of the WMPC Act, and those caused by DLPE managing conditions of environmental approvals under an environmental approval by the Minister for the Environment.

Only two of the sources of conflict of interest, or inefficiency and ineffectiveness, could be removed and still retain the sectoral environmental approval framework. These possible optimisations are:

- the NT EPA to control the NOI call-in and associated processes
- the NT EPA to undertake administration of the WMPC Act.

This would allow a credible impact assessment process, and credible implementation of the WMPC Act. The conflict of interest generated by having DLPE administer environmental approvals by the Minister for the Environment could be alleviated as per the optimised single environmental approval. This, however, would be contrary to the intent of this option to ensure sectoral rather than NT EPA administration of the outcomes of the environmental assessment process.

The remaining potentially conflicted processes associated with this option include the making of an environmental approval, and implementation of and reporting on compliance with that approval and its conditions. When undertaken by a sectoral agency, these processes inherently involve conflicts of interest that cannot be rectified by the inefficient and ineffective accreditation and assurance processes recommended by the review (Appendix B, and Table 1). Changing these roles, responsibilities or processes would eliminate the sectoral environmental approval framework as proposed in the review.

Optimisation provides only a minimal improvement. The optimised framework would still not meet the objectives of the proposed reforms.

This model would require a realignment of bureaucratic resources to cater for the proposed changes associated with an optimised sectoral approval framework. These are associated with the accreditation and assurance processes proposed to be conducted by the NT EPA, conducting and implementing environmental approvals by accredited sectoral agencies, and the operation of the expanded role of the WMPC Act.

4.3.2 Legislative implementation of an optimised sectoral approval framework

Implementation of an optimised sectoral approval framework, as described in the review and its recommendations, would involve:

- Amendments to the EA Act as provided for by the review's recommendations (including those associated with accreditation and assurance monitoring), adjusted according to the NT EPA's recommendations (not including the NT EPA recommendations on accreditation and assurance monitoring) and the additional amendments included in Appendix E.
- Amendments to sectoral legislation in relation to the accreditation criteria and processes, assurance monitoring, conditioning, approval and compliance and reporting requirements, as well as upgrading and/or providing for environmental management in sectoral legislation. This would include the:
 - *Mining Management Act*
 - *Petroleum Act*
 - *Planning Act*
 - *Fisheries Act*
 - *Pastoral Land Act*

- Amendment of the WMPC Act to allow for regulation of waste management and pollution control under a single piece of legislation and by the independent NT EPA.
- Amendment of the *Water Act* to remove waste discharge licensing.
- Amendment of the TPWC Act to better provide for the management of threatened species, ecological communities and biodiversity in general.

4.3.3 A timetable to implement the sectoral approval framework

Establishing the sectoral approval framework would involve two lengthy legislative components: reform of the EA Act and reform of a variety of sectoral legislation.

The legislative agenda would be large, necessitating a staging requirement. Reform of the EA Act and the *Mining Management Act* alone could take up to two to three years before it could be implemented after sectoral accreditation (if this is possible).

4.4 A transition from a sectoral approval to a single environmental approval

The review proposes that it would be a logical step for there to be a transition from an implemented sectoral environmental approval framework to a single environmental approval framework. This transition from an established sectoral approval framework (optimised or otherwise) to an optimised single environmental approval framework would involve:

- Amendment of the EA Act to remove reference to accreditation and to reform the assurance monitoring (to provide the required improvements to the EA Act's existing audit provision) put in place to establish the sectoral approval framework.
- Amendment of any accredited sectoral legislation to remove reference to accreditation, assurance monitoring, an environmental approval or reference to implementation, compliance, enforcement and reporting on conditions of an environmental approval.

The transition would require a second, significant bureaucratic realignment.

An optimised single environmental approval framework is the only option that meets the objectives of the proposed reforms. Temporary adoption of a sectoral approval framework, optimised or otherwise, would require significant time and resources in legislative reform of several Acts, cause significant bureaucratic realignment, be bureaucratically demanding, and would not conform with best practice (i.e. does not meet the objectives or OECD (2014)).

The NT EPA does not support delaying a readily achieved, optimised single environmental approval framework to allow for temporary implementation of a sectoral environmental approval framework, and subsequent transition to an optimised single environmental approval framework.

5 CONCLUSIONS

This advice on the review's recommendations and supporting material provides detailed comments on each recommendation. The majority of the recommendations do not meet the objectives of the proposed reforms. In many cases, the recommendations can be revised so that the intention of the recommendation is met, along with meeting the objectives. The review's recommendations are organised so that single matters are often

subject to more than one recommendation and/or dot point, often under different sectional headings. Recommendations, or appropriate alternatives that met the review's intentions, are amalgamated according to subject matter to allow an understanding of their possible adoption and consequences. This process leads to the following conclusions.

5.1 Structural reforms

5.1.1 A single environmental approval framework

It is possible to optimise a single environmental approval framework using proposed refinements to the review's recommendations so that the optimised model would meet the objectives.

The optimised single environmental approval framework provides the simplest framework and meets the required objectives. It provides efficiency and effectiveness by maintaining continuity of knowledge and relationships between the NT EPA and proponents from the initial NOI to the draft Environmental Approval, and on into ensuring compliance, enforcement and reporting during project operation. In other words, it adopts a project lifecycle approach to environmental regulation.

The review referred to a single environmental approval framework as providing clarity of process and responsibility and a direct means of ensuring that the requirements of bilateral agreements with the Australian Government's Department of the Environment are met. The review noted that this option provided an 'aspirational regime' for environmental management that might be implemented following temporary implementation of option 3 (the sectoral approval framework). Immediate implementation of the optimised single environmental approval framework provides these outcomes without the added complexity of a temporary, onerous sectoral environmental approval framework that would be subject to continuing conflicts of interest and established only after completing a long and complex legislative agenda.

It is estimated that a reformed EA Act with a single environmental approval could be implemented within nine to 12 months.

5.1.2 A sectoral approval framework

The sectoral approval framework, as described in the review, contains a large number of decisions/actions that are subject to conflicts of interest. As described in the review, it does not meet the objectives of the proposed reforms.

The review's sectoral approval framework cannot be optimised to allow it to meet the required objectives. Some of the option's decisions/actions can be reformed without affecting the overall intent of the option. The level of optimisation is constrained by the option being fundamentally dependent of decisions/actions subject to ongoing conflicts of interest and inefficient and ineffective processes. If these conflicts of interest and inefficiencies were removed or altered, the option would not exist. The sectoral approval framework and its partially optimised version do not meet the objectives of the proposed reforms.

A sectoral approval process is made more complex by its reliance on an undefined accreditation process that is likely to prove inefficient, ineffective and bureaucratically demanding. The complexity of the option is further increased by the requirement for parallel implementation of the single approval framework to provide for environmental assessment and approval of projects that are not subject to an accredited sectoral approval.

The first stage to implement a sectoral approval is estimated to take two to three years and require additional legislative amendment over a number of years before it was completely implemented.

5.1.3 NT EPA recommendations on structural reform

NT EPA recommendation 1

Government should, following consultation with industry and the community, consider the urgent implementation of the NT EPA's model for a single environmental approval framework.

NT EPA recommendation 2

A sectoral approval framework cannot be optimised to remove conflicts of interest, inefficiencies and ineffectiveness, and it should not be implemented.

NT EPA recommendation 3

The NT EPA's model for a single environmental approval framework should be implemented to ensure the reforms are more efficient, less arduous, less expensive and provide for more certain implementation of a credible model framework than the review's recommended 'aspirational regime' for an environmental framework, or a staged transition from a sectoral approval framework to a single environmental approval framework.

5.2 Reform of the environmental assessment, approval and management process

The following recommendations have been developed to assist the Northern Territory Government to implement the optimised single environmental approval, consistent with the NT EPA's first and second recommendations.

5.2.1 A single environmental approval

There is an urgent need to secure amendment of the EA Act to provide for a single environmental approval by the Minister for the Environment. This should apply to all significant development projects requiring environmental impact assessment. This action would require legislative provision for the implementation, compliance monitoring, enforcement and reporting of approval conditions, along with a number of other matters.

5.2.2 Provision of an NOI

There is an urgent need to secure legislation requiring a proponent, not the responsible minister, to provide an NOI to the NT EPA when a development project has potential to significantly affect the environment. Leaving the responsibility with the responsible minister would perpetuate conflict of interest and undermine the credibility of the environmental management framework.

5.2.3 Call in powers for NOIs

There is an urgent need to secure legislation to provide for an effective call-in power to secure NOIs when one is appropriate but has not been provided. It is essential that this avoids putting the Minister for the Environment in the position of having a conflict of interest. This is most appropriately done by allocating the responsibility to the NT EPA, as in Western Australia. The absence of a practical and effective call-in power, free from conflict of interest, again undermines the credibility of the environmental management framework.

5.2.4 Urgently needed policy

There is an urgent need for government and the NT EPA to adopt five policies/guidelines to provide certainty for the environmental impact process. These are:

- the identification of significant impacts on the environment
- risk management processes and frameworks
- when is an NOI not required
- content required in an NOI
- content required in an EMP.

The NT EPA currently provides all but two of these in the form of guidelines. These could be considered as a basis for adoption by government.

5.2.5 Other amendments

The review contains a number of other recommendations for reforms of the EA Act that are independent of the option government adopts for reform of the environmental management framework. These are desirable reforms of the EA Act as presented, or would be so with some amendment (as per comments on the review's recommendations, Appendix B).

5.2.6 NT EPA recommendations on environmental assessment, approval and management process

Not all the needed changes to the assessment and approval processes were identified in the review. There are additional changes that would overcome existing procedural and other difficulties and further enhance the credibility of the assessment process. Recommendations concerning these changes, along with those from the review (as adjusted to meet the objectives for the reforms), provide a coherent view of how the reformed processes would work and interact as well as the checks and balances these would depend on.

NT EPA recommendation 4

The urgent need for comprehensive reform of the EA Act can be met by implementing the recommendations provided in Appendix E.

5.3 Roles and governance of the NT EPA

5.3.1 The review's proposed changes to the NT EPA roles and governance

Securing the ongoing independence of the NT EPA is central to government's development and retention of public credibility in the environmental management system. The review's background material and some recommendations concern the roles and governance of the NT EPA. The review also proposed changes in the NT EPA's roles as a consequence of proposed changes to the roles of other agencies. These changes include:

- restricting the NT EPA's role to provision of advice on environmental assessments
- limiting NT EPA staff to a small secretariat

- staff operations in conducting environmental impact assessments to be under the control of DLPE
- moving control of, and operations under, the WMPC Act to a line agency (unspecified)
- the NT EPA no longer providing the Minister for the Environment with policy advice on its own initiative (i.e. advice functions limited to where advice is requested by the minister).

5.3.2 NT EPA recommendations on NT RPA roles and governance

NT EPA recommendation 5

The NT EPA should:

- remain an independent authority with a full-time Chair
- retain its administrative roles in relation to environmental impact assessment, waste management and pollution control
- have an enhanced role in providing policy advice to the minister, including development of legislation, statutory implements and guidelines related to its core business
- continue to control the operational activities of the staff provided
- not have its operations compromised by staff being required to concurrently or sequentially perform similar functions for the Department of Lands, Planning and the Environment (DLPE)
- have its public credibility and uncompromised independence enhanced by making it a fully independent authority with the capacity to manage its own finances and staff.

5.4 Reform of other environmental management

5.4.1 A single independent authority for waste management and pollution control

The review recommends that the WMPC Act be administered by a line agency rather than the NT EPA and that there be a single regulatory body for all waste management and pollution control purposes. Allocation of this function to a line agency would cause additional potential conflicts of interest in the environmental management framework. It would be more appropriate for there to be a single, independent regulator—the NT EPA—to continue to administer the WMPC Act. Expanding the WMPC Act's role to all waste and pollution issues would require amendment to the WMPC Act as well as removal of discharge licensing from the *Water Act* (see section 4.2.3). It would also require the WMPC Act to take over regulation of marine pollution issues not associated with the MARPOL Agreement (i.e. amendment to the *Marine Pollution Act*).

Application of the proposed amendments would need to vary according to whether or not a sector had legislation suitable for pollution control and waste management, and the significance of the environmental impact. Sectors with suitable legislation would be subject to the proposed amended Act for management of significant pollution and waste effects subject to conditions of a single environmental approval, but not non-significant effects. Sectors without suitable pollution and waste legislation would be subject to the

amended Act irrespective of a single environmental approval or the significance of the effect.

These changes would reduce conflicts of interest throughout the environmental management framework and enhance the credibility of the system.

5.4.2 NT EPA recommendations on reform of other environmental management

NT EPA recommendation 6

All waste management and pollution legislation should be consolidated into the WMPC Act to cover all land tenures, and it should be administered by the NT EPA.

NT EPA recommendation 7

Consideration should be given to enhancing the public credibility of the environmental management framework by consolidating the EA Act, the WMPC Act, and regulation of other environmental matters (e.g. land clearing, marine pollution) into a single environment protection Act.

APPENDIX A: LETTER FROM THE MINISTER FOR THE ENVIRONMENT



MINISTER FOR THE ENVIRONMENT

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Dr William Freeland
Chair
Northern Territory Environment Protection Authority
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DARWIN NT 0801

Dear Dr Freeland

On 9 September 2013, you wrote to my predecessor outlining general concerns with the Northern Territory's environmental management framework. You requested Government's consideration of the framework.

In 2014, the Northern Territory Government requested Dr Allan Hawke AC undertake a review of the Northern Territory's environmental assessment and approval processes. Dr Hawke delivered his Review to the Government in May 2015. The Review contains three options for structural reform and 22 recommendations for specific improvements to the current environmental management system.

On 18 November 2015, the Government publicly released the Review and announced that it had adopted Option 3 as described by Dr Hawke. The Government also announced that over the coming months, it would conduct consultation with interested stakeholders on the implementation of Option 3.

Government views Option 3 as providing a logical step towards the introduction of a single environmental approval as envisaged by Dr Hawke in Option 2 of his Review.

In accordance with section 25(1) of the *Northern Territory Environment Protection Authority Act* (the Act), I request the NT EPA's advice in relation to:

1. The Hawke Review - Specifically, a formal response that can be published by the Territory Government and NT EPA that identifies the NT EPA's position in relation to the structural reform options identified by Dr Hawke, a response to each of the 22 recommendations contained in the Review, and any related issues or recommendations not addressed in the Review that should inform Government's consideration; and



2. A model for a single environmental approval as envisaged in Option 2 of the Review that is appropriate for the Northern Territory, and including options for a process to implement the model.

In providing its advice, I request the NT EPA consider:

- Government's strategic policy and initiatives including *Framing the Future*, the *Northern Territory Economic Development Strategy*, the draft *Balanced Environment Strategy* and the *Red Tape Reduction Strategy*;
- the Memorandum of Understanding between the Northern Territory and Australian Governments for a 'one stop shop' to streamline environmental impact assessment and approval processes;
- Government's commitment to the responsible management of the Territory's natural resources; and
- Government's commitment to ensuring that legislative frameworks are in place to accommodate new environmental challenges that may arise as the Territory continues its industrial development.

At the same time as making this request, the Territory Government will be consulting with key stakeholders to obtain their views on how Option 3 can be implemented, and an appropriate model for a single environmental approval consistent with Option 2.

I acknowledge that when performing its functions under the Act, the NT EPA is required to encourage community involvement and engagement. To avoid duplicate consultation processes, I would like to invite the NT EPA to participate in the Territory Government's consultation process, and to use information obtained through this process to inform the requested advice. In addition, I would be pleased if you would make this request and the Hawke Review available from the NT EPA website.

I would appreciate if you would advise me of an appropriate timeframe to provide the information requested, and the NT EPA's preferred method for continued engagement in the environmental regulatory reform process.

I look forward to receiving your advice and working towards the improvement of the environmental assessment and approvals system.

Yours sincerely



GARY HIGGINS

04 DEC 2015

APPENDIX B: ASSESSMENT OF THE REVIEW'S RECOMMENDATIONS

Comments are provided under each of the review's 22 recommendations. Recommendations and/or dot points included in recommendations are reviewed against the performance criteria listed in section 1.2 and, where appropriate, other recommendations and best-practice principles of the OECD (2014). This is to ensure that existing causes for concern with the environmental management framework are corrected and that no additional causes for concern are created. Where possible, alternatives are provided for recommendations and/or dot points that do not meet the performance criteria.

