



**NORTHERN
LAND COUNCIL**





**Central
Land Council**

Joint Northern and Central Land Council

**Submission to the Northern Territory Department of Environment
and Natural Resources:**

Environmental Regulatory Reform Discussion Paper

June 2017

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Introduction

The Northern and Central Land Councils are independent statutory authorities established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) and also Native Title representative bodies for the purposes of the *Native Title Act 1993*. Pursuant to the ALRA more than 50% of the NT and around 85% of the NT coastline is now held by Aboriginal Land Trusts on behalf of traditional owners.



The **Northern Land Council** (NLC) was established in 1973 and became an independent statutory authority following passage of the ALRA in 1976. Within its jurisdiction, the NLC assists traditional owners by providing services in its key output areas of land, sea and water management, land acquisition, mineral and petroleum, community development, Aboriginal land trust administration, native title services, advocacy, information and policy advice. Relevant to this submission is a responsibility for facilitating economic development over more than 210,000 square kilometres of the land mass of the Northern Territory.

NLC's vision is for a Territory in which the rights and responsibilities of every Traditional Aboriginal Owner are recognised and in which Aboriginal people benefit economically, socially and culturally from the secure possession of their lands, seas and intellectual property. Our mission is to assist Aboriginal people in the northern region of the NT to acquire and manage their traditional lands and seas, through strong leadership, advocacy, industry engagement and management.

The **Central Land Council** (CLC) has statutory responsibilities under the ALRA for approximately 780,000 km² of land in the southern half of the Northern Territory. Of this area 417,318 km² is Aboriginal land under the ALRA. The CLC is also a Native Title Representative Body established under the *Native Title Act 1993* ('NTA') for the same region. Given existing pastoral land could not be claimed under the ALRA, Aboriginal freehold land in the CLC area tends to be very arid and remote. Some traditional owners unable to claim land under the ALRA have succeeded in obtaining rights to small areas known as Community Living Areas, under NT legislation.

Through its elected representative Council of 90 community delegates the CLC continues to represent the aspirations and interests of approximately 17,500 traditional landowners and other Aboriginal people resident in its region, on a wide range of land-based and socio-political issues.

The CLC aims to improve the lives and futures of its Aboriginal constituents through sustainable development and change. The CLC's development approach is based on an integrated and strengths-based strategy of building economic, social and cultural capital. Consistent with its statutory functions the CLC undertakes significant initiatives relating to: natural and cultural resource management; the development of remote enterprise and employment pathways; innovative community development work, ensuring land owners use income generated from

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land use agreements for broad community benefit; and negotiating land administration and land use agreements for third parties and traditional owners.

Overview



NLC and CLC welcome the reform process being undertaken by the NT Government, and the opportunity to be part of this process.

As noted in the discussion paper, previous reviews and submissions to those reviews have raised a number of issues and argued the need for reform. We concur that reform is essential. There is widespread dissatisfaction with the operation of the current system, including comment on its failings by the NT EPA itself. There is now the opportunity to implement a system that addresses existing shortcomings and effectively supports Aboriginal people in caring for their land and waters.

It is important that a coherent, principled framework of environmental protection legislation be enacted that recognises the status and cultural values of the Northern Territory's first peoples. Any new legislation should require assessments and approvals to be done in accordance with the principles of ESD that incorporate specific reference to Aboriginal cultural knowledge and the protection of Aboriginal cultural values.

To ensure genuine reform goes ahead, we urge the NT Government to adopt the following:

- Commitment to a clear timeline and the resources required to undertake the reform agenda;
- Ongoing consultation with key stakeholders, including for developing draft TEOs (not simply providing comment after they have been drafted) and offsets policy;
- An appropriate engagement process with Traditional Owners through the land councils, particularly on key questions such as community consultation and incorporation of traditional knowledge, to ensure prior and informed consent in the development of legislation and policy frameworks;
- Recognising that this is a significant body of work and some areas may be longer term, identification of key reforms to be implemented within the next two years, including:
 - Development of an offset policy
 - Expansion of the NT EPA to include Aboriginal representation
 - Guidelines for community consultation
 - Measures for increasing public confidence in the information underpinning environmental assessments
 - Guidelines for communicating EIS/complex information to enhance understanding and participation in the decision making processes

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Legislation relevant to Aboriginal land interests

NT is unique in having the ALRA, as well as the *Northern Territory Aboriginal Sacred Sites Act 1989*. The Native Title Act and *Aboriginal Land NT Act 1978* also provide protection for Aboriginal rights and interests over land and sea. It is essential to be clear on how any legislative changes will interact with these Acts, and to ensure Aboriginal rights are acknowledged and not compromised.



