

## Report on Public Comments on the Draft Northern Territory Assessment Bilateral Agreement

A draft of the new Assessment Bilateral Agreement between the Commonwealth and the Northern Territory of Australia (**NTA**) was published on 7 December 2020 with an invitation for any person to comment by 29 January 2021 (longer than the 28 days required by section 49A(a) of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**)).

This report provides a summary of the public comments. The public comments will be published on the Department of Agriculture, Water and the Environment (the **department**) website, except where the author has marked the public comment, or parts of the public comment, as confidential.

Four public comments were received on the draft Assessment Bilateral Agreement during the public consultation period. The following public comments were received and are listed in the order in which they were received:

1. Minerals Council of Australia
2. Environment Centre NT
3. Environmental Defenders Office
4. Arid Lands Environment Centre

Three of the public comments objected to, and one public comment was supportive of, the draft Assessment Bilateral Agreement.

An overview of the key issues and the department's response is provided below.

### 1. Timing of the new Assessment Bilateral Agreement

#### Issues raised

Three of the public comments received expressed concerns around the timing of the new Assessment Bilateral Agreement, due to review of the EPBC Act and pending changes to the *Environment Protection Act 2019 (NT)* (**EP Act**). Common concerns include:

- The EPBC Act will require major amendments after the independent review of the EPBC Act (the Samuels Review) including the implementation of National Standards. These amendments will require major changes to the Assessment Bilateral Agreement.
- Significant amendments are proposed to the EP Act and *Mining Management Act 2001 (NT)* (**MMA**) which will require major changes to the Assessment Bilateral Agreement.

#### Response

*The final report for the independent review of the EPBC Act is publicly available. The review was undertaken by an independent reviewer, Professor Graeme Samuel AC, supported by an Expert Panel. The final report is comprehensive, and the Government is committed to work through the full detail of the recommendations with stakeholders.*

*On 19 September 2019, the Northern Territory (NT) government passed new environmental legislation. These changes mean that the previous 2014 Assessment Bilateral Agreement no longer applies to some proposals. The Australian and NT governments have agreed to enter into a new Assessment Bilateral Agreement which reflects the new legislative framework. This new agreement will revoke and replace the 2014 bilateral agreement. This process is separate and distinct from negotiating bilateral agreements for single touch environmental approvals.*

*Changes to existing and future assessment bilateral agreements will be proportionate to changes made to the EPBC Act, its administration and the NTA legislations, following the implementation of the review's recommendations. The Australian and NT governments are aware of the need to ensure that such changes are compatible with existing and future bilateral agreements.*

*The NT government is currently undertaking stakeholder consultation to reform the EP Act and MMA. The objective of these reforms is to transfer responsibility for environment management of mining activities out of the MMA and into the EP Act. These reforms will apply to all types of mining activities.*

*The EP Act currently only applies to activities (including mining activities) that may have a significant impact on the environment.*

*The proposed changes to the EP Act do not affect the environmental impact assessment or environmental approval processes associated with significant development. These changes will not have any impact on the obligations under, or purpose of, the new Assessment Bilateral Agreement.*

## **2. Resourcing of the Northern Territory Government**

### **Issues raised**

Three of the public comments raised concerns about the current lack of resourcing in the NT Government. The public comments raised concerns that the NT Government is already under significant resource strain and that the added responsibilities of the new Assessment Bilateral Agreement will exacerbate this issue.

### **Response**

*The NT government, and the Northern Territory Environmental Protection Authority (NT EPA) already conduct environmental impact assessments on behalf of the Australian government. Previously these assessments have been conducted under an Assessment Bilateral Agreement, however that Agreement has expired. Consequently, the NT government is obliged to seek its assessment processes be accredited on a project-by-project basis in order to continue to deliver streamlined assessment processes for proponents.*

*Given previous and existing arrangements, there are no resourcing implications for the NTA from the new Assessment Bilateral Agreement.*