Recommendation 1

The review's recommendation 1

That the NT Government strengthen integrated assessment and approvals processes, as follows:

- *establish criteria, performance standards and benchmarks for all approvals containing environmental conditions. These are the standards against which sectoral approval processes can be accredited.*
- *consider the following as a necessary starting point:*
 - *the authorising legislation provide for environmental issues to be considered;*
 - *the legislation permit the application and enforcement of environmental conditions;*
 - *the legislation permit consideration of ESD principles in decision making;*
 - *the agency has access to adequate skills and expertise;*
 - *there is public consultation and a positive framework for proponents to build community confidence;*
 - *decision making processes and reasons are transparent; and*
 - *there is a formal compliance and enforcement policy that includes graduated compliance responses and penalties, regular compliance reporting, compliance auditing and the capacity for directed compliance investigations;*
- *establish the Environment Minister as the decision maker for projects not subject to approval by an accredited approval process;*
- *accreditation should be issued by the Environment Minister following consultation with, among others, relevant colleagues and the EPA;*
- *where there is an EPA Environmental Assessment Report and/or advice, require responsible decision makers to publish a statement setting out how those recommendations are reflected in specific approval conditions;*
- *reinforce the existing requirements for publishing Statements of Reasons in*

circumstances where EPA recommendations are not implemented;

- *require proponents to report annually and publicly on compliance with environment-related conditions of approval; and*
- *require the NT EPA to undertake regular assurance monitoring and reporting on the operation of the system to the Environment Minister.*

Comment on recommendation 1

The NT EPA agrees that there is an urgent need to reform the environmental assessment and approvals framework. There are well-documented cases of the environmental impact assessment system being ignored by proponents and thus no environmental assessment done when there should have been one, memoranda of understanding about environmental impact assessment not being honoured, recommendations from environmental assessment reports being ignored, and of no enforcement of environmental offences by relevant sectoral agencies when readily apparent.

As noted in the review, these aberrations have sectoral conflicts of interest at their core. It is inferred from the review that the proposed (a sectoral approval framework) structural reform is intended to attempt to correct these problems with the system, assuming that insufficiencies in the EA Act are also corrected.

The review states that a sectoral environmental approval framework would make the existing 'one-stop-shop' arrangements more effective and trusted. This is stated to be achieved through establishment of consistent, clear and appropriate standards for environmental approvals across all industries. This is proposed to be based on the Minister for the Environment accrediting sectoral approving agencies' processes and procedures to undertake environmental approvals, including subsequent environmental management, according to the consistent set of high-level performance standards.

The accreditation process is proposed to be backed up by enhanced assurance monitoring (auditing) of sectoral decision making to ensure compliance with the accredited processes.

Implementing the recommendation would require amendment to the EA Act, along with each Act where it is intended that an accredited environmental approval and management be provided. The review identifies the *Mining Management Act* and the *Planning Act* as potential candidates for accreditation, but a number of other Acts could be proposed, such as the *Petroleum Act*, the *Pastoral Land Act* and the *Fisheries Act*.

Minimum high-level standards

As proposed in the review, the accreditation would involve the use of minimum standards and assurance monitoring of the implemented processes by the NT EPA. These measures are proposed to provide a basis for consistency between environmental approvals granted by the Minister for the Environment and those provided by sectoral agencies. The measures are proposed to provide the public with reassurance that the system functions as intended, or if it does not, that something will be done about it.

The establishment of criteria identifying the minimum standards that government is willing to accept from its environmental legislation is critical if it is serious about developing a 'leading practice environmental management framework' using a sectoral environmental approval.

An example of regulatory inconsistency is provided by the lack of clear expectations about 'transparency'. These include:

- Licences issued under the WMPC Act are listed on the NT EPA website and available for viewing by any member of the public.
- Waste discharge licences issued under the *Water Act* are listed on the NT EPA website and available for viewing by any member of the public.
- Authorisations and mining management plans are not made available to the public.
- Until recently, there has been no requirement to make permits or environmental management plans under the *Petroleum Act* available to the public.

This inconsistent approach to transparency, including the lack of transparency in water extraction, mining and petroleum, is a source of concern for the community. Until such issues are resolved, the government will continue to face difficulties in improving community confidence in the environmental management system. Measures like those proposed in the review requiring public release of statements of reasons and reporting against environmental conditions would represent a significant improvement on existing requirements.

Recommendation 1 identifies matters in addition to transparency requirements that should be considered in developing these criteria. These are a mix of matters ranging from legislative requirements, possible regulatory requirements and internal policy to staffing and skills.

To be effective, these need significant additional work to identify what specific legislative, regulatory, policy and staffing capacities may be required. Recommendations 5, 18 and 22 contain additional matters that go some way to providing guidance about what may be important. These should also be considered.

All but one of the criteria are high-level matters pertaining to a required decision making process rather than the substance of what decisions might be about. The exception is staffing capacity. Determining the agreed set of minimum standards across agencies will need additional attention and will be time consuming.

The criteria should include appropriate appeal provisions, with these directed to an independent authority such as the Northern Territory Civil and Administrative Tribunal rather than to a minister.

Minimum standards for processes are essential, irrespective of the structural model adopted. They provide a possible means of ensuring all agencies comply with 'best practice' in keeping with the OECD (2014) principles. Minimum standards have the capacity to contribute to certainty, equity and transparency of processes. Alone, these do not necessarily guarantee these outcomes or appropriate environmental outcomes. Selecting which of the multiple suggestions for the high-level performance criteria are to be implemented, the level (legislation, regulation or guideline) at which each is to be implemented and the bureaucratic requirements of effective implementation requires detailed consideration.

Accreditation of sectoral processes

The environmental management framework is currently a fragmented patchwork of different sectoral agencies administering different legislation and associated standards and capacities to implement effective compliance and enforcement. This form of

environmental regulation has not engendered uniformity and consistency of environmental management regardless of industry type or sector.

The accreditation of sectoral legislation and processes by the Minister for the Environment is one of the essential characteristics/features of the proposed sectoral environmental approval framework.

The intent of sectoral agency accreditation as proposed by the review is to implement and maintain consistent use of the minimum standards (high-level processes and performance standards) across sectoral approvals and implement approval conditions. The review asserts that the system will deliver sectoral 'one-stop-shops' that are 'up to the task' of providing 'adequate environmental safeguards', and so engender a higher level of credibility among public perceptions.

The accreditation of sectoral 'one-stop-shop' environmental approvals will necessarily be based on sectoral legislation and processes that vary substantially. The minimum standards are likely to require legislative amendment through the Legislative Assembly and/or, via regulatory means, together with development of new internal guidelines and processes. In all cases, the legislative process needs to provide legislation 'fit for the purpose'; that is, suitable for accreditation. The accreditation process could not begin until after the legislative amendments are in place.

The sectoral 'one-stop-shop' would not be able to operate (no project approval could be given) during the period required to undertake the accreditation procedures. This delay would require the Minister for the Environment to provide environmental approval and management for projects during the accreditation process, should it be required. The alternative would be for no approvals to be granted for projects relevant to the unaccredited sectoral agency.

Under these circumstances, an environmental approval by the Minister for the Environment would, as with a sectoral 'one-stop-shop' project approval, involve requirements for implementation of regulatory responsibility under a variety of sector-specific legislation; for example, those affecting water, waste, pollution, biodiversity and transport. The agency seeking accreditation would be able to provide its own sector-specific approvals but not be able to assume responsibility for implementation of the environmental approval, including environmental management and reporting on implementation of environmental approval conditions. These responsibilities would lie with another agency. The affected agency would be restricted to the roles of the other sectoral agencies, i.e. providing sector-specific approvals required by an environmental approval (see page 14 of the review).

The Minister for the Environment's accreditation of agencies' legislation and processes is to be based on advice from whomever he/she pleases. The process of consultation is unstructured and requires assignment of bureaucratic responsibility for the consultation and provision of the information required. The NT EPA, as the independent body proposed to be charged with assurance monitoring of compliance with the accredited processes, is the most appropriate body to coordinate the consultation, and gathering and provision of the advice.

Once in possession of a review of the applicant agency's legislation and processes, the Minister for the Environment would have the option of agreeing or disagreeing with the 'fit-for-purpose' legislation, regulations and internal processes.

The Minister for the Environment would be able to accredit legislative improvements as 'fit for purpose'; i.e. the legislation would have been designed to be 'fit for the purpose' of accreditation. In this situation, the accreditation of legislation and regulation would seem

to achieve a limited purpose given that the Legislative Assembly has already determined an appropriate outcome in an appropriately public manner. It is likely to be viewed that way by the public.

Alternatively, the Minister for the Environment may view the legislation/regulation as inappropriate and determine that it should not be accredited. This could be due to a late amendment to the legislation or for whatever other reason. This situation could lead to a brief or protracted delay to the accreditation as the portfolio minister seeks amendment to the new legislation/regulations. This delay would extend the period during which the Minister for the Environment would be required to issue environmental approvals for projects that would otherwise be the responsibility of the agency seeking accreditation.

It is difficult to understand how a Minister for the Environment could have the power to overrule the Legislative Assembly's decisions and the Administrator's subsequent assent by refusing to accredit the new legislation.

The Minister for the Environment could provide an appropriate evaluation of the sectoral agency's internal guidelines and processes. The process would allow for public scrutiny of sectoral 'one-stop-shop' internal processes. A capacity for the public to view or be involved in the accreditation process is not provided for in the recommendation. Any decision on who is to be involved or informed is left to the Minister for the Environment. This omission needs to be corrected.

The sectoral accreditation process is a novel concept that is fundamental to the proposed sectoral approval framework. Reforming the relevant sectoral legislation is likely to be lengthy, and the accreditation process would be time consuming—assuming that the proposed accreditation is possible. As discussed above, the accreditation process is also vulnerable to providing outcomes that might be perceived as being of limited value. Functionally, it could easily end up dealing primarily with lesser, agency-specific, internal processes. It is not clear from the recommendations how uniform high-level standards are to be implemented and maintained on the basis of internal guidelines and processes.

The alternative of restricting accreditation to agency-specific internal processes would fail to provide a mechanism for maintaining uniform high-level standards for legislation over time, leading to uncertainty and inequity among proponents subject to different sectoral 'one-stop-shop' approvals, and a consequent loss of public credibility.

The recommendation does not provide for responsive reactions to potential regulatory or process improvements, changing needs, new technology or other future impositions. Once established, a sectoral approval framework and its accreditation processes would be unresponsive to, and act as a disincentive to needed regulatory change. The constraint of re-accreditation is time consuming, onerous, and would require simultaneous amendments across sectoral legislation in order to maintain consistency in providing 'adequate environmental safeguards'. The process would be a disincentive to reform, leading to undocumented, unaccredited diversion of internal processes away from those that were accredited.

The NT EPA is unaware of any suitable, alternative way of providing accreditation of environmental approval and management processes across sectoral agencies—one that provides the intended outcomes in a way that is transparent, timely, avoids outcomes that could be viewed as limited and provides for responsive change. There are only two seeming alternatives to the accreditation process.

The first is to simply abandon the accreditation of environmental approval legislation and processes. This would mean abandoning one of the two essential components of the

sectoral approval framework, leaving a situation much as it is now, and perpetuating the existing uncertainty, lack of credibility and inequity.

The second alternative is to enshrine the minimum criteria in a single piece of legislation and have them applicable to all environmental approvals and management. The logical place for these minimum standards, assuming adoption of a sectoral approval framework, would be in an environment protection Act, or at least temporarily in the EA Act.

However, if it were implemented, an accreditation process would inevitably be a highly bureaucratic, unnecessary and relatively unproductive activity. Thought needs to be given to the capacity of the single environmental approval framework to provide the proposed benefits of accreditation, without having to resort to a separate, burdensome accreditation process.

Assurance monitoring

Assurance monitoring (audits) is provided for under the NT EPA Act and EA Act. The audit powers under the EA Act have never been used.

Inability to make use of the audit powers is associated with shortcomings in the EA Act, i.e. the EA Act has no stated purpose for conducting an audit, no mechanism for ensuring compliance with the audit powers or capacity to implement findings. These constraints caused the NT EPA to use its investigative powers under the NT EPA Act to examine the operation of the existing environmental management framework with respect to two developments and found the framework a failure in both cases (Redbank Copper Mine and sandmining in the Howard sand sheets).

The NT EPA views an adequate capacity for audits as essential for sound operation of any environmental management framework. This should include clear purposes for undertaking an audit, powers to require compliance with the audit powers and processes for implementation of audit findings, i.e. corrective action.

Enhanced assurance monitoring is the second of the review's two essential characteristics of a sectoral approval framework. In the context of a sectoral approval framework, assurance monitoring is assumed to provide a mechanism for ongoing checking to ensure appropriate implementation of the accredited high-level processes/minimum standards. The potential effectiveness of the recommendation largely depends on compliance with the audit powers, the detail of the recommendation (what is to be audited and reported), transparency of outcomes, what mechanisms exist for implementing corrective action on the basis of the findings and the recommendation's capacity to engender community faith in the system.

The assurance monitoring is proposed to provide public credibility in the accredited agency's capacity to deliver 'adequate environmental safeguards'. There are several reasons why this remains uncertain.

The first is that the proposed monitoring is restricted to reviewing compliance with the accredited standards, with individual decisions and environmental outcomes specifically excluded. Auditing of compliance with the high-level minimum standards listed in recommendation 1 could only provide bureaucratic credibility; i.e. the agency went through the processes that were publicly accredited. This process does not guarantee 'adequate environmental safeguards' or even a necessary capacity for the agency to achieve those environmental outcomes. Sectoral conflict of interest would necessarily continue, and inconsistent decision making by different sectoral agencies across different sectors would remain.

Assurance that the objective of 'adequate environmental safeguards' is achieved could only be provided by an audit that included the decisions and the environmental outcomes. An audit that encompasses these additional features would be onerous, intrusive, time consuming and unsuited to the regular checking role the recommendation seeks to establish. Recommendation 11 provides additional clarification of what is to be audited. Additional comments are provided under that heading.

The second reason there is uncertainty that the proposed assurance monitoring is able to provide public credibility is that the recommendation provides no mechanism to ensure an accredited agency need comply with the audit requirement.

The third problem is the nature of the proposed reporting to the minister. The recommendation provides the NT EPA with only one required response following the conduct of an audit. That is to report findings to the Minister for the Environment. The NT EPA Act allows the NT EPA to provide advice to the minister that requires tabling in the Legislative Assembly and a ministerial response in six months. It also allows for provision of administrative advice requiring no ministerial response or tabling of the advice in the Legislative Assembly. Advice may also be provided in environmental quality reports. None of these seems suitable for the proposed reporting of assurance monitoring outcomes.

The fourth reason there is uncertainty that the proposed assurance monitoring is able to provide public credibility is the absence of any necessary requirement for the results of monitoring to be revealed to the public. Revealing the audit findings to the public is essential to ensuring continued public credibility of the system.

The fifth problem causing uncertainty is that the recommendation provides no mechanism for corrective action. Nor does the review provide a recommendation concerning a ministerial power to revoke an accreditation. If accreditation is to be implemented, it is essential that the Minister for the Environment has this power. Continued sound operation of the system requires that publicly available corrective actions be implemented as soon as possible after finalisation of the audit.

Additional comments on recommendation 1, assurance monitoring, are provided under recommendation 11.

An environmental approval from the Minister for the Environment

Recommendation 1, dot point 3 is essential to the sound operation of both a single environmental approval framework and a sectoral approval framework. It would allow the Minister for the Environment to provide an environmental approval for projects in situations where there is no responsible minister (i.e. no accredited sectoral 'one-stop-shop') under a sectoral approval framework, or for all assessed projects under a single environmental approval framework.

Sectoral environmental approval framework

A sectoral environmental approval framework is the review's preferred option for structural reform. As described in the review and in the above comments, this option is functionally similar to the existing sectoral 'one-stop shop', with the exception of accreditation requirements designed to provide for minimum high-level standards for the approval and implementation of assessment report recommendations and draft conditions and ongoing assurance monitoring to ensure adherence to those minimum standards. It also provides a duplicate process for environmental approvals and management based on environmental approvals by the Minister for the Environment (for projects other than those subject to accredited one-stop-shop approvals).

The review regards the accredited, uniform high-level processes for decision making, improved transparency in reporting and assurance monitoring as being sufficient to overcome conflicts of interest. A sectoral approval framework is built on and incorporates the conflicts of interest in the existing sectoral approvals processes.

The NT EPA's views on recommendation 1

Adoption of the sectoral environmental approval framework aims to:

- Provide for the essential and urgent need for an environmental approval issued by the Minister for the Environment, which could be issued under a single environmental approval framework or a sectoral environmental approval framework.
- Alleviate the conflicts of interest inherent in the sectoral approval framework proposal by using poorly defined and ineffective accreditation and assurance monitoring processes requiring transparency provisions. There is a need for clarification and justification of the nature, extent and certainty of any benefits these processes may provide in alleviating the conflicts of interest in the sectoral approval framework.

The NT EPA views the strengthening of the audit powers in the EA Act as essential to the sound operation of the environmental management framework. These powers are unsuited to the regular checking role proposed for assurance monitoring under a sectoral approval framework and are best used in particular instances when the environmental management framework has failed.

The limited capacity of the proposed accreditation and assurance monitoring to alleviate sectoral conflicts of interest precludes the NT EPA's support for a sectoral environmental approval framework. Thought needs to be given to structural reform that provides the proposed benefits of accreditation and assurance monitoring without having separate, burdensome accreditation and assurance process—i.e. a single environmental approval.