The ALRA was the first attempt by an Australian government to legally recognise the Aboriginal system of land ownership and put into law the concept of inalienable freehold title. It is a fundamental piece of social reform that has provided land for many Aboriginal people in the Northern Territory and so enabled them to maintain, and in some cases to re-establish, their cultural identity.

By providing legal title and a measure of control over Aboriginal land, the Act has allowed Aboriginal landowners to determine the pace and extent of involvement in the broader Australian society and economy. ALRA has contributed to the responsible development of the Northern Territory by providing traditional landowners with rights to make decisions about their own country, and providing third parties with certainty about the process for accessing Aboriginal land. The many resource development projects and commercial enterprises now operating on Aboriginal land show that respecting our land rights can be compatible with national economic development.

The Land Rights Act sets out the functions and responsibilities of the land councils. Section 23 sets out core functions, to:

- identify the relevant traditional owners and affected people;
- ascertain and express the wishes and opinions of Aboriginal people about the management of, and legislation in relation to, their land and waters;
- consult with traditional Aboriginal owners and other Aboriginal people affected by proposals;
- negotiate on behalf of traditional Aboriginal owners with parties interested in using Aboriginal land or land the subject of a land claim;
- assist Aboriginal people carry out commercial activities; obtain traditional owners informed consent, as a group;
- assist in the protection of sacred sites;
- direct a Aboriginal Land Trust to enter into any agreement or take any action concerning Aboriginal land.

In addition, the ALRA underpins the sacred site protection regime in the NT by allowing the Territory to make laws to protect, or prevent the desecration of, sacred sites in the NT; providing the Land Councils with functions to ensure the protection of sacred sites; and making it an offence to enter or remain on land that is a sacred site. The NT is the only jurisdiction in Australia that provides sacred sites with such protection and should rightly be proud of this achievement and the recognition it affords to Aboriginal people in the NT. Such protections mean that Aboriginal people can safely support development proposals on their land in the comfort that their sacred sites will be

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adequately protected in the face of such developments. It is the long-standing experience of the land councils that Aboriginal people are supportive of sustainable development and willing for their land to provide opportunities for employment and income for their benefit. However, this is only true insofar as they can be confident that sacred sites are not at risk. Sacred sites are places of deep spiritual significance and are an integral part of Aboriginal culture. Their protection is vital for the continuation of religious and cultural traditions and as a source of identity for Aboriginal people. Consistent with our functions, the land councils assist Aboriginal people to protect their sacred sites by ensuring that every development proposal that comes before the councils (including exploration and mining, infrastructure and road works) is subject to site clearance (work area clearance process) either through the land council itself or through the Aboriginal Areas Protection Authority (AAPA).

Expert Report on Proposal for Environmental Regulatory Reform in the Northern Territory

The CLC and NLC commissioned the attached report in response to the *Environmental Regulatory Reform Discussion Paper May 2017* and support all of the recommendations made in the report.

It is essential to view these recommendations in light of the unique NT context: that Aboriginal people make up approximately 30% of the population¹ (ABS 2011), the extensive Aboriginal property rights and interests, and the Acts discussed above.

These demographics and the significant land and waters asset base position Aboriginal people as owners, managers and major investors in policy and programs relevant to our cultural, economic, social and environmental interests. However, this is not recognised in current legislative, institutional and policy frameworks. Aboriginal representation on bodies such as the EPA Board and any advisory boards should reflect this significant role.