### 3. Scope and effectiveness of the *Environment Protection Act 2019 (NT)*

#### Issue raised

Three of the public comments raised issues with the EP Act and its failure to assess a number of projects that should have assessed. Issues were raised about the intent of the EP Act and that there has not been sufficient time to test the new legislation. Specific concerns include:

- A number of significant proposals for land clearing have been approved without any referrals under the EP Act (for example Ban Ban Springs, Nyathi Reserve Pty Ltd for a permit to clear Pastoral Land, not calling in a water extraction licence near Tennant Creek, and not assessing fracking in the Beetaloo Basin).
- The construction of Port Melville, off the coast of Darwin, without an NTA environmental impact statement or approval, despite its potentially significant impacts on threatened species habitat.
- The Pastoral Land Board's approval of over 20,000 hectares of clearing of native vegetation at Maryfield Station without any formal Environmental Impact Assessment process.
- The EP Act is a new legislation without sufficient time to prove its efficacy. Hence it is too early to accredit the legislation for assessments under the EPBC Act.
- The EP Act is skewed towards development rather than environmental conservation and is not capable of providing an assessment framework for matters of national environmental significance (Matters of NES) in lieu of assessment under the EPBC Act.
- The EP Act meets only 2 of the 14 national standards.
- The EP Act processes frequently do not meet national standards for public participation, transparency, information, review and objective decision-making.
- The EP Act is not well placed to assess cumulative impacts of cross boarder actions.

#### Response

*The EP Act and Environment Protection Regulations 2020 (EP Regulations) commenced in June 2020. The EP Act and EP Regulations were developed through key stakeholder consultation and public consultation and took into consideration the outcomes of a number of reviews into the NTA's environmental impact assessment and approval processes. The environmental impact assessment processes that have been adopted reflect best practice environmental management and provide increased certainty and transparency when compared to the NTA's previous legislation. The NTA's processes also include increased opportunities for public participation when compared with both its previous processes and the EPBC Act.*

*The objectives of the EP Act are:*

- (a) to protect the environment of the Territory; and*

- (b) to promote ecologically sustainable development so that the wellbeing of the people of the Territory is maintained or improved without adverse impact on the environment of the Territory; and*
- (c) to recognise the role of environmental impact assessment and environmental approval in promoting the protection and management of the environment of the Territory; and*
- (d) to provide for broad community involvement during the process of environmental impact assessment and environmental approval; and*
- (e) to recognise the role that Aboriginal people have as stewards of their country as conferred under their traditions and recognised in law, and the importance of participation by Aboriginal people and communities in environmental decision-making processes.*

*The EP Act and EP Regulations establish an environmental impact assessment and environmental approval system designed to minimise impacts on the environment and deliver ecologically sustainable development. The EP Act provides for increased public participation, assessment of cumulative impacts and the impacts of a changing climate. The EP Act provides for a test for significant impact that applies to all aspects of the environment (it includes, but is not limited to, those defined as Matters of NES under the EPBC Act). The EP Act establishes an obligation on proponents to refer an action if it has the potential to have a significant impact on the environment. The threshold to refer a proposal to the NT EPA is based on evidence about the significance of the potential impact and is applied consistently across industry sectors. The NT EPA has 'call-in' powers that can be used to require a proponent to refer an action where it has not done so in accordance with the EP Act and EP Regulations. The NT EPA has not yet been required to exercise these call-in powers as all proponents who are required to refer their proposal have done so. Regardless of this, it is noted that the new Assessment Bilateral Agreement does not apply to the referral stage.*

*Environmental impact assessment processes in the NTA are conducted by the independent NT EPA. The NT EPA, and its members, are not subject to Ministerial direction in the performance of its powers and functions. The NT EPA operates transparently which provides accountability. This structure removes any potential conflicts of interest between government's various responsibilities in encouraging economic development and the environmental impact assessment process and ensures objective decision making.*

*The proposed National Environmental Standards prepared by Professor Graeme Samuel AC in his role as the independent reviewer of the EPBC Act do not apply to environmental impact assessment processes. Nevertheless, the EP Act and EP Regulations contain numerous opportunities for public participation in the impact assessment process and ensure transparency in decision making.*