Recommendation 2

The review's recommendation 2

Formalise the process for major projects facilitation.

- *unambiguous criteria for granting major project status;*
- *recognising that major project facilitation is intended to reduce transaction costs for proponents, not to supplant the decision making process;*
- *establishing a clear oversight process for coordination of various decisions, particularly where a project requires multiple decisions from multiple line Ministers or their delegates; and*
- *reporting arrangements to the Government on major projects progress.*

Comment on recommendation 2

The NT EPA notes that the Northern Territory Government has developed the 'Major Project Status Policy Framework' (available at: <https://nt.gov.au/industry/major-projects-in-NT/about-major-projects-in-NT>).

Recommendation 3

The review's recommendation 3

In relation to approvals specifically, the EPA's role should be enhanced and focused to:

- *provide independent evaluation of the impact of projects and recommend risk-based and outcome-focused environmental approval conditions. Recommendations to decision makers by the NT EPA to manage environmental risk must be expressed in clear terms with performance statements that can be monitored effectively;*
- *ensure that the Environmental Impact Assessment (EIA) process is consistent with ESD principles;*
- *undertake assurance monitoring and reporting of the environmental approvals system, within a formal assurance monitoring framework and policy set by Government;*
- *on request of the Minister, provide advice on issues affecting the NT's capacity to manage emerging environmental issues and actions necessary to enhance community and business confidence in the environment protection regime; and*
- *provide independent advice to the Minister on the operation of the bilateral agreements with the Commonwealth Government under the Environmental Protection and Biodiversity Conservation Act.*

Comment on recommendation 3

The NT EPA's assessment role does not and should not provide for granting an environmental approval. An environmental approval should be provided by the Minister for the Environment, in consultation with relevant portfolio ministers and whomever he or she wishes. This is to ensure environmental matters are equally considered along with other whole-of-government concerns.

The review's background material for this recommendation notes that:

'The community will generally have greater confidence in the outcomes of environmental assessment and approval processes when there is an independent authority acting as a check and balance in the system. This arises from a general community concern about sectoral interests outweighing the broader public interest.'

More simply put, the public has little confidence in an environmental management framework based on decisions actually or potentially subject to the conflicts of interest inherent in sectoral environmental approvals. This reality is reflected in the OECD's (2014) criteria for when an independent regulatory authority is most appropriate.

The OECD (2014) criteria were echoed in the second reading speech for the NT EPA Act in the Legislative Assembly in 2012. The role of the NT EPA was conceived to provide for independent environmental impact assessment, and waste and pollution management.

The implication that the NT EPA's role should be confined to environmental impact assessment is also elaborated on in the review's discussion before presenting recommendations 12 and 21. That discussion clearly suggests that the WMPC Act should be administered by a line agency.

The recommendations to restrict the NT EPA to providing advice on environmental impact assessments and to transfer the WMPC Act to a line agency ignore two important factors. The first was noted by the government during the second reading speech for the NT EPA Act. This is that along with environmental impact assessment, the administration of waste management and pollution control was seen by the public as lacking credibility unless it is undertaken by an independent authority.

The NT EPA's administration of the WMPC Act is in keeping with the OECD (2014) best practice recommendation on when it is most appropriate to have an independent regulatory authority (see section 2.1.3). Placing the WMPC Act in a line agency would revert to the less credible option of administration with conflicts of interest. Current practice for large developments is to issue the WMPC Act's approvals and licensing following formal impact assessment (usually an EIS). Approvals and licensing under the WMPC Act should be viewed as a sectoral approval that can, along with other sectoral approvals, be invoked by the conditions of an environmental approval and be administered by an agency not subject to sectoral conflicts of interest.

Transfer of the WMPC Act to a line agency and accreditation of its processes under a sectoral approval framework would compound recommendation 3's performance deficiencies.

The second concern with the proposed transfer of the WMPC Act to a line agency is a practical consideration. Impact assessment, and waste management and pollution control are separate functions. The subject matters of the two undertakings are, however, broadly overlapping. Waste management and pollution control staff are active participants in the impact assessment process, where they are able provide immediate and credible expert advice on matters often central to an impact assessment. Loss of this expertise would require additional staff for the NT EPA. Consultancies are used to provide advice on assessments, but the response time, including government procedures, is often long, delaying the assessment process.

The government's acknowledged need for an independent authority to manage waste and pollution, and implicitly the compliance of the NT EPA Act with the OECD (2014) principles, suggest that the government's establishment of the NT EPA to manage impact assessment and waste and pollution is a correct, rational, practical response to the difficulty a small jurisdiction has in providing as broad a spectrum of expertise as possible. This has been done by locating expertise in one independent authority rather than increasing duplication of roles across agencies with conflicts of interest.

Taken together, recommendations 3 and 12 would inevitably reduce the capacity of the NT EPA to provide the Territory with independent environmental management and advice. Limiting the NT EPA's role to environmental impact assessment, together with the administrative changes proposed in recommendation 12, only fosters continuation of conflicts of interest in the environmental management framework.

Recommendation 3 provides five specific recommendations concerning the NT EPA's environmental impact assessment and advisory roles. These reflect, in some measure, existing roles, processes and undertakings adopted by the NT EPA in its operations. In some cases, the adopted processes and undertakings are not reflected in legislation/regulation. In these cases, the processes and undertakings are supported by NT EPA guidelines available to proponents and other members of the community, or may be present in legislation other than the EA Act.

The recommendation to provide risk and outcomes-based assessment report recommendations (dot point 1) is part of standard practice for the NT EPA. This is articulated in the Terms of Reference for EISs.

An outcome-based recommendation is an axiomatic result of the use of the risk management standard. The use of this standard and the production of outcome-based recommendations have not been made a legislated requirement.

The NT EPA fully endorses use of standard risk management and the development of outcome-based recommendations from EISs. It would be appropriate for these standards to be introduced into an environmental protection Act (or, temporarily, the EA Act) or as regulations/guidelines under that Act.

The NT EPA Act requires that the NT EPA achieve outcomes commensurate with ESD, as provided for in the 'Inter-Governmental Agreement on the Environment', 1992 (IGAE). Formal adoption of ESD (including its principles) in the EA Act, additional to its existence in the NT EPA Act (dot point 2), would provide the community with more certainty about the government's intentions in signing the IGAE and increase general understanding of the principles involved.

The NT EPA supports use of the IGAE understanding of ESD because that is what the Northern Territory Government agreed to undertake at a national level. A consequence of this position is that the NT EPA has not supported adoption of the draft version of ESD prepared by the former EPA (EPA Report, 2010. *Ecologically Sustainable Development in the Northern Territory*).

There are serious concerns with the model for assurance monitoring (dot point 3) proposed under recommendations 1, 3 and 11. The proposed assurance modelling is tightly linked to the proposed function of a sectoral environmental approval framework. The NT EPA's concerns with the assurance monitoring, as described in the review, are provided under recommendations 1 and 11. Enhanced assurance monitoring is essential irrespective of the environmental management framework that is adopted but not in the form proposed.

The NT EPA Act allows the Minister for the Environment to request advice on whatever environmentally related matter he or she chooses. The NT EPA is obliged to respond. The NT EPA may similarly provide information unrequested. Both have occurred during the first four years of the NT EPA's operations. No additional legislative or regulatory action is required to achieve dot point 4.

Dot point 5 deals with the NT EPA's provision of advice to the minister concerning the operation of the bilateral agreement with Australian Government's Department of the Environment for impact assessment and that proposed for environmental approvals and implementation. This advice can be provided under the existing NT EPA Act. The capacity of the NT EPA to adequately fulfil this role in relation to the bilateral agreements is impacted by the particular environmental framework the government adopts. A sectoral environmental approval framework is a dispersed decision-making framework requiring dispersed reporting under the proposed approvals bilateral agreement. The NT EPA would not necessarily be in a sound position to provide the minister with the required advice. A centralised agency collating this information may be more appropriate in this circumstance.

The NT EPA's views on recommendation 3

Adoption of recommendation 3 would:

- Impose changes to the roles of the NT EPA that would be contrary to the OECD (2014) recommendations on when an independent regulator is appropriate. It would result in diminution of the NT EPA's capacity to provide independent environmental management, advice and assessment, reduce its skills base, and undermine public credibility in the environmental management framework.

- Impose a system of assurance monitoring that is inefficient and ineffective and that would not achieve the outcomes desired in the review's recommendations.
- Require a legislative/policy basis for the NT EPA's use of risk-based impact assessments and outcome-focussed recommendations from impact assessments.
- Require that assessment reports note and comment on inadequate monitoring proposals.
- Include ESD requirements (including the IGAE principles) in an environment protection Act or, temporarily, in the EA Act.
- Require the NT EPA to provide advice to the Minister for the Environment on the functioning of bilateral assessment and approval agreements with Australian Government Department of the Environment, which while functionally compatible with the NT EPA's role, would be practically difficult and inefficient under the sectoral environmental approval framework.

The NT EPA does not support the proposed changes to the roles of the NT EPA. The changes are incompatible with government policy, impractical in a small jurisdiction and contrary to OECD (2014) best practice—i.e. the NT EPA does not support the first two of the above dot points. These two dot points, along with the proposed sectoral approval framework reform of which they are part, do not meet the objectives of the reforms.

The NT EPA supports the above dot points three, four and five as proposed in recommendation 3.

The NT EPA views improved capacity for assurance monitoring (audits) as necessary, but not as described or for the purpose proposed in the review.

The NT EPA supports its reporting to the Minister for the Environment on the functioning of the bilateral agreements, but this role would be subject to uncertainties under a sectoral approval framework.

Recommendation 4

The review's recommendation 4

Create an enforceable "call-in" power for actions that are likely to have a significant environmental impact and have not been referred by a proponent or responsible entity. The "call-in" regime should:

- *be a discretionary decision of the Environment Minister acting on EPA and/or Departmental advice;*
- *enable the Environment Minister to issue a time-limited stop work order for any action likely to have a significant environmental impact that has not undergone environmental assessment and approval;*
- *enable the Environment Minister to impose, subject to natural justice, enforceable conditions on a project in the event that a proponent does not submit a Notice of Intent (NoI) in response to a call-in; and*
- *create an offence of substantially commencing without prior authorisation a project that is subject to an assessment process.*

Comment on recommendation 4

The EAAP mechanisms for submission of an NOI and existing call-in powers are briefly described to provide an understanding of the inadequacies of the EAAP and identify processes appropriate to ensuring projects are submitted for environmental assessment when appropriate.

Under the EAAP, referrals (provision of an NOI) are the responsibility of the responsible minister (the minister under which a sectoral project approval would be provided for the project). NOIs are required when a project has potential for causing a significant effect on the environment. The role of the NOI is correctly that of providing the NT EPA with information sufficient to allow a determination of whether impact assessment is necessary; i.e. whether there is potential for a significant effect on the environment.

The EAAP provides the NT EPA with a call-in power when it believes that a project should have been referred and the responsible minister has failed to provide an NOI. The call-in would occur through the NT EPA directing the delegate of the responsible minister, or ultimately the responsible minister him or herself, to provide the necessary NOI.

This process has four shortcomings. The first is that the process is onerous from the perspective of the NT EPA, and the responsible minister concerned. What should be a relatively simple, straightforward request for an NOI from a proponent is instead one that provides a significant disincentive to the NT EPA in seeking an NOI and places possibly inappropriate pressure on a minister to achieve a relatively simple, everyday outcome. The onerous nature of the process is reflected in it having been used only once since 1984 when the EA Act began. AN NOI was obtained as a result of the direction to provide the referral.

The second shortcoming of the process is that the EAAP provides no simple or even stated response should a responsible minister not comply with the direction to provide an NOI.

The third shortcoming is that the EAAP do not provide a mechanism for referral of an NOI when there is no responsible minister. Nor do the EAAP's call-in powers apply when there is no responsible minister. It is impossible for the NT EPA to obtain an NOI without a responsible minister other than through a voluntary action by the proponent. This shortcoming can, and has in recent times, cause embarrassment to the government and the NT EPA.

The fourth shortcoming of the EAAP process is that there is no offence when an NOI is not provided when, according to the EAAP, one should have been submitted.

These four shortcomings are compounded by there being no mechanism for stopping, or ensuring appropriate environmental impact assessment when projects begin without a referral for assessment having been made.

Only matters directly associated with recommendation 4 (i.e. call-in powers) are discussed. Issues associated with assignment of responsibility for submission of an NOI are provided under recommendation 7.

Call-in and associated powers need to apply to:

- failures to provide an NOI when appropriate i.e. when there is potential for significant effects on the environment
- processes that ensure compliance with a call-in of a project i.e. penalty provisions

- remedial and enforcement actions, and enforcement of assessment requirements on projects begun without having submitted an NOI when appropriate.

The call-in and associated powers need to meet the following qualitative criteria:

- timeliness to ensure minimum environmental harm and minimise impacts on proponents where possible and appropriate
- avoidance of onerous imposts on the NT EPA and ministers
- allocation to an administrative level appropriate to the relatively minor impost of providing an NOI and ensuring compliance
- implementation without causing any diminution of the responsibilities and independence of roles in the environmental impact assessment process.

Dot points 1 and 2 of the review's recommendation would require a call-in power implemented by the Minister for the Environment acting on the advice of the NT EPA and other agencies of government. It also provides for the Minister for the Environment to issue a stop work order for projects that have begun without environmental assessment and approval (presumably this should read as 'without having submitted an NOI when one would reasonably be required'). No mechanism is provided for ensuring appropriate bureaucratic support for the minister when undertaking this process.

The allocation of these responsibilities as proposed in this recommendation places the Minister for the Environment in a difficult position. It would be contrary to the OECD's reason for establishing an independent regulator (see section 1.2.1) (OECD 2014). Nor is the recommendation in accord with the NT EPA Act; i.e. the NT EPA is to provide independent environmental impact assessment, which includes determination of when an NOI is appropriate.

Use of the call-in powers by the Minister for the Environment would not be seen to be independent and so undermine public confidence in the objectivity and impartiality of the decisions. These decisions would in some circumstances violate the competitive neutrality required in regulation of both government and non-government projects and may involve significant impact on particular interests that engender a requirement for impartiality (i.e. place the Minister for the Environment in the position of having a conflict of interest). These issues are even more important given that many ministers maintain multiple portfolios with potentially competing interests.

The proposed allocation of a call-in power and power to implement a stop work order to the Minister for the Environment are not in keeping with the existing situation where call-ins are appropriately conducted by the NT EPA. The processes would inevitably be time consuming and consequently not minimise environmental harm or impacts on the proponent. This is likely to be inefficient, ineffective and would undermine the independence of environmental impact assessment in the Northern Territory.

The third dot point would 'enable the Minister for the Environment to impose, subject to natural justice, enforceable conditions on a project in the event that a proponent does not submit an NOI in response to a call-in'. There is a need for additional information concerning what is proposed. The use of the word 'condition' in the review is related to the conditions of environmental or project approvals. It is not used in the context of environmental assessment. The following comments assume that the word 'conditions' refers to an environmental or project approval.

If used in this sense, it implies the minister would grant an environmental approval with conditions without undertaking any environmental impact assessment. This is a radical

departure from the review's recommendations concerning the independence of the environmental assessment process, the use of risk management and outcome-based conditions, and the sectoral approval framework's adoption of environmental approvals as part of sectoral approvals. It would necessarily undermine the integrity and accountability of the entire assessment system. The inevitable outcome is open rorting of the system.

If this was not the intent, the recommendation should have provided for the NT EPA to issue a stop work order (which would be in accord with OECD (2014)) backed up by the issuing of a penalty and a requirement to begin the environmental impact process (i.e. provide the NT EPA with an NOI).

If the recommendation were adopted, the imposition of the stop work order etc. by the Minister for the Environment would require the establishment of a bureaucratic process to advise him or her on what the appropriate approval conditions might be so as to provide an environmental approval, including the necessary public comment component of the process. This would be exceedingly difficult in the absence of any environmental impact assessment. It would also be an exceptionally convoluted and lengthy process to simply get a proponent to provide something that should have been provided in the first place.

Any ministerial involvement in placing enforceable conditions on such a project would undermine the OECD's (2014) reason for having an independent authority and be seen to be so by the public i.e. the recommendation should be in accord with the NT EPA Act.

Dot point 4 provides for a penalty for 'substantially commencing a project that is the subject of an environmental impact assessment'. The NT EPA supports such a penalty, but 'substantially commencing' is vague and clearly open to abuse—it should be removed.

The NT EPA's views on recommendation 4

The NT EPA supports the recommendation's intention to provide an effective call-in power but not the recommendation's method of meeting that intention.

The recommendation does not meet the qualitative criteria for providing appropriate call-in powers. It would replace the existing onerous process with a new onerous process that is not timely, is allocated to an administrative level that is not proportionate to the required action, and is contrary to the NT EPA Act's intention of independent environmental impact assessment. This is compounded by its placing the Minister for the Environment in the position of having potentially conflicting interests when making a decision.