With reference to Aboriginal interests, we draw your particular attention to the following areas:

Territory Environmental Objectives (TEOs)

As raised with DENR staff, the land councils emphasise our desire to be involved in the development of draft TEOs, to ensure consideration is given to Aboriginal interests at the earliest stage.

TEOs provide a mechanism for inserting Indigenous interests early in the EIA process. Recognition of Aboriginal cultural values is essential, and TEOs must be in alignment with the Sacred Sites Act and

¹ ABS (2011), *Estimates of Aboriginal and Torres Strait Islander Australians*, Australian Bureau of Statistics, <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001> [accessed 22/6/17].

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ALRA. Without knowing the proposed format of TEOs, it is difficult to provide input. However, we have attached some examples of how TEOs that are inclusive of Aboriginal interests may look as Appendix A.

Incorporating traditional knowledge

The significance of fully integrating traditional knowledge into the Northern Territory’s environmental impact assessment process should not be underestimated. Aboriginal traditional knowledge has developed over millennia and is key to management of a variety of specific environments, yet it remains largely ignored by industry and by environmental scientists and managers. This is the outcome of ineffective policies that have been implemented without consideration of the value of traditional knowledge, and how it can be respectfully acquired and utilised to improve conservation of the Northern Territory environments.



Currently, recognition of traditional knowledge in the environmental impact assessment process in the Northern Territory remains a matter of policy, not law. Recent application of the policy by the NTEPA has led to gathering of traditional knowledge specific to areas and to projects, but there are few examples where the knowledge is being used to its full effect. As a consequence of loose application of policy due mainly to lack of a formal framework that defines how traditional knowledge should be used, in most cases it is simply being catalogued, categorised and stored in databases, but not being used in a meaningful, rational or scientific way in the Northern Territory.

Incorporation of traditional knowledge into legislation and through every stage of the EIA process would address this.

Meaningful community engagement

Culturally appropriate consultation is essential and lacking in the present system, where there is no requirement for on-country consultation in the EIA process. Currently, crucial data is often not released until late in the process, and there is not sufficient time for it to be adequately reviewed, let alone communicated to Indigenous stakeholders who are directly affected. EIA documentation should at minimum include a plan outlining culturally appropriate consultation to be undertaken on-country prior to conclusion of the assessment process, and ongoing throughout the term of the project.

As outlined above, traditional knowledge can make a valuable contribution to environmental outcomes and the EIA process. In keeping with modern best practice principles, it is essential that the EIA process consider social and cultural impacts alongside environmental. History has shown that in the Northern Territory, during ‘consultation’ with Aboriginal people, project developments are presented as *fait accompli*, with little opportunity to input any changes that might be necessary to protect sensitive areas having cultural values.

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A survey of Recent Terms of Reference/EIS guidelines issued by the NTEPA does not demonstrate a consistent or in-depth approach to engaging Aboriginal people on questions regarding the risk a project might pose to traditional knowledge and/or Aboriginal culture. The main focus continues to be on protecting past aspects of culture (i.e. heritage) and not the more relevant living aspects that define the values of current Aboriginal society. The focus should be shifted to structured gathering, management and use of traditional knowledge via participatory engagement.

A fully participatory engagement process that carries Aboriginal people through project development from initial planning to project closure, encompassing environmental impact assessments, risk analysis and management at all phases of the project would represent the gold standard for consultation. Participation at this level offers the opportunity for Aboriginal people to manage their cultural estate and apply traditional knowledge across the whole of the project's life in a practical and meaningful way (Smith 2016)².



The CLC and NLC recommend that environmental assessment and approval legislation should include an obligation on the proponent to consider how they engage with Aboriginal communities and Traditional Owners and that they:

- work with the community during planning and conducting its research
- seek the prior and informed consent of the community prior to acquisition of information
- collect traditional Aboriginal knowledge in collaboration with the community
- respect traditional Aboriginal knowledge and Aboriginal intellectual property rights, and
- bring traditional Aboriginal knowledge and scientific knowledge together.

