



**Australian Government**  
**Department of the Environment and Water Resources**



# Review of Australian Government/Northern Territory Government Assessment Bilateral Agreement

# Review Report

June 2007

## Table of Contents

### Page

<b>I)</b>	<b>Background .....</b>	<b>3</b>
	THE BILATERAL AGREEMENT .....	3
	PROJECTS ASSESSED UNDER THE AGREEMENT .....	3
	THE REVIEW PROCESS.....	5
<b>II)</b>	<b>Consultation .....</b>	<b>5</b>
<b>III)</b>	<b>Evaluation of the operation of the agreement.....</b>	<b>5</b>
	1. PUBLIC COMMENT AND CONSULTATION .....	5
	2. CONSIDERATION OF ENVIRONMENTAL IMPACT .....	8
	3. EFFICIENT, EFFECTIVE AND TIMELY PROCESS, MINIMISING DUPLICATION OF TWO ASSESSMENT PROCESSES .....	9
	4. FURTHER COMMENTS .....	11
<b>IV)</b>	<b>Recommendation .....</b>	<b>15</b>
<b>V)</b>	<b>Appendix 1 - Bilateral agreement.....</b>	<b>17</b>
<b>VI)</b>	<b>Appendix 2 - Set of review questions .....</b>	<b>30</b>
<b>VII)</b>	<b>Appendix 3 - List of Submissions .....</b>	<b>32</b>

## I) BACKGROUND

### The Bilateral Agreement

The Bilateral Agreement between the Australian Government and the Northern Territory under section 45 of the *Environment Protection and Biodiversity Conservation Act 1999* ('EPBC Act') relating to Environmental Impact Assessment ('the Agreement'), was entered into on 31 May 2002. A copy of the Agreement is at [Appendix 1](#).

The specific objects of this agreement are to contribute to:

- (a) protecting the environment;
- (b) promoting the conservation and ecologically sustainable use of natural resources;
- (c) ensuring an efficient, timely, and effective process for environmental assessment and approval of actions; and
- (d) minimising duplication in environmental assessment of relevant impacts within the meaning of section 82 of the *Environment Protection and Biodiversity Conservation Act 1999* through Commonwealth accreditation of Northern Territory processes.

The Agreement provides for the accreditation of the Environmental Impact Statement ('EIS') process and the Public Environmental Report ('PER') process under the Northern Territory *Environmental Assessment Act* and the Inquiry process carried out under the Northern Territory *Inquiries Act* (set out in Schedule 1 to the Agreement) to ensure an integrated and coordinated approach to environmental assessment for actions requiring approval from both the Australian Government (under the EPBC Act) and the Northern Territory.

An action does not require assessment under Part 8 (environmental impact assessment) of the EPBC Act if the action is assessed in the manner described in Schedule 1 to the Agreement.

The five year life of the Agreement ends on 30 May 2007. Undertaking this review meets a requirement of the EPBC Act and the Agreement and provides a basis on which to amend the agreement under section 56A of the EPBC Act.

### Projects assessed under the Agreement

In the five year period since the Agreement entered into force ten projects have been assessed or are being assessed under the Agreement, and are as follows:

EPBC Act Project title	Proponent	Status
1. Woodside Energy Limited and Alcan Gove Pty Limited/Energy generation and supply/Wadeye to Gove (Galupa)/NT/Trans-territory Gas Pipeline (EPBC 2003/1186)	Woodside Energy Limited and Alcan Gove Pty Limited	Assessment process used – EIS under the Northern Territory <i>Environmental Assessment Act</i>  Assessment ongoing
2. MIM Holdings Limited/Mining/McArthur River/NT/McArthur River Mine Expansion (EPBC 2003/954)	MIM Holdings Ltd	Assessment process used – EIS under the Northern Territory <i>Environmental Assessment Act</i>  Approved – 20 December 2006

<b>EPBC Act Project title</b>	<b>Proponent</b>	<b>Status</b>
3. Compass Resources NL/Mining/Rum Jungle/NT/Copper, cobalt and nickel mine - Browns Oxide Project (EPBC 2005/2011)	Compass Resources NL	Assessment process used – PER under the Northern Territory <i>Environmental Assessment Act</i>  Approved – 27 June 2006
4. Marine Harvest/Aquaculture/Port Patterson/NT/Port Patterson Barramundi Sea Cage Farm (EPBC 2005/2149)	Marine Harvest	Assessment process used – EIS under the Northern Territory <i>Environmental Assessment Act</i>  Proposal withdrawn – 30 November 2006
5. Marine Harvest/Aquaculture/Melville Island/NT/Snake Bay Barramundi Sea Cage Farm (EPBC 2005/2150)	Marine Harvest	Assessment process used – EIS under the Northern Territory <i>Environmental Assessment Act</i>  Proposal withdrawn – 30 November 2006
6. Matilda Minerals Ltd/Mining/Tiwi Islands/NT/Andranangoo Creek & Lethbridge Bay mineral sand mining (EPBC 2005/2155)	Matilda Minerals Ltd	Assessment process used – EIS under the Northern Territory <i>Environmental Assessment Act</i>  Approved – 17 July 2006
7. NT Department of Planning and Infrastructure/Land transport/Victoria River/NT/Victoria Hwy Upgrade (EPBC 2005/2307)	NT Department of Planning and Infrastructure	Assessment process used – PER under the Northern Territory <i>Environmental Assessment Act</i>  Approved – 28 March 2007
8. Marine Harvest/Aquaculture/Darwin Harbour/NT/Barramundi Nursery Farm (EPBC 2005/2378)	Marine Harvest	Assessment process used – EIS under the Northern Territory <i>Environmental Assessment Act</i>  Proposal withdrawn – 30 November 2006
9. Territory Iron Ltd/Mining/Frances Creek/NT/Frances Creek Iron Ore Mine (EPBC 2006/2550)	Territory Iron Ltd	Assessment process used – PER under the Northern Territory <i>Environmental Assessment Act</i>  Approved – 21 December 2006
10. Darwin Clean Fuels Pty Ltd/Energy generation and supply/Darwin Business Park/NT/Condensate Processing Facility, East Arm (EPBC 2006/2734)	Darwin Clean Fuels Pty Ltd	Assessment process used – EIS under the Northern Territory <i>Environmental Assessment Act</i>  Assessment ongoing