The NT EPA supports allocation of the call-in powers to the NT EPA. This is more efficient and effective than the recommendation and would not undermine the reason for the existence of the NT EPA. It would not place an onerous burden on the NT EPA or a minister to achieve a relatively simple outcome, and it would minimise negative environmental outcomes as well as impacts on the proponent as appropriate. The powers should include penalties for ignoring the need for an NOI and a call-in, penalties for starting work without providing an NOI, a requirement to begin the assessment process following a call-in and, if relevant, provide for rehabilitation of project sites for projects initiated without submission of an NOI.

Recommendation 5

The review's recommendation 3

Streamline the EIA process by creating a tiered assessment system that is responsive to the degree of environmental risk associated with particular developments, the capacity to manage the risks and the performance of the proponent, which would:

- remove the existing Public Environment Report (PER) process and make the EIA process more flexible, with the capacity to select timeframes for assessment that reflect the environmental risks associated with a project;*
- simplify EIA guidelines to focus on risk assessment and adaptive management responses rather than comprehensive descriptions of the environment;*
- formalise assessment by NOI and enable the EPA to recommend environmental conditions at the NOI phase where the activity is well understood and the receiving environment is not particularly sensitive. As far as practicable, these conditions should be standardised;*
- enhance the NOI phase to encourage proponents to bring forward risk-based outcomes-focussed arrangements that incorporate performance based adaptive management practices.*
- reward good practice based on "earned trust" so that proponents who produce high quality documentation and management plans and build community trust are rewarded with a lighter assessment touch while those with poor documentation or practice are subjected to greater prescription;*
- when seeking advice from Government agencies on an NOI, the EPA should concurrently circulate a draft decision for comment including potential conditions; and*
- failure to comment in the prescribed time should be regarded as concurrence with the recommendations.*

Comment on recommendation 5

The intent of recommendation 5, dot points 1 and 3 is to provide a flexible assessment process geared to evaluation of the environmental risks of projects, and provision of risk-based recommendations in the assessment report. Removal of the Public Environmental Report (PER) from the assessment process as proposed in dot point 1 is essential. The processes of the assessment bilateral arrangements with the Australian Government Department of the Environment have rendered the PER to a form mimicking that of the EIS. It has become more burdensome than originally intended and no longer provides a simpler alternative to the EIS for less environmentally demanding projects.

Provision of an environmental approval based on an NOI, as proposed in dot point 3, with additional information from the proponent is an appropriate response to the needs of smaller, less environmentally demanding projects.

The tiers proposed in the recommendation do not provide for all recognised needs in impact assessment. The NT EPA proposes that one of the following assessment decisions be made on the basis of an NOI:

- no assessment required

- assessment is required as an
 - assessment on proponent information (API)
 - environmental impact statement (EIS)
 - strategic impact assessment (SIA)
 - public inquiry
- the action is environmentally unacceptable.

The SIA, public inquiry and an unacceptable action are not catered for in recommendation 5. The discussion below outlines draft conceptual approaches for defining and implementing the assessment decisions. These will necessarily require elaboration, discussion and consultation.

The role of the NOI is to inform the NT EPA on a project so that it can determine whether there is a need for additional assessment.

The NOI provides information on the project and environmental aspects of it that may cause potentially significant effects on the environment. This does not require and should not require extensive risk assessment, nor extensive field work or experimental evaluation.

Proponents who provide elaborate NOIs run the risk of spending resources and time on matters of little environmental significance. It would be simpler and more efficient to provide the basic information required. If an EIS or other assessment is necessary, resources are better spent on actions focussed on meeting the requirements of defined terms of reference, rather than trying to second guess the potential requirements of assessment in the hope of avoiding an EIS.

The information provided in an NOI may be little more than a concept plan, a desk top summary of the project environment and identification of potentially significant effects on the environment according to specific triggers (risk criteria). This level of information can be sufficient for an NOI to meet the requirements of its role—i.e. allowing the NT EPA to determine the need for environmental assessment.

Neither the role of the NOI nor the information requirements associated with it should be changed.

The difficulty with the existing system is that the only forms of impact assessment are an EIS or an inquiry—both at the very high extreme of assessment processes.

AN NOI may document a project that does not require additional assessment because there is no potentially significant effect on the environment. Some will have a low potential for significant effects on the environment and others potentially more significant effects that require more detailed assessment and consideration.

The NT EPA may need to seek additional information from a proponent to determine whether an action (a project) has potential for significant impacts on the environment, and if it does, whether the action is reasonably considered to be unacceptable or would require assessment as an API, EIS, SIA or an inquiry.

Proponents whose projects are found to have no potential for significant impacts would not require an environmental approval. These projects would be required to abide by other existing environmental regulation.

An API could be required when a proponent provides a proposal that has low and readily mitigated significant effects on the environment. It would have to gain an environmental approval from the Minister for the Environment. This would involve possible provision of additional information (including an EMP) to the NT EPA and publication of the documentation and the NT EPA's assessment report. The NT EPA would, as for an EIS, provide the Minister for the Environment with the documentation, the assessment report, a draft approval and a draft statement of reasons. The final approval and its conditions would be published on the NT EPA website.

It is important that an environmental approval based on an API is not (and it should not) be based on unfounded assumptions about the project and the environment in which it will occur. It needs to be based on accurate information, potentially significant impacts and use of proven mitigation measures.

A strategic impact assessment (SIA) would be based on an area of land, potentially extensive, focus on the potential environmental effects of a particular industry or set of industries/activities, and provide a mechanism for potentially rapid future environmental approvals for industries included in the SIA.

The assessment could be undertaken by an individual, a company, a consortium of companies/interests, a government agency, an industry association or other body. It would be initiated by an NOI providing information on the industry/industries relevant to the SIA, desktop environmental information and identification of potentially significant environmental effects. Terms of reference for the assessment would be provided by the NT EPA. The SIA would require public scrutiny and an assessment report from the NT EPA.

It differs from an EIS in that recommendations and draft conditions of approval would not be specific to any particular project or specific location other than a defined, probably large, area. The environmental approval issued by the Minister for the Environment would adopt environmental conditions of approval for the relevant industries. Individual proponents would be able to use the information gathered in the SIA and the approved conditions, to provide an NOI for a particular project in a particular site. Environmental approval of that project could be based on an API, or potentially require additional assessment depending on the adequacy of the SIA information (scale and detail) in terms of the project and its applicability to the particular site, the conduct of risk assessment and mitigation, and the level of uncertainty surrounding these assessments.

An unacceptable action would be one that is viewed as fundamentally and fatally flawed; i.e. the consequences of its implementation are catastrophic and cannot be successfully mitigated. Information would be assessed from an NOI, or as a recommendation based on an API, EIS or SIA. If unacceptable, a draft statement of unacceptability would be developed and provided to the Minister for the Environment following consultation with the proponent. The Minister for the Environment would be required to make a decision, in consultation with the portfolio minister and others as he or she chooses, that the action was unacceptable or direct the NT EPA to assess the action with an EIS or other assessment.

The recommendation's second dot point, to adopt risk management and the process of continuous improvement (adaptive management), is similar to recommendation 3's dot point 1.

Dot point 4 calls for an upgrading of the NOI to include development of 'risk-based, outcomes-focussed arrangements that incorporate performance-based adaptive management practices.' As discussed under dot points 1 and 3 above, the role of the NOI is to provide sufficient information to allow the NT EPA to determine whether

additional assessment is necessary. The NT EPA views the provision of elaborate NOIs as potentially expensive and counter-productive for the proponent. The NT EPA's guideline on what should be included in an NOI does not encourage the use of a risk assessment process beyond the identification of potential impacts based on triggers (risk criteria) for particular matters. If used, a full risk management approach could provide misleading outcomes based on inadequate data and assessment or devote time and resources to matters that may be of limited significance.

Dot point 5 calls for recognition and rewarding of proven good practice by allowing for a 'lighter touch' during the impact assessment process. Good practice during the impact assessment process provides its own rewards. It ensures a rapid and uneventful process and outcome. Poor practice is inevitably associated with delays and project disruption caused by failures to adequately respond to the terms of reference for an EIS. Project failures are often associated with failure to provide for adequate information, risk assessment and management. A light touch would likely involve a diminution in the adequacy of proposed risk management and the proponent and the process losing credibility in the eyes of the public.

The rewarding of good practice, as stated in the review's documentation supporting this recommendation, is appropriate to regulation of approval conditions; and is implemented by the NT EPA in the licensing context.

The recommendation's dot points 6 and 7 relate to the NT EPA's process for gaining expert input to the NOI process from government agencies. As discussed above, the NOI is designed to provide information sufficient to allow the NT EPA to make a decision about the need for impact assessment.

Providing a preliminary decision and draft conditions of approval in requests for agency contributions is inappropriate. These two dot point recommendations seem to indicate that this would take the form of a draft environmental approval. Any such draft proposals would necessarily be developed devoid of the necessary contributions being sought from agencies. It would also likely make a faulty assumption that the NOI provided to the NT EPA and the agencies contained all the information required by the NT EPA to make an assessment decision or a draft approval decision. It may not even be possible to make such a decision, draft or otherwise. The draft decisions would be of limited utility to agencies contributing the information, delay the NOI process and be of no importance for projects not requiring an approval or requiring additional assessment. It would waste a lot of people's time and lead to proponents being given false hope.

It is inappropriate to make decisions, draft or otherwise, about environmental matters in the absence of the required information.

The recommendation's dot point 7 proposes an assumption of concurrence with a draft approval decision when an agency fails to respond to a request for comment. This recommendation is contingent on adoption of the immediately above proposal. Implementation of the above proposal is inappropriate, and dot point 7 is not considered further.

An option to terminate the consultation process in the absence of an agency's input would be useful. Use of this tool should be at the NT EPA's discretion and depend on the likely importance of the information being sought.

The NT EPA's views on recommendation 5

Adoption of recommendation 5 and its seven dot points would:

- require enhancement by broadening the proposed three-tiered assessment structure to accommodate all assessment needs
- recognise and implement the fundamentally important need for the use of risk management processes in environmental assessment, and approvals and management
- impose changes to the NOI that would require use of risk assessment, which would not necessarily provide useful results given the preliminary nature of information available in NOIs
- reward good practice and performance with lowered requirements for impact assessment, likely causing inadequate risk assessment and management and lowering the credibility of the proponent and the assessment process in the eyes of the public (rewarding good practice is more applicable to regulation of approval conditions)
- incorporate a time inefficient process into NOI assessment by requiring draft approval conditions/outcomes without gathering the available information to make that decision, resulting in no or little benefit to either proponents, agencies or the NT EPA.

The NT EPA supports:

- increasing the tiered assessment processes, as well as addition of an early decision that an action as proposed is unacceptable
- rewarding those who employ sound management practices in meeting approval conditions, but not in the assessment process
- risk management and outcome-based conditions.

The NT EPA does not support the recommendations relating to the NT EPA's seeking comments on NOIs from other agencies.

Recommendation 6

The review's recommendation 5

Create a clear trigger in the EA Act and the EAAPs setting out the circumstances in which an NOI (or a referral) is to be submitted to the EPA for consideration as to whether environmental assessment and approval is required. The trigger should require referral when:

- *a proponent intends to undertake an action (or series of actions); and*
- *it is reasonable to conclude that the action(s) is likely to have a significant environmental impact; and/or*
- *there is likely to be a significant impact on a matter of national environmental significance.*

Comment on recommendation 6

These triggers already exist. The first and second dot points exist in the objective (section 4) of EA Act:

‘to the greatest extent practicable, that each matter affecting the environment which is, in the opinion of the NT EPA, a matter which could reasonably be considered to be capable of having a significant effect on the environment, is fully examined and taken into consideration.’

While the objective of the EA Act may require modification, it provides greater clarity and certainty than that proposed in recommendation 6. The EA Act does not include matters of national significance, which are one of many environmental elements potentially subject to significant environmental impact.

These ‘triggers’ can be difficult to interpret in any given case. This is particularly so because ‘significant effect of the environment’ or ‘significant impact’ is not defined in the EA Act.

The NT EPA already has guidelines on when an NOI is not required for projects that would be approved under four pieces of sectoral legislation and a guideline on what should be included in an NOI. A guideline on the identification of significant impacts is in preparation.

The NT EPA’s views on recommendation 6

The recommendation has been implemented. The EA Act and NT EPA guidelines provide understanding on triggers for environmental impact assessment. Some of these guidelines may require adoption at the legislative level in order to provide certainty for industry and the community. It may be possible to enhance the clarity of the EA Act and its objective when it is re-written.

Recommendation 7

The review’s recommendation 7

Clarify the referral process to make it clear that a proponent has the responsibility to either:

- *submit an NOI for their project to the EPA themselves if there is likely to be a significant environmental impact; or*
- *ensure that the relevant sectoral decision making agency has referred the action to the EPA.*

Comment on recommendation 7

It is most efficient and effective for the proponent to have responsibility for submission of an NOI when a project has potential for significantly affecting the environment. It would save time for the proponent by directly referring the project to the NT EPA rather than detouring through another agency, and it would likely encourage greater compliance with NT EPA requirements for appropriate content in an NOI, saving additional time and double handling.

The second clause (dot point 2) may perpetuate the review’s and the NT EPA’s concerns about certainty in responsibility for submitting an NOI. This clause is written such that it may be impossible for a proponent to guarantee or even achieve. This clause may be better constructed by providing an agency with a discretionary power to

independently submit a referral when this has not occurred. This is as provided under the Australian Government's *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

The NT EPA's views on recommendation 7

The NT EPA supports implementation of the recommendation subject to the proposed amendment of the second clause. This would eliminate existing difficulties with sectoral referrals and provide a precautionary measure to ensure submission of NOIs when appropriate.

Recommendation 8

The review's recommendation 8

The EPA should be empowered to publish an "adequacy score card" concurrently with a proponent's EIA documentation. This scorecard:

- *should focus on the adequacy of the environmental risk assessments and the sufficiency or completeness of the performance based management arrangements proposed; and*
- *a draft of the scorecard should be provided to the proponent ahead of publication and the proponent given the opportunity to correct their documentation.*

Consideration should be given to using peer review to outsource preparation of the adequacy scorecard. If "Supplementary Reports" are required to correct information deficiencies then these Reports should be subject to public disclosure prior to the EPA proceeding to finalise recommendations.

Comment on recommendation 8

The proposed implementation of the intent of this recommendation requires improvement. Inadequacies affect virtually all aspects of the EIS, including:

- failure to adequately address terms of reference
- deferral of critical data gathering until after sectoral project approval
- failure to undertake risk management and assessment according to the national standard, including
 - failure to provide objectives, identify risk criteria, identify and apply a consistent measure of consequence, confused identification of impacts and consequences, confusion as to the definition of likelihood
 - failure to justify levels of likelihood and consequence
 - failure to assess the levels of uncertainty associated with likelihood and consequence estimates
 - failure to adequately assess the effectiveness of mitigation measures
 - estimates of risk that do not allow for comparison of the risk levels of different potentially significant effects of the environment, preventing informed allocation of resources to mitigation of different risks

- no or insufficient baseline data to allow for detection of change following initiation of operations
- inadequate sampling design and intensity used for data gathering and proposed for monitoring
- poor stakeholder consultation
- project descriptions that are insufficient or even inconsistent, obscuring what impacts may occur, their significance and proposed impact mitigation.

The net results are:

- deferral of assessment of critical issues until the supplementary phase of the assessment
- a poorly informed public
- a slow and difficult assessment causing delays to project schedules and additional expense to the proponent caused by a need to provide supplementary data, analysis, risk assessment, mitigation strategies and even redesign of projects
- onerous approval conditions and regulatory attention should all inadequacies not be detected and corrected.

The primary losers are the proponent and the community.

These inadequacies prompted the NT EPA to institute a voluntary pre-submission review of draft EISs to help the proponent identify major shortcomings that need to be corrected. Not all proponents avail themselves of this opportunity. Those that do respond tend not to correct the deficiencies, preferring to wait and see what happens and undertake corrections during the supplement phase of the process. This effectively prevents the public from knowing and understanding the basis on which the NT EPA has to make its assessment decisions. This is inappropriate and to the proponent's detriment.

The intention of the proposed 'score card' to correct these deficiencies is sound—i.e. to inform the public on inadequacies in the EIS and provide proponents with the opportunity to correct their EISs prior to submission.

There are two concerns with the recommendation as written.

The first is the use of a 'score card'. This implies that a proponent would receive, and the public would have access to, a card providing a score, for argument's sake, of between zero and 10, with five perceived as the passing grade. This is not helpful to the proponent or the public, as even a single deficiency could be sufficient to require a non-passing grade for the EIS.

What is needed is an 'adequacy report' providing the proponent with advice on which components of the EIS are in need of addition to or correction of the material presented. The great breadth of the deficiencies encountered in EISs requires that the adequacy report not be limited to the small range of matters provided for in recommendation 8, dot point 1. It should be based on all matters associated with the EIS.

Recommendation 8, dot point 3 deals with two unrelated matters. The first is the use of consultants in the assessment process and the second to public availability of supplements to draft EISs.