#### **4. Scope and effectiveness of the new Assessment Bilateral Agreement**

##### **Issues raised**

Two of the public comments raised concern about the current scope of the draft Assessment Bilateral Agreement and suggested the following changes:

- One public comment raised the issue that currently section 6.4 of the draft Assessment Bilateral Agreement only requires expert advice be sought for coal seam gas and large coal mining activities. They suggested that a number of issues that are not part of the current EPBC process such as shale and tight gas, fracking and greenhouse gas emissions should also require expert advice.
- Another public comment suggested excluding the element thorium from the trigger to seek and consider advice from the Supervising Scientist (section 6.4(c)) in accordance with the Memorandum of Understanding between the Commonwealth and the NTA in relation to working arrangements for the regulation of uranium mining in the Territory (the **MoU**). Thorium is not explicitly included in the definition of Nuclear Actions under the EPBC Act, *Environmental Protection and Biodiversity Conservation Regulations 2000* nor the MoU. Parties should not be compelled to accept advice from government officers that might override the authority of relevant ministers.

Another public comment raised concern about the effectiveness of the draft Assessment Bilateral Agreement by stating that:

- The Draft Agreement proposes that the NT EPA will assess various classes of actions that, but for the Draft Agreement, would normally require assessment under the EPBC Act. The effect of the Draft Agreement is that certain classes of action will not be assessed under the EPBC Act and will instead be assessed under the EP Act.

### Response

*The Independent Expert Scientific Committee on Coal Seam Gas and Large Coal Mining Development (IESC) established under the EPBC Act in 2012, provides independent expert scientific advice to Australian governments on the potential impacts of proposed coal seam gas and large coal mining developments on water resources. The IESC's functions are further prescribed in s 505D<sup>1</sup> of the EPBC Act. Although under s 505D(2)(b) of the EPBC Act, the IESC has additional functions outside of the scope of assessing coal seam gas and large coal mining developments, it is specified that such functions are only to be exercised 'at the request of the appropriate Minister of a declared State or Territory' and with the written agreement of the Minister for the Environment. Under s 505E, however, it is provided that a "declared State or Territory" can only include States or Territories which are a party to the National Partnership Agreement on Coal Seam Gas and Large Coal Mining Development (the **NPA**). The NPA, entered into in 2012, however, was between the Australian Government and state governments of Queensland, New South Wales, Victoria, and South Australia. Hence, as the NTA is **not** a declared State nor Territory, any coal seam, shale or tight gas development that will be referred to the IESC (as per the recommendations of ALEC), will be beyond the scope of the IESC to comment or provide expert scientific advice on, under the current arrangements of the EPBC Act.*

*In addition, the NTA supports the use of independent expert reviews when indicated by a rigorous risk-based assessment. The NT does not support unnecessary additional red-tape.*

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<sup>1</sup> Note: Under s 505D(2)(b), at the request of the appropriate Minister of a declared State or Territory and with the written agreement of the Minister for the Environment, the IESC is also to provide scientific advice to the Minister of the State or Territory in relation to matters other than coal seam gas and large coal mining developments, if the IESC has sufficient scientific expertise.

*The NTA considers that the scope of the new Assessment Bilateral Agreement should be limited to the obligations specified in the EPBC Act and does not support the suggestion that all forms of hydraulic fracturing activities should require the seeking of expert advice.*

*With regards greenhouse gas emissions assessed by experts during assessment. Climate change considerations such as greenhouse gas emissions are not one of the provisions of Part 3 of the EPBC Act. Under section 75 of the EPBC Act, the Minister for the Environment decides if a proposed action needs approval only if the proposed action has, will have or is likely to have adverse impacts on any matter protected by each provision of Part 3 of the EPBC Act, as climate change considerations are not currently matters of any provision of Part 3 of the EPBC Act, considering greenhouse gas emissions in the assessment process would go beyond the scope of the EPBC Act.*