Further, we recommend that proponents should be required – under legislation - to lodge consultation reports and engagement plans in accordance with guidelines when referring a matter. A key element of the consultation report and engagement plan needs to involve engaging with Aboriginal communities and should be conducted in accordance with guidelines on matters such as:

- a presumption of on-country consultation
- the need for plain English and local language versions of documents, or parts of documents
- the importance of culturally appropriate practices
- who is to be consulted, including Traditional Owners and diverse Aboriginal communities
- resources provided to facilitate engagement

² Smith, HD (2016): Life of Mine Planning and Cultural Sustainability on Aboriginal Land, *First International Congress on Planning for Closure of Mining Operations*, Santiago, Chile.

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Failure to complete consultation reports and engagement plans adequately (for example, in accordance with the guidelines) should be part of the adequacy review conducted by NT EPA.

Environmental offsets

Aboriginal landowners have an interest in offset policy from two perspectives: as communities directly and indirectly affected by the environmental, social and/or cultural impacts of projects, and as businesses taking part in the offset economy.



A well-designed offset framework will support economic development in Aboriginal communities, provide employment, preserve traditional knowledge and generate social benefits, while ensuring a net environmental benefit.

Where possible, offsets should be applied within the bioregion of the project. Where there are direct impacts on a community (for example deterioration of water quality), local application should be a requirement and should utilise Aboriginal businesses and/or Aboriginal employment if available.

We request that the Land Councils have an opportunity to provide input from the earliest stages of development of an offset policy; further, that this policy does not wait on the delivery of the full reform agenda, but be progressed immediately.



Specifically, we recommend that:

- The Department of Environment and Natural Resources should immediately begin community consultation on environmental offsets before a Discussion Paper is prepared.
- These consultations should form the basis of a Discussion Paper on offsets, including principles and mechanisms to give clear guidance on the scope and application of the scheme and to address ecological, social and equity considerations.
- Consultation should be ongoing, including the establishment of an independent Steering Committee with oversight and advisory functions.

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APPENDIX A: Example TEOs incorporating an Indigenous perspective

- (1) The Territory recognises that the well-being of its peoples are built on strong and enduring relationships with lands and seas and is committed to maintaining and where necessary re-building those relationships.
- (2) The Territory will maintain and enhance the quality of environments and their contributions to human well-being by:
 - maintaining critical features of the structure and function of Territory landscapes at all spatial scales
 - protecting biophysical and cultural connections within and among important elements of the landscape.
- (3) The Territory seeks strong sustainability from all developments so that livelihoods and other contributors to well-being are improved without substantially reducing natural and cultural capital.
- (4) The Territory will manage land and seascapes to maintain the high quality of ecosystems services that underpin customary and commerce-based livelihoods and lifestyles.
- (5) To foster equity in sharing of benefits and costs of development, proposals will show and be assessed on how benefits are generated and delivered and costs minimised for the local and regional people most directly affected by development-related change.
- (6) To ensure that gains in environment, economy, and social and human capital are mutually reinforcing, major resource use or development will be designed to help resolve existing environmental problems while avoiding new ones.
- (7) To foster an informed and hence engaged and supportive public, the Territory will require full and timely public access to information and analysis used in decision-making on resource use and management, and environmental impacts and their management.
- (8) To ensure that no segment of Territory society is systematically disadvantaged relative to others, Territory law will require that all natural and cultural values identified through regular consultations with the community are considered by decision-makers in resource use and management.
- (9) To ensure consideration of the full range of values affected by resource management decisions, the Territory will require developers and regulators to explain important decisions in terms of the weight given to different values.
- (10) Because Indigenous Territorians suffer severe disadvantage but have particular rights and obligations in regard to lands, seas and natural resources, specific Indigenous values, allocations, entitlements and access to benefits must be addressed in all development and natural resource management plans.
- (11) To help overcome systemic disadvantage, partnerships with Indigenous people will assist them to participate fully in development and resource use decisions affecting them.
- (12) Government will provide direction and context for other sectors by supporting and coordinating regional resource management, conservation and development plans framed by landholders and their communities and designed for strong sustainability.

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(13) To inhibit over-concentration of development and resource use in one or a few locations or entitlement in the hands of a few individuals or groups, processes for allocation of entitlements, particularly early in the development/use cycle will be designed to foster equitable access.