The NT EPA uses consultants where practicable, especially when there is a need for highly specialised advice not available in the NT EPA or NT Government.

The practicality of using a consultant is strongly influenced by the short timeframes imposed on the NT EPA when assessing an EIS. Use of a consultant can delay the process, often by a considerable period. The proponent bears the consequences in terms of impacts on project timeframes and certainty.

An additional constraint is imposed by consultants often being loath to be critical of the work of other consultants, who may in turn be asked to review the former's EIS output, or who are competitors for work in the same industry. Consultants can also take longer than doing it yourself, if agency has the skills available. These are significant impediments.

There is a significant lack of transparency surrounding the material used by the NT EPA to provide its assessment report. The supplementary material is not made available to the public until after the assessment report is submitted to the Minister for the Environment and responsible minister.

The NT EPA's views on recommendation 8

Adoption of recommendation 8 would:

- be greatly improved by use of an adequacy report rather than a 'score card' and by broadening the matters considered in making the report
- improve the transparency of material (the supplement) used by the NT EPA during its assessment of EISs.

Recommendation 9

The recommendation 9

The Terms of Reference for EIAs and the subsequent Assessment Reports should be issued with clear statements about the length of time for which they will be valid. The length of time should be based on the likelihood of significant change to material environmental concerns.

Comment on recommendation 9

The NT EPA currently issues a statement of a validity period for each project's terms of reference for the EIS.

The NT EPA does not issue a validity period for an assessment report. It is critical that an assessment report remain valid for a project until it ceases, or a change in the circumstances of the project causes a change in or addition to its environmental impacts that would require a new EIS. This is necessary for maintaining responsible implementation of EIS recommendations and for providing the proponent with greater certainty.

It would be helpful to have the capacity to invalidate an assessment report and environmental approval if the project does not commence within a specified period of time. It would also be helpful to proponents to have the capacity to gain minor alterations to assessment report recommendations/approval conditions and for the Minister for the

Environment to approve major changes to assessment recommendations/approval conditions.

Improved clarity of the existing provisions for dealing with a significant potential change in a project's effect on the environment would provide greater certainty for the community and proponents.

The NT EPA's views on recommendation 9

The NT EPA supports the imposition of a validity period on terms of reference for EISs. It views a validity period for assessment report recommendations as contrary to good practice unless the proponent fails to implement the project.

There is need for a mechanism to provide for minor and major alterations in assessment report recommendations/approval conditions, and for review and restructure of provisions for dealing with potentially significant changes in a project's effects on the environment.

Recommendation 10

The review's recommendation 10

Enhance trust and confidence in the effectiveness of the sectoral one-stop-shop environmental assessment process by:

- *requiring responsible decision makers to report publicly on how they have put EPA recommendations into project approval conditions; and*
- *requiring proponents to report annually and publicly on compliance with environment related conditions of approval.*

Comment on recommendation 10

Both dot points of the recommendation are basic transparency measures that should apply to any option for structural change. The measures should be implemented in the EA Act and if a sectoral environmental approval framework were adopted, in all sectoral environmental approval legislation, unless there are good policy reasons to do otherwise. This recommendation is basic to achieving the outcomes desired from Recommendation 1, or any alternative structural option adopted.

The NT EPA's views on recommendation 10

The NT EPA fully supports implementation of recommendation 10, irrespective of the structural option adopted, its implementation through the EA Act and any sectoral approval legislation as appropriate.

Recommendation 11

The review's recommendation 11

Charge the NT EPA with assurance monitoring and reporting on the operation of the system. This monitoring should have a performance improvement orientation, as opposed to a compliance orientation, and should focus on:

- *the integrity of the assessment system – in particular whether systems are in place and operating effectively – to ensure that actions requiring assessment or approval are being appropriately identified and assessed;*

- *the effectiveness of the sectoral one-stop-shops, including compliance with transparency and reporting commitments;*
- *the operation of risk management arrangements within the assessment and approval system to ensure that they are robust, well-modulated and used to achieve ESD outcomes;*
- *the extent to which the system is delivering risk-based, adaptive and outcomes-focussed decisions*
- *the operation of relevant quality assurance arrangements;*
- *the extent to which proponents are demonstrably building community confidence;*
- *the compliance of proponents with disclosure and environmental performance reporting obligations; and*
- *the effectiveness of compliance and enforcement monitoring and reporting.*

Comment on recommendation 11

This recommendation is very similar to recommendation 1, dot point 8, which also proposes calling on the NT EPA to conduct assurance monitoring. Another similar recommendation is made under recommendation 3. Recommendation 11 elaborates on the substance of what is intended to be monitored. Comments made under recommendation 1, dot point 8 will not be repeated here, where the focus is on what is to be monitored and how. This is critically important if the proposed assurance monitoring is to achieve its intended outcome; i.e. public reassurance that a sectoral agency is capable of providing for 'adequate environmental safeguards' and engendering credibility in the eyes of the public.

The outcome sought is based on confirming the application of the proposed uniform, high-level processes of sectoral agency decision making. The assurance monitoring (audits) is proposed to be sufficient to overcome the effects of conflict of interest in the sectoral 'one-stop-shop' system.

The assurance monitoring is to be undertaken such that it is:

- not a compliance function
- not to review individual decisions
- to be oriented towards improving performance.

Two of recommendation 11's eight dot points (2 and 7) could be monitored in this way. An examination of the high-level performance functions proposed to be accredited (recommendation 1, dot point 2) reveals nine matters that could be considered for the assurance monitoring. Two of these are essentially the same as those provided in recommendation 11. The nine matters are:

- legislation provides for consideration of environmental matters
- legislation permits the application and enforcement of environmental conditions
- the legislation permits consideration of ESD matters
- the agency has access to adequate skills and expertise

- there is public consultation
- decision-making processes are documented and transparent
- there is a compliance and enforcement policy
- decision makers publish a statement of reasons for decisions involving translation of assessment report draft conditions into approval conditions
- proponents to provide annual reporting on implementation of approval conditions.

It is not intended that these be viewed as the total number of possible high-level standards that could be developed and considered. The dot points above concerning agency processes might well be converted into a larger number of minor steps that could be audited, or other matters included. The dot points above allow evaluation of the potential value of the assurance monitoring proposed.

It would be an easy matter to determine whether a sectoral agency had implemented the high-level minimum standards (i.e. yes or no). This alone could not be used to determine the more important questions of whether these tools were used appropriately or whether the system was working effectively. This would require examination of the nature of the decisions and outcomes of those decisions. This capacity is precluded by the review's recommendations on the nature of the audits. Nor would the recommendation on what is to be evaluated allow for determination of whether the tools were applied in all, some or none of the situations that required their application. If there were no record of a tool being used, it does not mean there were no situations where it should/could have been used. The recommendations seem to rate having the tools above the appropriate and effective use of those tools. The latter would not be subject to the assurance monitoring (audits).

Recommendation 11's five matters that could not be effectively audited according to the review's recommendations (recommendation dot points 1, 3, 4, 6, and 8) are:

- to ensure that actions requiring assessment and approval are being appropriately identified and assessed (this requires evaluation of the decision made and its outcomes)
- to ensure that the operation of risk management arrangements are robust, well-modulated and used to achieve ESD outcomes (this requires evaluation of multiple decisions and the outcomes)
- the extent of delivery of risk-based adaptive and outcome-based decisions (this requires evaluation of multiple decisions and the outcomes)
- the extent to which proponents demonstrate building community confidence (this is entirely focussed on decisions and outcomes)
- the effectiveness of compliance and enforcement monitoring and reporting (this is entirely focussed on decisions and outcomes).

These are all important questions. Answering the questions would take a lot more than the review's recommendations allow.

The assurance-monitoring recommendations proposed can only hope to achieve a minor level of public reassurance. That reassurance would be undermined by unacceptable environmental outcomes that could not be detected using the proposed

recommendations. It could show that a sectoral agency has (or perhaps not) the desired set of tools (many of which would be publicly available through the accreditation process) and some (or all) of which were seen to be used (or not used) without an ability to record whether the tools were appropriately used (provided good outcomes). The only outcome of the process would be that the agency, as expected from the accreditation process, has the opportunity to behave well. It has very little to do with improving public credibility or demonstrating a capacity to provide 'adequate environmental safeguards'.

The purpose of the assurance monitoring (audits) is critical to the implementation and credible functioning of a sectoral approval framework. Achieving that purpose requires a higher level of audit than is proposed in the review. The required level of audit is expensive, time consuming, disruptive of the recipient agency's functioning and highly intrusive.

The purpose of the review's proposed assurance monitoring, and the utility of possible outcomes achievable using the review's recommendations, need more thorough examination. Is assurance monitoring as proposed really worth it?

Appropriately enhanced existing audit powers are too demanding to provide the continuous, high-level monitoring role envisioned in the review and would need to be confined to highly specific instances of known concern.

The NT EPA's views on recommendation 11

Adoption of recommendation 11 would require careful evaluation of decisions and outcomes to achieve a significant increase in public credibility. The NT EPA does not support the assurance monitoring as proposed.

The NT EPA recognises an urgent need for enhanced audit powers to be included in the EA Act. Audits should be focussed on known cases of environmental concern.

The adoption of a single environmental approval issued by the Minister for the Environment with compliance and enforcement functions undertaken by the NT EPA, and the transparency measures associated with this model, including public reporting against approval conditions, supported by appropriate auditing powers in the EA Act, would provide the necessary public credibility of the system.

Recommendation 12

The review's recommendation 12

The overall capacity, capability and robustness of the NT environmental management system will be enhanced if there is a clear separation between the role of independent environmental assessment and provision of advice to Government on environmental policy. This can be achieved by:

- *confirming the operation of the EPA as an independent Board with a dedicated Chair;*
- *supporting EPA Board Meetings with a dedicated Secretariat responsible for managing meetings, recording decisions, and liaising with the Department, much in the way that Cabinet Secretariats operate;*
- *confirming the requirement that the Chief Executive of the Department of Lands, Planning and the Environment provide the EPA with all the necessary logistical and professional support to perform its functions including assurance monitoring functions as well as other specified regulatory functions;*

- *ensure that environmental policy development, including the development of guidelines and compliance and enforcement policies is performed within the Department of Lands, Planning and the Environment under the direction of the responsible Minister; and*
- *as with other respected independent statutory bodies, the EPA's back office support, including professional and technical expertise, and administrative services, will continue to be provided by the line Department.*

Comment on recommendation 12

Recommendation 12 is focussed on the roles, responsibilities and functioning of the NT EPA. To evaluate the effects of recommendation 12 on the independence of the NT EPA, and any other consequences stemming from the recommendation, it is necessary for there to be clarity as to the existing roles, responsibilities and functioning of the NT EPA. These are clearly outlined in the NT EPA Act.

The NT EPA Act provides the objectives the NT EPA is to achieve, the level of independence it is able to implement in its functioning, the roles it is obliged to undertake and the limits imposed on that role, the support provided for its functioning and the NT EPA's role in administering that support.

The objectives the NT EPA is to achieve are:

- to promote ecologically sustainable development
- to protect the environment, having regard to the need to enable ecologically sustainable development
- to promote effective waste management and waste minimisation strategies
- to enhance community and business confidence in the environmental protection regime of the Territory.

To achieve these objectives, the NT EPA is established as an independent body corporate. It is not subject to the direction or control of the minister in the exercise of its powers or the performance of its functions, or the direction or control of the minister in the exercise of a member's powers or the performance of the member's functions.

The NT EPA's functions are to advise and report to the minister, undertake functions associated with environmental assessments and the management of waste and pollution conferred on the NT EPA under NT EPA Act, or any other Act, and to perform any other functions conferred on it by NT EPA Act or any other Act.

Advice to the minister must be provided at his or her request, and may concern:

- achieving appropriate and effective environmental policy and management for the Territory
- legislation related to the environment and its administration
- issues affecting the Territory's capacity to achieve ecologically sustainable development
- emerging environmental issues

- the cumulative impacts of development on the environment
- or
- any other matter related to the objectives of the NT EPA.

The NT EPA may provide the above advice to the minister on its own initiative. The NT EPA must also respond to ministerial requests to inquire into and provide reports on any aspect of environmental quality in the Territory.

The NT EPA may take the following into consideration when providing advice to the minister:

- the need to adopt objectives, targets and standards for environmental management that are:
 - soundly and scientifically based
 - consistent with best practices
- the need to consider:
 - the global dimension of environmental impacts of actions and policies
 - regional variations in the environment
- the need to develop a strong, growing and diversified economy and a well-informed and engaged private sector that can enhance the capacity for protection of the environment
- the need to maintain and enhance international competitiveness in an environmentally sound way
- the need to adopt cost-effective and flexible policy instruments, including, for example, improved valuation, pricing and incentive mechanisms
- government economic policies and priorities for the Territory
- any other matters the NT EPA considers relevant.

The NT EPA may make guidelines about its administrative practices and procedures, which may include guidelines that provide for dealing with culturally sensitive or commercial information.

To achieve its objectives, the NT EPA must be, and is, empowered to implement the EA Act, the WMPC Act and the *Environment Protection (Beverage Containers and Plastic Bags) Act*.

The Chief Executive (currently the CE for DLPE) must provide the NT EPA with staff and facilities to enable it to properly exercise its powers and perform its functions. A staff member provided to the NT EPA is subject only to the direction of the chairperson in the conduct of his or her duties for the NT EPA.

The NT EPA is responsible to the Legislative Assembly. This is achieved by the chairperson providing the minister with an annual report of its performance. The minister must table the report in the Legislative Assembly.

The OECD (2014, page 57) highlights the potential risks of undue influence and loss of trust when an independent regulator is supported by ministry (departmental) staff. These include:

- 'risks to the quality of decision making due to the quantity and quality of services provided by the ministry (department) or by constraints on the regulator's ability to fully control the resources at its disposal
- risks of inappropriate information exchange between staff working for the regulator and ministry (departmental) staff; for example, staff involved in decisions related to funding of external bodies and risks that staff may be conflicted by apparent differences in the approach or interests of the ministry (department) and those of the regulator.'

Both are of concern when staff allocated to serve the regulator's needs are concurrently or sequentially serving similar needs of the department.

The NT EPA views these risks as presenting significant concern to the authority's integrity and recommends that the staff supporting the NT EPA's legislated functions not be put in the position of attempting to serve two masters. This could only be achieved by establishing the NT EPA as a fully independent body with control of its finance and staff.

The NT EPA Act clearly provides for the minister to request and receive, or the NT EPA to voluntarily provide advice on, policy (including guidelines and compliance and enforcement guidelines) and legislative matters. This review is a good example of this role being implemented.

OECD (2014) endorses the provision of policy advice by an independent regulator. This is provided on the basis of recognition of practical considerations related to the location of relevant human resources. It describes the process as one of the independent regulator providing advice to the minister and the department providing for formal drafting and development prior to being re-submitted to the minister. It also appreciates and supports the value of consultation between the department and the regulator during the drafting and development of the policy. This is how policy development is undertaken when suggested by the NT EPA; however, there is no formal provision for consultation between DLPE and the NT EPA.

The Western Australian *Environment Protection Act 1986* avoids the inefficiencies and staff duplication inherent in the current processes. The Western Australian Act provides for the independent EPA to provide policy advice at the behest of the minister (or the EPA) by drafting the advice, including statutory instruments. To ensure recognition of independence, the draft is published (including in the Gazette) and public consultation undertaken. The draft is revised as appropriate, published (including in the Gazette) and submitted to the minister as a draft. The minister may undertake consultation if the draft varies greatly from the first draft or can set up a consultative committee. The minister may approve or not approve the draft or seek reconsideration by the EPA.

This process is open, transparent, accountable and is seen to maintain the WA EPA's independence.

The *Victorian Environment Protection Act 1970* established the Victorian EPA and provides for the Governor of Victoria to assent to regulations developed by the Victorian EPA.

The current Northern Territory procedures for providing and finalising policy advice to the minister requires duplication of services provided by the NT EPA and DLPE, or imposes conflicts of interest on staff from sequential or concurrent direction by DLPE and the NT

EPA. Formalising and extending the procedures of the NT EPA's policy roles would provide greater transparency and efficiency and avoid potential loss of ministerial and NT EPA credibility.

Dot point 1 recommends retention of the independent role of the NT EPA and its dedicated chairperson. The proposed changes (dot points 2, 4 and 5) would significantly undermine the capacity of the NT EPA to meet its statutory obligations of independent advice and function and transparency in delivery of its functions.

Recommendation 12, dot points 1 and 3 are in keeping with the existing situation, but when viewed collectively with the other recommendations are taken mean:

- reduction in the resourcing of the NT EPA to a secretariat to manage NT EPA members' activities and act as liaison with the department
- provision of other services (including those related to operations) under the control of the department, not the NT EPA.