*Although thorium is not directly mentioned in the 'Nuclear actions' section of the EPBC Act Policy Statement 1.1 Significant Impact Guidelines – Matters of National Environmental Significance 2013, it is a radioactive element whose isotopes and decay products commonly qualify mineral sands and rare earths proposals as nuclear actions under section 22(1)(e) and (g) of the EPBC Act if. This is because thorium and its decay products may be sufficiently concentrated in ore, processing or tailings products such that radioactivity levels exceed 1 Becquerel per gram (Bq/g). Including thorium in the new Assessment Bilateral Agreement is therefore essential for the Commonwealth's administration and enforcement of the EPBC Act.*

*According to Item 2.1(a) and 2.1(b) of Schedule 1 of the new Assessment Bilateral Agreement, each class of action's assessment determined by the EP Act and EP Regulations will also be assessed in accordance to regulation 3.02 of the EPBC Regulations and Part 8 of the EPBC Act. If some classes of action have not been considered in the new Assessment Bilateral Agreement is because those classes of actions did not pass the threshold to be referred to the NT EPA. This threshold is based on evidence about the significance of the potential impact of the class of action and is applied consistently across industry sectors. Moreover, it should be noted that the new Assessment Bilateral Agreement does not apply to the referral stage. If some classes of actions have, will have or are likely to have adverse impacts on Matters of NES and are not specified in Schedule 1 of the Agreement, those classes of actions will be assessed under Part 8 of the EPBC Act. It is important to note that the new Assessment Bilateral Agreement, does not have effect in classes of action located in a Commonwealth area or Commonwealth agency or in Kakadu National Park or Uluru-Kata Tjuta National Park (Clause 4.2(c) of the Agreement under section 49 of the EPBC Act).*

## **5. Potential conflicts of interest**

### **Issues raised**

One public comment raised concerns about 'conflicts of interest' in relation to the NT Government assessments and approvals of certain actions. The public comment states the following:

- NT Government should not be responsible for approving actions relating to World Heritage and Ramsar sites. The EP Act does not address Matters of NES adequately. The Commonwealth is the best placed agency to assess impacts to nationally listed Ramsar wetlands and World Heritage sites.

- State governments often have conflicting interests being involved in different roles including the proponent, sponsor or beneficiary as well as the assessment agency.
- The NT Government does not include a third-party merits-based appeal or a judicial review pathway under the EP Act.

## **Response**

*The new Assessment Bilateral Agreement would not provide the NT Government with additional approval powers. Under the new Assessment Bilateral Agreement, the Commonwealth Environment Minister will still be required to make a decision on whether approve an action that will have or is likely to have a significant impact on Matters of NES under the EPBC Act. The new Assessment Bilateral Agreement authorises the environmental impact assessment of actions occurring within the Territory. It remains the Australian Government's responsibility to approve actions, including considering the cross-border impacts of approvals. If the Minister is not satisfied that the agreement is being complied with, or that assessment processes under the agreement do not give effect to the agreement in a way which accords with the objects of the EPBC Act and Australia's international obligations, sections 57 to 64 of the EPBC Act provide a mechanism by which the agreement can be cancelled or suspended.*

*Environmental impact assessment processes in the NTA are conducted by the independent NT EPA. The NT EPA, and its members, are not subject to Ministerial direction in the performance of its powers and functions. The NT EPA operates transparently which provides accountability.*

*This structure removes any potential conflicts of interest between government's various responsibilities in encouraging economic development and the environmental impact assessment process.*

*Part 12 of the EP Act contains both merits and judicial review processes. Merits review processes are limited to persons directly affected by compliance and enforcement decisions and do not apply to environmental impact assessment processes.*

*Environmental impact assessment and environmental approval processes are subject to judicial review. Standing for judicial review extends to:*

- *a proponent of an action*
- *an applicant for a decision*
- *a person directly affected by the decision*
- *a person who has made a genuine and valid submission during an environmental impact assessment and environmental approval process. A genuine and valid submission encompasses all types of submissions except form letters and petitions, and submissions that are not received within the submission period. The court has the discretion to grant standing to a person who made a submission outside of the submission period.*