As described in the OECD (2014) principles and recommendations, and as described in the second reading speech and the NT EPA Act, this would undermine the credibility of the NT EPA. It would be based on staff providing departmental outcomes, or outcomes potentially heavily conflicted with departmental agendas (i.e. it would not be independent). The recommendations do not provide a clear statement that the NT EPA, via its chairperson, would maintain management responsibilities for the staff in performing their operational functions and for the staff to be free from conflicting interests. Any such, the proposed change is likely to result in a significant loss to the credibility of the NT EPA.

Recommendation 12 does not meet the objectives of the proposed reforms.

The NT EPA's views on recommendation 12

The NT EPA does not support recommendation 12 and recommends:

- that the Western Australian *Environment Protection Act 1986* be reviewed as a basis for providing a more transparent and efficient process for providing the minister with policy advice
- that the most effective way of protecting the independence and transparency of the NT EPA is to establish it as a fully independent regulatory body managing its own financial and staffing matters.

Recommendation 13

The review's recommendation 13

The Government should consider modernising the approach to managing the impacts on threatened species currently set out under the Territory Parks and Wildlife Conservation Act. This would include consolidating the threatened species management functions.

Comment on recommendation 13

This improvement would increase certainty in implementation and operational management of project approvals, and it would likely allay significant community concern in relation to threatened species management.

The NT EPA's views on recommendation 13

The NT EPA supports recommendation 13 and recommends that the reform include threatened ecological communities and general biodiversity matters, not just threatened species.

Recommendation 14

The review's recommendation 14

The NT should develop an environmental offsets policy as a priority, based on the "avoid, mitigate, offset philosophy". In the interim, the NT Government could adopt the Commonwealth Offsets Policy.

An NT-specific offsets policy should consider the conservation value of large scale threat reduction such as fire and feral animal management in offsetting the residual impact on native flora and fauna, and protected species. In this context, large scale land management undertaken by indigenous land holders and ranger groups has an important role to play in offsetting the ecological impact of localised development.

Comment on recommendation 14

Adoption of the Australian Government's policy would provide an efficient way to meet the offsets requirements of a proposed bilateral agreement on environmental approvals with the Australian Government's Department of Environment. The government should consider whether the Australian Government's offset policy meets the Northern Territory's requirements, and if not, investigate alternatives. The second dot point may provide an effective solution for the NT. Its limitation is that offsets exist for the duration of a project. This will create a community expectation for continuation of ongoing management post-project.

The NT EPA's views on recommendation 14

The NT EPA supports the recommendation but recommends consideration of government's objectives associated with adoption of the Australian Government's policy and whether these might be met in another way within a relatively short time.

Recommendation 15

The review's recommendation 15

Strengthen long term strategic land use planning so that environmental considerations and constraints – including threatened species impacts – are considered when strategic land use decisions are being made. This could be done at the time of formulating strategic area plans and/or planning scheme amendments. The resultant plans and policies should promote ESD of future urban land.

Strategic Planning documents should clearly set out the environmental constraints associated with the planning area, level of environmental risks associated with the development concept, and establish a set of outcome performance criteria to be met by individual developments under the plan.

In order to comply with the proposed Approvals Bilateral (cl 8.2) the NT Government should work towards ensuring that all environmental information is discoverable, accessible and re-usable by the community, proponents and other Government agencies.

Comment on recommendation 15

The intent of the recommendation is sound. Strategic land use planning in the Northern Territory recognises environmental and other issues to the extent determined by available information. The constraint is the level of available information, including the scale and abundance of those data. Within this constraint, the Territory's strategic land use planning endeavours to fulfil dot points one and two at the levels of strategic land use plans and area plans. Other than a few specific cases of some environmental matters, the quality of the data is unlikely to ever provide a high level of certainty within zoning categories and even across zonings.

Serious consideration needs to be given to the potential cost effectiveness of developing the information necessary to provide the level of certainty this recommendation seems to envision.

Strategic plans are necessarily designed to be of long-term standing with a requirement for periodic review. If produced as described in dot point 1, great energy could be expended in detailing some matters pertinent to some developments, never be appropriate for other developments, not required during the lifetime of the plan, and ignore unknown others that may prove important. Highly generalised information and advice can be provided, but the detail must inevitably be left to the individual developer. The existing hierarchy of planning and planning approvals caters to these diverse needs.

A central consideration in evaluating the recommendation is that the longevity of the data's usefulness may, in many cases, be less than the likely longevity of the strategic plan.

It is uncertain what, if any, legislative reforms the recommendation might require.

A number of government agencies are actively involved in the development and digital provision of data relevant to the recommendation.

The NT EPA's views on recommendation 15

The NT EPA supports the intent of the recommendation but remains uncertain as to the extent to which it could be implemented and the cost effectiveness of doing so. A more credible approach would be for government to undertake an SIA as the NT EPA proposes for the impact assessment processes (i.e. an independent environmental assessment as is required under the EA Act and NT EPA Act).

Recommendation 16

The review's recommendation 16

The Planning Act should be amended to:

- require strategic planning to, as far as possible, establish outcome-based environmental performance standards that will apply to subsequent developments. The standards should cover management of at least the potential significant impacts on matters of National Environmental Significance, NT threatened species and communities, water resources, natural environments and habitats. Standards could also include management of construction impacts such as noise and dust;*
- require consultation with the EPA during the strategic planning process on the environmental risk assessment and performance standards. Moreover, the Government may also wish to require the EPA to make recommendations to the*

Minister whether the plan:

- *has considered all relevant environmental risks;*
- *has factored these risks into the final design appropriately;*
- *and that, if implemented, the scheme is not likely to jeopardise continued functioning of important ecosystems; and*
- *that the outcomes will not be inconsistent with ESD;*
- *require assessment of environmental risks at the zoning stage of development with the aim of ensuring that subsequent development is ecologically sustainable. The assessment and associated ESD decision should be published along with the zoning decision; and*
- *exempt land development from further need for environmental impact assessment by the EPA in circumstances where the environmental risks have been assessed during the zoning.*

Comment on recommendation 16

This recommendation is closely related to recommendations 15 and 17. The comments provided under those recommendations apply equally to recommendation 16.

The NT EPA's views on recommendation 16

The NT EPA's views on recommendation 16 are the same as those expressed on recommendations 15 and 17.

Recommendation 17

The review's recommendation 17

Outside the areas subject to planning controls, the Department of Lands, Planning and the Environment, in consultation with the EPA, the Department of Mines and Energy and the Department of Land Resource Management, should undertake high level bioregional strategic environmental assessments. The purpose of such assessments should be to facilitate strategic environmental risk analysis and establish the environmental performance guidelines that subsequent development projects in these regions would need to meet.

Comment on recommendation 17

As with recommendation 16, this proposal can only be credibly implemented through a publicly acceptable process. The proposed activity is recommended to be done in consultation with the NT EPA. It is not clear what 'consultation' means. It is appropriate for the DLPE to be the proponent of such a process on its own behalf, if it is subject to formal, independent, strategic environmental assessment under the EA Act i.e. under terms of reference with formal provision of a recommendation report etc. to the Minister for the Environment. DLPE control over the assessment of the SIA inevitably causes conflicts of interest with its planning and approval roles for industry and government projects.

The failure to use an SIA would lead to individual developers having to undertake full environmental impact assessment for individual developments. They would not be able to access the simplified processes offered following an SIA.

Use of an SIA would ensure that the assessment would be conducted in a focussed, cost-effective manner. It would avoid costly data gathering lacking focus on the needs of particular industries or areas of land. The assessment could also be initiated by a private industry corporation, a consortium of companies, or an industry association as would occur when a normal EIS is required. Government should not necessarily pay the bills.

The NT EPA's views on recommendation 17

The NT EPA fully supports the intent of recommendation 17. The proposed implementation of the recommendation has not considered all the necessary variables and lacks focus. The recommendation could prove cost ineffective if implemented as proposed.

The NT EPA recommends that an SIA be used so as to maximise the cost effectiveness of the proposed process, minimise bureaucratic stumbling blocks and avoid serious conflicts of interest.

Recommendation 18

The review's recommendation 18

Test and accredit the integrated approval process under the Mining Management Act where the Minister for Mines and Energy grants project and environmental approval to mine developments against the criteria established under Recommendation 1, subject to:

- *consultations between the Department of Mines and Energy and the EPA to ensure that the guidelines for preparation of the environmental component of Mining Management Plans are fit for purpose;*
- *establishing as a performance standard for mining management plans that "adverse effects on the environment are managed to reduce environmental damage to as low as reasonably practicable";*
- *guidance for the preparation of mining management plans to ensure that they are risk-based and outcome-focused. Actions to manage environmental risk must be expressed in clear terms with performance statements that can be monitored effectively;*
- *increase transparency and confidence in the process by providing public Statements of Reasons for key decisions including:*
 - *the decision to, or not to, refer mining management plans to the EPA; and*
 - *the judgement about the acceptability of the environmental controls in mining management plans;*
- *the likelihood that the anticipated residual environmental impact is as low as reasonably practicable;*
- *publication of the environmental impact management sections of mining management plans. Commercial-in-confidence exemptions should be strictly limited;*
- *publication of annual mine environmental management performance reports prepared by proponents; and*

- *development of a compliance reporting strategy that facilitates appropriate publication of compliance audits.*

Comment on recommendation 18

The dot points are directly related to recommendation 1's required minimum standards of accreditation. Minimum standards of approvals are appropriate, but accreditation is likely to be ineffective given that a sectoral environmental approval framework is founded on conflicting interests within sectoral approvals. Publication of EMPs and statements of reason—as well as proponent annual reporting on compliance with approval conditions, compliance and enforcement policy and strategy, reporting requirements, and compliance audits—are also essential components of a single environmental approval framework.

Experience indicates that publication of compliance reporting can occur but without necessarily providing the public with any worthwhile information—e.g. much of the voluntary reporting under the *Petroleum Act*. Standards need to be established to ensure that reporting does not continue in this way into the future.

The NT EPA's views on recommendation 18

The NT EPA does not support recommendation 18. It is structured as a 'test' in relation to the flawed sectoral approval framework for structural reform, which does not meet the requirements of the objectives of the reforms. The transparency provisions are standard and should be part of a single environmental approval framework. It should only be implemented following more detailed consideration of appropriate ways in which to implement the reforms and the associated costs and bureaucratic requirements.

The NT EPA supports use of the concept of 'reasonably practicable' in reference to the mitigation of impacts. A suitable definition is:

'Risks of significant impact are to be mitigated to achieve acceptable/tolerable environmental outcomes (meet adopted risk/performance criteria, or triggers) and are as low as reasonably practicable; i.e. there are no additional practical measures that could reasonably be taken to reduce risks further.'

Recommendation 19

The review's recommendation 19

Streamline the requirements for mining management plans and environmental mining reports so that they can be used as the NOI under the EA Act. This will remove the considerable duplication currently undertaken in preparing multiple documents covering essentially the same issues.

Comment on recommendation 19

Mining management plans (MMPs) and environmental management plans (EMPs) have purposes that differ from those of NOIs.

MMPs/EMPs are designed to allow the regulator to determine the adequacy of, and allow implementation of, environmental management. AN NOI is designed to allow the NT EPA to determine the need for environmental assessment (e.g. an EIS). These different purposes have a limited compatibility, and combining two into one document is usually unsatisfactory and onerous for the proponent.

The incompatibility usually results in the NT EPA not receiving information appropriate for determining whether there is a need for an EIS. This often results in the NT EPA having to request additional information from the proponent.

It also means that a proponent has to produce a large amount of information that is of no relevance to the determination of needs for environmental assessment. The additional information in the MMP could well be irrelevant if additional assessment is required.

In most cases, the proponent would be better off providing a relatively brief NOI designed according to the NT EPA's guideline concerning what should be included in an NOI. It should be the proponent's responsibility to submit an NOI to the NT EPA. It would be less onerous on the proponent, more quickly processed without need for additional information and provide an outcome without having to produce a relatively large document (e.g. an MMP) that could be irrelevant should there be a need for an EIS.

Of greater concern to the NT EPA and the proponent is the absence of a functional relationship between the EMP provided in an EIS and the environmental components of an MMP ultimately required by the Department of Mines and Energy (DME). This is a serious duplication that would be perpetuated under a sectoral approval framework. Proponents frequently spend over a year negotiating an MMP with DME after having completed the EIS.

If an environmental approval were provided by the Minister for the Environment as under a single environmental approval framework, the EMP would have been part of the EIS and produced according to the guideline on what should be included in an EMP. It would be completed prior to receiving the environmental approval although potentially subject to alteration as a result of the minister's deliberations. It would be confined to matters having a significant effect on the environment.

Under a sectoral environmental approval framework, it would be appropriate for the mining specific issues in an MMP to be finalised in parallel with EMP development in the EIS rather than both hanging in limbo for lengthy periods post EIS.

The NT EPA's views on recommendation 19

The NT EPA views the existing process of melding the functions of an NOI and an MMP or EPM as unlikely to provide an efficient outcome for proponents. An NOI is no more suitable as an MMP than an MMP is as a substitute for an NOI. EMPs and NOIs meet divergent needs and contain divergent content. It is more efficient and effective for proponents to provide NOIs directly to the NT EPA.

The recommendation should address the more serious issue of duplication of processes used to develop EMPs during the EIS process and the environmental components of an MMP. This significant problem for proponents could be alleviated by:

- the government adopting the NT EPA's guidelines on content of NOIs and EMPs as regulatory material
- adoption of recommendation 7 placing the onus for provision of an NOI on the proponent
- proponents developing the mining component of MMPs in parallel with the development and approval of EMPs through the EIS process.

Recommendation 20

The review's recommendation 20

Grant approval to mining management plans for periods related to the scale of environmental risks and the likely effectiveness of proposed management interventions. These approvals should be granted for periods of up to five years, subject to annual performance reporting, to reduce transaction costs for industry and approval agencies without increasing environmental risk.

Comment on recommendation 20

The NT EPA supports application of variable duration approvals for environmental management approvals as a means for rewarding good practice and allowing for closer regulation of proponents with poor practices.

The NT EPA's views on recommendation 20

The NT EPA supports this recommendation.

Recommendation 21

The review's recommendation 21

Consider amending the Waste Management and Pollution Act and the Water Act to create a single regulatory regime for management of mine site water, waste and pollution both on and off-site. Responsibility for administering this arrangement might be delegated to the Department of Mines and Energy under appropriate monitoring and reporting arrangements when the Acts are triggered by mine-related activities.

Comment on recommendation 21

The NT EPA supports the creation of a single regime for regulation of waste and pollution across all industries and land tenures. Removal of the exemption for mining and petroleum under the WMPC Act is a critical first step to allow equity and certainty in the application of environmental management of these issues.

The proposed amendments would be most efficiently implemented as applying to management of all pollution or waste management related to significant environmental effects conditioned in a single environmental approval, and all pollution and waste matters in sectors not having legislation to manage environmental effects. The Act would not apply when sectoral legislation provided for management of environmental matters and the effects of pollution and waste that were less than significant and not subject to conditions imposed by a single environmental approval.

The above regulatory change needs to be complemented with removal of contaminated water discharges from the *Water Act*. The Chair of the NT EPA currently holds a personal delegation from the Controller of Water Resources for implementation of the sections of the *Water Act* associated with discharge licensing. The relevant sections of the WMPC Act would need to be reviewed to ensure that appropriate amendments were put in place to deal with discharges if necessary.

It would also require improved clarity about the application of the WMPC Act in relation to the *Marine Pollution Act*; i.e. marine pollution from sources other than those related to the MARPOL Agreement.

The equity and certainty of regulatory application under this recommendation should not be undermined by transfer of the WMPC Act to a sectoral agency; i.e. one that would inevitably be subject to conflicts of interest.

The NT EPA's views on recommendation 21

The NT EPA supports the intent and implementation of the recommendation, subject to:

- the WMPC Act continuing to be administered by an independent authority (i.e. the NT EPA) as recommended by the NT EPA in comments under review recommendations 3 and 12
- the *Water Act* being amended to remove waste discharge licensing, with potential minor amendments to the WMPC Act to ensure sound, continuing licensing of discharges as necessary
- marine waste and pollution matters not covered by the MARPOL Agreement being clearly identified and subject to the WMPC Act.

Recommendation 22

The review's recommendation 22

Ensure that all primary decision making legislation used to authorise projects and developments provides for the decision maker to:

- *consider environmental issues, including relevant international obligations, national policies, guidelines and plans;*
- *consider cross-border issues;*
- *implement, via conditions, any advice of the NT EPA;*
- *impose risk-based environmental conditions, including offsets and requirements for management plans;*
- *require public reporting of performance monitoring; and*
- *enforce conditions.*

Comment on recommendation 22

The NT EPA considers that these high-level minimum management standards are critical requirements for all environmental approvals, irrespective of what structure the government adopts for the environmental management framework.

The NT EPA's views on recommendation 22

The NT EPA supports the intent of the recommendation while recognising that their application is unlikely to overcome the conflicts of interest that characterise the sectoral approval framework. It should only be implemented following more detailed consideration of appropriate ways in which to implement the reforms and the associated costs and bureaucratic requirements.

APPENDIX C: ASSESSMENT OF RECOMMENDATIONS AGAINST OBJECTIVES OF THE REFORMS

Assessment of the review's recommendations and associated dot points in relation to the assessment's objectives (Y= yes, N = no, E = an existing practices/legislation or not requiring legislative amendment)

Rec	Dot point	Effective & efficient	No conflict of interest	Promotes equity	Provides certainty & credibility	Helps meet national obligations	Promotes ESD	Comments
1		N	N	N	N	N	N	The sectoral approval framework does not meet the performance criteria.
	1	Y	Y	Y	Y	Y	Y	Minimum standards are appropriate; accreditation is not.
	2	Y	Y	Y	Y	Y	Y	Minimum standards are appropriate; accreditation is not.
	3	N	Y	Y	Y	Y	Y	Environmental approvals should be granted by the Minister for the Environment.
	4	N	N	N	N	N	N	
	5	N	Y	Y	Y	Y	Y	Appropriate if implemented under environmental approval by the Minister for the Environment.
	6	E	E	E	E	E	E	
	7	Y	Y	Y	Y	Y	Y	Appropriate if implemented under environmental approval by the Minister for the Environment.
	8	N	Y	N	N	N	N	Alternative provided.
2		E	E	E	E	E	E	

Rec	Dot point	Effective & efficient	No conflict of interest	Promotes equity	Provides certainty & credibility	Helps meet national obligations	Promotes ESD	Comments
	1	E	E	E	E	E	E	
	2	E	E	E	E	E	E	
	3	E	E	E	E	E	E	
3		N	N	N	N	N	N	The role of the NT EPA should not change as proposed under the sectoral approval framework.
	1	Y	Y	Y	Y	Y	Y	
	2	Y	Y	Y	Y	Y	Y	Not practical under the sectoral approval framework.
	3	N	Y	N	N	N	N	Alternative for enhanced audits is provided.
	4	E	E	E	E	E	E	
	5	Y	Y	Y	Y	Y	Y	Not practical under the sectoral approval framework.
4		Y	Y	Y	Y	Y	Y	Intent appropriate only; proposed implementation is inappropriate.
	1	N	N	N	N	N	N	
	2	N	N	N	N	N	N	
	3	Y	N	N	N	N	N	Proposed implementation is inappropriate.
	4	N	Y	Y	Y	Y	Y	Proposed implementation is inappropriate.
5		N	N	N	N	N	N	Alternative provided.

Rec	Dot point	Effective & efficient	No conflict of interest	Promotes equity	Provides certainty & credibility	Helps meet national obligations	Promotes ESD	Comments
	1	N	N	N	N	N	N	Alternative provided.
	2	Y	N	N	N	N	N	Alternative provided.
	3	Y	N	N	N	N	N	Alternative provided.
	4	N	N	N	N	N	N	
	5	N	N	N	N	N	N	Only useful in implementation of conditions.
	6	N	N	N	N	N	N	
	7	N	N	N	N	N	N	Useful as an option.
6		E	E	E	E	E	E	Requires regulatory improvement.
7		Y	Y	Y	Y	Y	Y	Intent is appropriate.
	1	Y	Y	Y	Y	Y	Y	
	2	N	N	N	N	N	N	Alternative provided.
8		N	N	N	N	N	N	Score card is inappropriate; alternative provided.
	1	Y	N	N	N	N	N	Should focus on all matters.
	2	Y	Y	Y	Y	Y	Y	Score card inappropriate; timing of action endorsed.
9		N	N	N	N	N	N	Alternative provided.
10		N	N	N	N	N	N	
	1	Y	Y	Y	Y	Y	Y	Only for environmental approvals by the Minister for the Environment.

Rec	Dot point	Effective & efficient	No conflict of interest	Promotes equity	Provides certainty & credibility	Helps meet national obligations	Promotes ESD	Comments
	2	Y	Y	Y	Y	Y	Y	Only for environmental approvals by the Minister for the Environment.
11		N	Y	N	N	N	N	Alternative provided.
	1	N	Y	N	N	N	N	Additional matters need to be included.
	2	N	Y	N	N	N	N	Additional matters need to be included.
	3	N	Y	N	N	N	N	Additional matters need to be included.
	4	N	Y	N	N	N	N	Additional matters need to be included.
	5	N	Y	N	N	N	N	Additional matters need to be included.
	6	N	Y	N	N	N	N	Additional matters need to be included.
	7	N	Y	N	N	N	N	Additional matters need to be included.
	8	N	Y	N	N	N	N	Additional matters need to be included.
12		N	N	N	N	N	N	Alternative provided.
	1	N	N	N	N	N	N	
	2	N	N	N	N	N	N	
13		Y	Y	Y	Y	Y	Y	Should include threatened ecological communities and biodiversity in general.
14		Y	Y	Y	Y	Y	Y	
15		E	E	E	E	E	E	
	1	E	E	E	E	E	E	
	2	E	E	E	E	E	E	

Rec	Dot point	Effective & efficient	No conflict of interest	Promotes equity	Provides certainty & credibility	Helps meet national obligations	Promotes ESD	Comments
16	1	N	N	N	N	N	N	Alternative provided.
	2	N	N	N	N	N	N	Alternative provided.
	3	E	E	E	E	E	E	
17		N	N	N	N	N	N	Alternative provided.
18		N	N	N	N	N	N	
	1	N	N	N	N	N	N	
	2	N	N	N	N	N	N	
	3	N	N	N	N	N	N	Appropriate for environmental approval under Minister for the Environment.
	4	N	N	N	N	N	N	Appropriate for environmental approval under Minister for the Environment.
	5	N	N	N	N	N	N	Appropriate for environmental approval under Minister for the Environment.
	6	N	N	N	N	N	N	Appropriate for environmental approval under Minister for the Environment.
	7	N	N	N	N	N	N	Appropriate for environmental approval under Minister for the Environment.
	8	N	N	N	N	N	N	Appropriate for environmental approval under Minister for the Environment.
19		N	Y	N	N	N	N	
20		E	E	E	E	E	E	

Rec	Dot point	Effective & efficient	No conflict of interest	Promotes equity	Provides certainty & credibility	Helps meet national obligations	Promotes ESD	Comments
21		N	N	N	N	N	N	Delegation should not be subject to the proposed conflict of interest. Should include transfer of discharge licensing from <i>Water Act</i> to WMPC Act.
22		N	N	N	N	N	N	Appropriate for environmental approval under Minister for the Environment.
	1	N	N	N	N	N	N	Appropriate for environmental approval under Minister for the Environment.
	2	N	N	N	N	N	N	Appropriate for environmental approval under Minister for the Environment.
	3	N	N	N	N	N	N	Appropriate for environmental approval under Minister for the Environment.
	4	N	N	N	N	N	N	Appropriate for environmental approval under Minister for the Environment.
	5	N	N	N	N	N	N	Appropriate for environmental approval under Minister for the Environment.
	6	N	N	N	N	N	N	Appropriate for environmental approval under Minister for the Environment.

APPENDIX D: REGULATORY AGENCIES AND LEGISLATION/FUNCTIONS POTENTIALLY APPLICABLE TO DEVELOPMENTS OCCURRING IN THE NORTHERN TERRITORY

- Department of Mines and Energy
 - *Mining Management Act*
- Northern Territory Environment Protection Authority
 - *Environmental Assessment Act*
 - *Waste Management and Pollution Control Act*
- Aboriginal Areas Protection Authority
 - *Northern Territory Sacred Sites Act*
- Department of Primary Industry and Fisheries
 - *Fisheries Act*
- Department of Transport
 - *Control of Roads Act*
- Department of Health
 - *Environmental and Public Health Act*
- Department of Lands, Planning and the Environment
 - *Planning Act*
 - *Heritage Act*
 - *Marine Pollution Act*
 - *Crown Lands Act*
- Department of Land Resource Management
 - *Water Act*
 - *Territory Parks and Wildlife Conservation Act*
 - *Soil Conservation and Land Utilisation Act*
 - *Bushfires Act*
 - *Pastoral Land Act*
 - *Weeds Management Act*
- Power and Water Corporation
 - Power and water supply

- Local governments
 - Local roads, waste disposal, stormwater
- Aboriginal land councils
 - *Aboriginal Land Rights (Northern Territory) Act 1976*
 - *Native Title Act 1993*
- The Australian Government's Department of the Environment
 - *Environmental Protection and Biodiversity Conservation Act 1999*
 - *Australian Nuclear Non-proliferation (Safeguards) Act 1987*

SUPERCEDED

APPENDIX E: NT EPA RECOMMENDATIONS FOR AN ENVIRONMENT PROTECTION ACT

Environment protection Act

These recommendations have been compiled to assist government to reform the environmental impact assessment process and implementation of an environmental approval consistent with an optimised single environmental approval framework.

The NT EPA is of the view that to be effective, an environment protection Act would need to contain specific provisions to manage the impacts of waste or pollution as currently addressed by the *Waste Management and Pollution Control Act*, waste discharge licensing provisions of the *Water Act*, and the *Litter Act*. MARPOL matters would remain in the *Marine Pollution Act*. More effective management of marine wastes and pollution could be achieved through the consideration and commencement of provisions of the *Marine Pollution Act* that have not been commenced.

Specific recommendations relating to the inclusion of the components of those Acts are not included in the recommendations below. The recommendations refer specifically to environmental assessment and approvals and the implementation of those approvals. The NT EPA considers the additional matters should be included in the design of the environment protection Act, with development and implementation of the new Act staged to prioritise the more urgent reforms associated with environmental impact assessment, environmental approvals and management.

In all cases, the recommendations are written as preliminary guidance for drafting instructions for reform. Notwithstanding this, the recommendations are the NT EPA's views only and make no presumption of future acceptance by government.

These recommendations use the following terms:

- 'Decision maker' refers to any person or entity that is required to issue a project approval but does not include the Aboriginal Areas Protection Authority. As examples, it includes the Minister for Mines and Energy under the *Mining Management Act* and the Development Consent Authority under the *Planning Act*.
- 'Portfolio minister' refers to the minister identified in the Administrative Arrangements Orders as having responsibility for an area of government relevant to the project. There may be more than one portfolio minister for any given project.
- 'Advisory bodies' refers primarily to government agencies but may include other organisations (such as cooperative research centres) that may have relevant information or experience.

Preliminary drafting instructions

1. The primary objective of the Act will be to ensure ecologically sustainable development.

The primary objective would 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, licensing and a general duty of environmental management and protection.

The objectives and principles of ecologically sustainable development and objective of environmental impact assessment are specified in the *National Strategy for Ecologically Sustainable Development*.

2. The Act will need to define 'significant impact' and the criteria used to determine a potentially significant effect on the environment; i.e. in assessing whether or not a project may have a significant impact. For example, the NT EPA may consider:
 - the character of the receiving environment and potential impacts of the proposal
 - confidence in the prediction of impacts
 - confidence in proposed management measures.
3. The Act will specify high-level minimum standards for environmental assessment and approval, implementation and reporting processes.
4. Proposals with the potential for significant environmental impact must be referred (a notice of intent, NOI) to the NT EPA by the proponent to enable the NT EPA to decide whether the proposal is to be subject to the environment impact assessment process.
5. A decision maker may refer a project if they are of the view that a proponent has not referred the project and it should be referred.
6. The NT EPA may write to the proponent directing the project be referred where the proponent has not referred the project ('call in'). Failure to comply with such a direction is an offence.
7. Offence provisions to be included for proponents who do not refer proposals (including provisions requiring a proponent to 'make good' any damage caused by proceeding without an assessment).
8. A person who is required to refer a proposal for consideration must not commence works that would implement the proposal until a decision has been made on that referral. This should be an offence provision.
9. The Act is to apply to 'proposals'. Proposals do not include activities that are required in the collection of environmental data, provided that those activities do not have a significant impact on the environment. 'Proposals' will include projects, works developments and may include policies, programs or groups of projects (for the purposes of strategic impact assessment, SIA).

10. The NT EPA is to be able to seek further information from the proponent in order to make a determination on whether assessment is required and if so, at what level.

11. The Act is to incorporate the following types of assessment decisions:

- no assessment required
- assessment is required as an
 - assessment on proponent information (API)
 - environmental impact statement (EIS)
 - strategic impact assessment (SIA)
 - public inquiry.
- the action as proposed is environmentally unacceptable.

12. All existing provisions relevant to assessment by public environmental report (PER) are to be removed.

13. The NT EPA may make an assessment decision that an action is unacceptable using information contained in an NOI (with or without additional proponent information) or material submitted during the conduct of an API, or draft EIS or draft SIA, or supplement, or any further information.

14. An unacceptable action is one reasonably considered to be fundamentally and fatally flawed; i.e. has significant impacts of that cannot be successfully mitigated, and has consequences that are catastrophic/extremely serious or irreversible.

15. The NT EPA must prepare a draft statement of unacceptability after making an assessment decision that it views an action as unacceptable.

16. The purpose of the draft statement of unacceptability is to document and demonstrate that the impacts and consequences of implementing a proposal cannot be adequately mitigated and are of such significance that the action should not proceed. The rules of procedural fairness would apply.

17. When the NT EPA considers that a strategic assessment or public inquiry is required, it is to consult with:

- the Minister for the Environment
- the proponent.

18. The NT EPA may, at its discretion, undertake its own investigations/inquiries and seek advice from advisory bodies or other relevant experts in making a determination of the assessment decision.

19. An NOI must describe the characteristics and causes of all identified potentially significant impacts including:

- the scope of the proposal
- the type, magnitude, duration, frequency and extent of the potential environmental impacts of the proposal
- the significance and nature of the surrounding biophysical environment

- the potential for on-site or off-site effects on the environment
 - the extent to which there is existing information regarding past projects and current proposals with potential or actual environmental impacts of a similar nature, and determination and mitigation of potential for cumulative impacts
 - potential economic, social and cultural impacts
 - perceived or existing levels and extent of public concern.
20. The NT EPA must issue a public statement of reasons to support decisions made during the environmental assessment process. This includes whether assessment is required and if it is, the type of assessment required.
21. The absence of potential significant impacts would result in a decision that no assessment is required. Proponents would be reminded that they are responsible for seeking any necessary regulatory approvals for specific aspects of their proposal.
22. The NT EPA may apply assessment on proponent information in situations where there are likely to be low (but significant) impacts. The environmental impacts and proposed management measures need to be understood. The proponent information will be published by the NT EPA.
23. An EIS assessment is used to consider the environmental impacts of a single 'project'.
24. The NT EPA may direct that an SIA be undertaken to consider the impacts of actions under a policy, plan or program of a proposal for the purpose of informing project planning and design; assessing significant impacts and cumulative impacts; and assessing broader scale, specified development opportunities and their environmental impacts (at the regional or catchment level). Consideration should be given to Part 10 of the *Environment Protection and Biodiversity Conservation Act* (EPBC Act) and the 'derived proposal' provisions of the *Environment Protection Act 1986* (Western Australia) in designing this process.
25. The completion of an SIA is intended to provide environmental benefit (by addressing, as far as possible, all specific impacts and the cumulative impacts of development) but also to reduce requirements for individual EIS assessments over time. Following an SIA, future specified developments in the area may result in the following assessment decisions:
- no assessment required
 - assessment on proponent information (API)
 - an EIS for developments that are not specified in the SIA or that potentially cause additional or different significant environmental impacts
- or
- the action is as proposed unacceptable.
26. Specific provisions that identify which party bears the initial cost of an SIA and how that party can recover costs from subsequent beneficiaries of the assessment will be required.

27. An assessment by public inquiry may consider all impacts of the proposal or may consider only specific impacts. It may be used as an assessment method in itself or be used in combination with assessment by EIS or SIA.
28. An inquiry is to be established through the appointment of an appropriate person to lead the inquiry. The appropriate person is appointed by the NT EPA and may not be a member of the NT EPA. Before appointing the appropriate person, the NT EPA must consult with the Minister for the Environment and proponent. The format of the inquiry will be determined by the NT EPA on a case-by-case basis in consultation with the proponent and appropriate person. The costs of the inquiry are to be met by the proponent and are payable to the NT EPA.
29. For assessment by EIS, SIA and assessment by inquiry, the NT EPA is to prepare draft terms of reference. The NT EPA will publish a notice documenting:
- the NT EPA has determined that a particular proposal requires assessment
 - draft terms of reference have been released.

The NT EPA may charge the costs of publishing this notice to the proponent.

30. The public, agencies and the proponent can provide comment on draft terms of reference. The comments are to be considered by the NT EPA in the finalisation of the draft terms of reference before they are issued to the proponent. A summary of the comments received and an explanation of the way they have been addressed (if at all) is to be made public by the NT EPA.
31. The NT EPA may publish public submissions on draft terms of reference. A person making a submission may request that all or part of the submission is withheld from publication.
32. Final terms of reference are valid for a particular period (nominally three years). This period may be extended on application to the NT EPA. When extending the validity period, the NT EPA may amend the terms of reference. The proponent is to provide any information that may be required by the NT EPA in making a determination to extend the validity period.
33. The NT EPA may seek public comment or the advice of experts as part of its assessment of whether to extend the validity period or make amendments to the terms of reference. Any costs associated with making a determination are chargeable to the proponent.
34. On receipt of the draft EIS or draft SIA, the NT EPA will prepare an adequacy report. The adequacy report will provide a high-level analysis of the NT EPA's view of the adequacy of the information presented, with specific reference to whether or not information addresses the terms of reference. The adequacy report is not a detailed analysis of the quality of information presented in the draft EIS or draft SIA for the purposes of impact assessment by the NT EPA.
35. The proponent is to publish a draft EIS or draft SIA for public comment. The draft EIS or draft SIA is to be published for a period determined by the NT EPA but not less than 30 business days as directed by the NT EPA. The proponent is to publish a notice regarding the publication of the draft EIS or draft SIA in newspapers as directed by the NT EPA. Costs of publishing the notice are to be borne by the proponent.

36. The proponent is to submit the final draft EIS or draft SIA at least 15 business days prior to the date that it intends to publish the draft EIS or draft SIA in order to enable the NT EPA to prepare the adequacy report. The adequacy report will be provided to the proponent and published at the same time as the draft EIS or draft SIA is published. The presentation of information in an adequacy report is not a 'reviewable decision' of the NT EPA.
37. A supplement is a document prepared by the proponent to respond to information and comments received during the public comment period on the EIS or SIA. A proponent is to submit a supplement unless the NT EPA determines that a supplement is not required. If the NT EPA considers a supplement is not required, it must publish its statement of reasons supporting the decision.
38. The supplement will be published by the NT EPA on receipt.
39. Having received a supplement, or where assessment is by proponent information, the NT EPA may direct a proponent to submit further information ('further information notice'). The further information notice is to be supported by a statement of reasons and will be published. Information received in response to the notice will be published by the NT EPA on receipt.
40. A proponent may request that information in a notice of intent, draft EIS, draft SIA, supplement or further information is withheld from publication by the NT EPA. It is the responsibility of the proponent to establish that information should be withheld. Information will only be withheld if it is:
- commercial in confidence
 - cultural in confidence (as advised by a land council or the Aboriginal Areas Protection Authority)
 - subject to legal professional privilege
- or
- otherwise required to be withheld by law.
41. When conducting an assessment by proponent information, or following receipt of the draft EIS or draft SIA, supplement and any further information, the NT EPA is to prepare its assessment report for submission to the minister within 10 weeks.
42. The purpose of the assessment report is to assess the impacts of the proposal and provide recommendations for mitigating and managing significant impacts. Subject to the statements below regarding sunset clauses, an assessment report remains 'valid' for as long as the proposal continues to be implemented substantially in the manner envisaged when the assessment was complete.
43. In assessing a proposal, the NT EPA may consider information from any of the following:
- information in the notice of intent
 - information in the draft EIS, draft SIA or any supplementary document
 - responses to any further information requests
 - issues raised in public submissions or meetings

- proponent's proposed management measures and responses to submissions
 - reports from a public inquiry
 - advice from other government agencies
 - additional information provided by the proponent, including peer reviews
 - expert advice commissioned by the NT EPA
 - relevant environmental policies, guidelines and standards
 - the NT EPA's own investigations and expertise
- or
- any other information considered relevant by the NT EPA.

44. Regardless of the type of assessment undertaken, the NT EPA is to have powers to:

- direct proponents to provide the NT EPA with the information the NT EPA considers necessary to facilitate the examination of the notice of intent, draft EIS, draft SIA, a supplement or response to further information
- establish a panel comprised of representatives from Territory Government agencies to provide the NT EPA with information in respect of the notice of intent, draft EIS, draft SIA, supplement, further information or inquiry report, or to make comments, suggestions or recommendations in respect of any documentation or information received through the assessment process
- request or engage a person or an organisation that, in the NT EPA's opinion, is suitably qualified to provide the NT EPA with information in respect of any information or documentation provided during the assessment process
- direct a proponent, for the purposes of an environmental assessment, to include third-party peer reviews of one or more (or all) elements of a particular proposal and the proponents proposed management response
- require the proponent to meet the costs associated with providing such expertise (that is, engagement of external consultants, third-party reviews, establishment of review panels etc.).

45. Powers are required to allow the establishment of a panel or engagement of experts and to 'stop the clock' (i.e. suspend a statutory timeframe) in relation to the development of terms of reference or the assessment report as relevant and appropriate.

46. Changes to a proposal during assessment (a revised proposal) that may alter the significance of its environmental impact are to be referred to the NT EPA for a decision.

47. The NT EPA is to consider the revised proposal and determine that:

- assessment is no longer required
- the assessment type is no longer appropriate or required and determine an alternate assessment type (including that a proposal assessed on proponent information (API) now requires assessment by EIS or SIA)

- the terms of reference are no longer appropriate or relevant and determine that new terms of reference are required
- the contents of a draft EIS, draft SIA, supplement or further information response no longer appropriately address the potential significant additional or different impacts or management responses and the draft EIS, draft SIA, supplement or further information should be resubmitted

or

- the revised proposal does not raise any additional or different impacts and the assessment can proceed.

The NT EPA will publish a statement of reasons for its decision.

48. Changes to a proposal during implementation that may alter the significance of its environmental impact are to be referred to the NT EPA for a decision (changed proposal) (see clause 14A of the EAAP).

49. The NT EPA is to consider the changed proposal and determine that:

- further assessment is required, and specify the type of assessment
- or
- the changed proposal does not raise any additional or different impacts and no further assessment is required.

The NT EPA will publish a statement of reasons for its decision.

50. In considering a revised proposal or changed proposal, in order to make a determination about requirements for further assessment, the NT EPA may consider whether the change:

- will have a significant impact on the environment that differs in a material way from the impacts identified in the initial identification and consideration of the proposal
- results in new or additional areas or locations to be subject to the significant impact (regardless of whether such areas or locations fall within the same leasehold area, planning area, catchment, basin or region of the Territory)
- results in a substantial change to the manner in which the proposal is to be implemented or managed
- results in a substantial change to the type or amount of any output
- other matters considered relevant by the NT EPA.

51. The NT EPA is to be able to require the proponent to submit information to assist it to make a determination in relation to a revised proposal.

52. The NT EPA is to be able to 'stop the clock' on the assessment process in order to make a determination on a revised proposal.

53. The NT EPA may extend consultation timeframes to reflect the complexity of a proposal and the demographics of the impacted/interested community and may

require a proponent to develop and implement a public consultation or communications strategy.

54. The NT EPA may terminate the assessment process where:

- there has been no action by a proponent within a reasonable period
- or
- the proposal has been varied to the extent that the NT EPA considers the process should be terminated and recommenced
- or
- the proponent has failed to provide information requested by the NT EPA relevant to the assessment.

In all such circumstances, the rules of procedural fairness apply.

55. The assessment process must be completed within the validity period stated in the terms of reference developed for the assessment. This includes all stages of the process from the original assessment decision to delivery of the assessment report to the Minister for the Environment. If—due to a failure by the proponent to submit the draft EIS, draft SIA, supplement or further information—the assessment process cannot be completed within the validity period, or the proponent has not sought approval to extend the period (which approval must be sought not less than six months before the expiry of the validity period), the environmental assessment process is to automatically cease. A proponent that wishes to ‘reactivate’ the proposal at a later time will be required to submit a new notice of intent.

56. The Act should provide a ‘sunset’ clause on the assessment where after five years (or such longer period as may be specified in an environmental approval) a proponent has not substantially commenced works on a proposal, that the proposal must be resubmitted to the NT EPA before the proponent commences implementation. The NT EPA can determine what form of assessment, if any, is necessary. The NT EPA can determine the extent to which, if at all, information submitted in the original assessment process can be relied on by the proponent in the new assessment. The nominal sunset clause period of five years will not apply to strategic assessments.

57. If the strategic assessment is for a development, then the sunset period is a period of five years from the later of:

- the issue of the environmental approval associated with the strategic assessment
- the completion of any project (‘derived project’) authorised under the strategic assessment

or

- the authorisation of any project (‘derived project’) under the strategic assessment, where that project has not commenced.

58. If the strategic assessment is for a policy, plan or program, then the sunset period is a period of five years from the later of:

- the completion of the strategic assessment

or

- the completion of any project authorised through under the assessed policy, plan or program.

59. The NT EPA to be able to recognise within a specific assessment report that the sunset period for the particular assessment is greater than the nominal period.

60. For the purposes of the sunset clause provisions, the 'work' that has commenced needs to be substantial and needs to have had an environmental impact.

61. Each step of the assessment process, involving actions by the NT EPA or public comment periods and submission of proponent information, is to be subject to timeframes specified in Administrative Procedures. This includes:

- seeking further information on a referral
- determining whether or not assessment is required, and if so, the type of assessment
- developing draft terms of reference
- seeking public comment on draft terms of reference
- finalising terms of reference
- developing the adequacy report
- seeking public comment on the draft EIS or draft SIA
- developing the assessment report.

Timeframes are to be specified in business days. Timeframes should be reviewed for consistency with other jurisdictions but in the first instance should reflect those in the current Act as specified business days.

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

- the proposal is of such significant impact or public interest that the NT EPA is of the opinion that additional time is required (reasons should be given for forming this opinion)
- insufficient information is provided to enable the NT EPA to make recommendations

or

- where agreed in consultation with the proponent.

63. On completion of an assessment report, the NT EPA is to prepare a draft environmental approval, including draft conditions of approval concerning significant effects on the environment as appropriate.

64. The draft environmental approval, or as appropriate draft statement of unacceptability, is to be provided to the proponent and relevant government agencies for comment.

65. The assessment report and the draft environmental approval, or as appropriate the draft statement of unacceptability, is to be provided to the minister.
66. The environmental approval, is to be issued to the proponent by the Minister for the Environment on the basis of the assessment report and draft environmental approval:
- within a specified time
 - subject to consultation with the relevant portfolio minister and other parties as determined by the minister, including seeking public comment.
67. The Minister for the Environment may adopt the draft environmental approval and conditions, or amend the draft approval, refuse to adopt the draft approval and develop a new/revised approval, or refuse to issue an approval.
68. The statement of unacceptability is to be issued by the Minister for the Environment:
- within a specified time
 - subject to consultation with the relevant portfolio minister and other parties as determined by the minister, including seeking public comment.
69. The Minister for the Environment may refuse to adopt the draft statement of unacceptability and direct the NT EPA to assess the project using one of the specified types of assessment.
70. Where the Minister for the Environment amends, rejects or develops a new approval or conditions, or rejects a draft statement of unacceptability, the minister's reasons for amending or refusing to adopt the draft approval or draft statement of unacceptability must be published by the minister:
- in the Legislative Assembly within six sitting days of the granting of the environmental approval
 - a copy of the reasons must be provided to the NT EPA.
71. The NT EPA may, at the request of the proponent or otherwise:
- make minor, non-significant amendments to an approval or conditions that may be necessary or desirable to manage the significant environmental impacts
- or
- make recommendations to the Minister for the Environment for significant amendment of an approval or conditions.

Minor, non-significant amendments, may involve changes of an administrative nature; for example, fixing errors or improvement in the mitigation of a significant potential impact.

Significant amendments may involve changes of significance such as those caused by a change in the significance of a potential environmental effect of a project.

The NT EPA must advise the Minister for the Environment, the portfolio minister and the relevant decision makers of minor changes and publish changes that it makes.

The NT EPA must make a recommendation to the Minister for the Environment on a significant requested change, which may include a decision that additional impact assessment is required. The NT EPA must advise the portfolio minister and the relevant decision makers of the NT EPA's recommendation for a significant change. The minister can approve, alter or not approve proposed significant changes to an environmental approval, or condition, subject to appropriate transparency measures.

Consideration should be given to the *Environment Protection Act 1986* (Western Australia) in designing this process.

72. A decision maker must not approve an amendment to a project, and a proponent must not commence an amended project, until the NT EPA has advised of its decision regarding the need for environmental impact assessment and, if relevant, the Minister for the Environment has made a decision in respect of an approval or condition.
73. An environmental approval remains valid:
- for the period the relevant assessment report remains valid
 - if the project has been substantially initiated and all matters the subject of the approval have been completed
- or
- if the project is subject to approved alteration and an amended validity time, and the environmental approval has been reissued or amended or otherwise declared to be valid.
74. A proponent may request an extension to the validity period for an environmental approval.
75. A proponent commits an offence if:
- there is a failure to comply with an environmental approval
 - work commences in the absence of an environmental approval.
76. The NT EPA is to have powers to enforce the environmental approval on behalf of the Minister for the Environment. The NT EPA should have a range of enforcement options, including the power to give directions, issue infringement notices or undertake prosecutions. The NT EPA may make recommendations to the Minister for the Environment for the revocation of the environmental approval (with such powers of revocation to be held by the minister).
77. Proponents are to provide the NT EPA with a publicly available annual report on compliance with approval conditions and the environmental outcomes associated with their implementation.
78. The NT EPA will provide the Minister for the Environment with a public annual report on compliance with conditions in environmental approvals.

79. The Minister for the Environment may require a person to develop an environmental management plan (EMP) as a condition of an environmental approval. The EMP is to be developed to the satisfaction of the NT EPA, another decision maker, or other bodies such as the Minister for Transport or Department of Land Resource Management, as specified in the approval.
80. The EMP cannot require any measures for protecting the environment that are inconsistent with the terms of the environmental approval granted by the Minister for the Environment.
81. An EMP is to be able to manage or protect any aspect of significant impact on the environment. Examples of EMPs or the matters that may be included in an EMP include:
- biodiversity management plans
 - dust management plans
 - emissions and discharge plans
 - erosion and sediment control plans
 - general environmental management plans
 - health impact management plans
 - heritage management plans
 - noise management plans
 - odour management plans
 - social impact management plans
 - waste reduction plans
 - water management plans.
82. Decision makers must not issue a project specific sectoral approval that is inconsistent with the minister's environmental approval and conditions.
83. Provisions are to be included in the Act to enable guidance material and standards to be developed and published by the NT EPA.

Guidance material is not to be enforceable; standards are to be enforceable. (i.e. it is to be an offence to fail to comply with the requirements specified in a standard.)

Guidance material will provide additional information and assist decision makers and proponents to understand the environmental assessment process, when an assessment may be required and the level of assessment that may be required. Examples of guidance material that may be developed include generic guidelines for an EIS for acid metalliferous drainage or the NT EPA's expectations in relation to community consultation.

Standards will be used to specify matters that may change over time but for which a level of enforcement is required; for example, a standard may specify when referral of a proposal is (or is not) required.

Standards will be developed with industry and public consultation and specified by notice in the Gazette; consideration should be given to Part 4 of the *Waste Management and Pollution Control Act* and section 18 of the *Territory Parks and Wildlife Conservation Act* for the obligations anticipated in developing enforceable standards. It is expected that standards may be substantial documents and the provision should require a notice regarding the document but not require the entire document to be published in the Gazette. It is expected that the Gazetting instrument would refer to the standard by name.

The NT EPA or minister may adopt guidelines or standards by reference. For example, if another jurisdiction has developed assessment requirements for a particular industry, the NT EPA may wish to adopt those requirements rather than developing new requirements.

84. Provision should be made for adoption of the Australian Government Department of the Environment's policy on offsets as a temporary measure while the Northern Territory investigates its requirements and possible alternatives.
85. Provisions are to be added to the Act to allow the NT EPA to undertake audits on compliance with assessment processes, including any undertakings given during the process and reflected in the assessment report, implementation of environmental approvals, implementation and reporting processes, and environmental outcomes achieved. Decision makers, agencies and proponents are to be required to cooperate with assurance auditing or subsequent auditing/investigation if required in audit findings.
86. The NT EPA will report audit findings to the Minister for the Environment and publish audit findings on its website.
87. Provision is to be made in the Act for the NT EPA to undertake corrective action where necessary to direct an agency or the proponent to undertake minor corrections as required, or in the case of major issues, recommend that the Minister for the Environment direct such corrective action.
88. The Act should provide for appeals directed to the Northern Territory Civil and Administrative Tribunal. Appeals should be on decisions made by the NT EPA during the assessment process; e.g. a decision that assessment is required and the level of the assessment and also on decisions made by the Minister for the Environment, e.g. in relation to conditions on an environmental approval. There should not be the opportunity to appeal the information provided in an assessment report or adequacy report.
89. The NT EPA is to be able to charge fees for the environmental assessment and approval process. Fees are to be separately chargeable for each step of the process (e.g. developing or amending terms of reference, preparing the assessment report). If a proponent submits a variation, or other changes to information, that results in the NT EPA being required to reconsider a decision or redraft terms of reference then such costs should be separately chargeable.

For certainty, it is proposed that cost recovery provisions apply to the entire project life cycle, from referral to final approval and including any amendments to the approval. Cost recovery processes under the EPBC Act, *Environment Protection Act 1994* (Queensland) and *State Development and Public Works Organisation Act 1971* (Queensland) should be considered.

SUPERCEDED

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