## **The Review Process**

Section 65 of the EPBC Act requires a review of the operation of the Agreement to be carried out prior to its expiry on 30 May 2007.

Under clause 22.2 of the Agreement, the parties agreed that:

- (a) the review of this agreement under section 65 will be carried out jointly by Environment Australia and the relevant Northern Territory agency;
- (b) the review will evaluate the operation of the agreement against the aim of the agreement;
- (c) the views of key stakeholders will be sought as part of the review;
- (d) the review will commence at least eight months before the agreement is due to expire, and will be completed at least three months before the agreement expires; and
- (e) the report of the review will be transmitted jointly to the Ministers.

## **II) CONSULTATION**

The review process for the Agreement involved public consultation by way of a written invitation to key stakeholders to provide comments. A set of questions was compiled to assist input into the review (see [Appendix 2](#)).

Key stakeholders were identified as including development interests involved with the operation of the Agreement, relevant government agencies and non-government, business, industry and conservation interests.

The process of reviewing the Agreement also involved consultation with the relevant assessment and approval officers within the Australian Government Department of the Environment and Water Resources (the Australian Government Environment Department) and the Northern Territory Department of Natural Resources, Environment and the Arts Environment Protection Agency Program (NT EPA Program), Natural Resource Management Division.

## **III) EVALUATION OF THE OPERATION OF THE AGREEMENT**

The following issues were canvassed with stakeholders in order to review the operation of the Agreement against the objects of the Agreement. Below is an evaluation of the operation of the Agreement against these key issues.

### **1. Public comment and consultation**

A number of submissions received commented on whether assessment processes conducted under the Agreement provided an adequate opportunity for public consultation and access to assessment documentation. Of the five projects for which assessment has been completed under the Agreement (McArthur River Mine Expansion; Cobalt and Nickel Mine – Browns Oxide Project; Andranangoo Creek & Lethridge Bay mineral sand mining; Victoria Highway Upgrade; and Frances Creek Iron Ore Mine), specific comments were received in relation to the McArthur River Mine Expansion and the Browns Oxide Project. In general feedback provided from assessment officers within the Australian Government and the Northern Territory Government was that the assessment process conducted in relation to the five projects provided for adequate public comment and document access in relation to those projects. For those projects draft guidelines were advertised for public comment; draft

assessment documentation was placed on public display; and the needs of any interest groups with particular communication needs were catered for. In relation to catering for the later requirement, Compass Resources NL noted that for the assessment of the proposed Cobalt and Nickel Mine – Browns Oxide Project, a meeting was held with traditional owners, organized through the Northern Land Council.

### ***Proposals***

A submission received from the Northern Land Council suggested a number of ways the Agreement could be strengthened in relation to public consultation and access to documentation. A summary of these comments together with suggested responses is outlined below.

#### *Proposal 1*

The Northern Land Council recommended that proponents should be required to fully engage statutory bodies such as the Northern Land Council while Environment Impact Assessment documents are being drafted.

#### *Response*

It is not a requirement under the Bilateral Agreement for proponents to fully engage bodies, such as the Northern Land Council, while assessment documentation is being drafted. In accordance with the Agreement, public comment is to be sought on draft assessment documentation and the needs of any interested groups with particular communication requirements are to be catered for. In relation to the latter requirement the engagement of bodies such as the Northern Land Council may be appropriate. As noted above, consultation with Traditional Owners in relation to the assessment of the Browns Oxide Project, was organised through the Northern Land Council. Throughout the Northern Territory assessment process the Northern Territory Government encourages ongoing consultation between proponents and stakeholders.

#### *Proposal 2*

The Northern Land Council suggested that all environmental data associated with a proposal, such as raw environmental and monitoring data, reports and plans, should be provided within the assessment documents to ensure that impacts are assessed to the greatest extent practicable.

#### *Response*

It is not a blanket requirement for all environmental data associated with a proposal to be provided within assessment documentation. In order to satisfy the requirements of the EPBC Act and the *Environment Protection and Biodiversity Conservation Regulations 2000* (EPBC Regulations), the assessment needs to assess all the impacts that the action is likely to have on the relevant matters of national environmental significance. In addition, a draft PER or draft EIS needs to address all the matters prescribed in Schedule 4 of the EPBC Regulations. In particular, information relating to impacts on the relevant matters of national environmental significance is to include any technical data and other information used to make a detailed assessment of the relevant impacts. This is not a requirement for all environmental data to be provided. The process requires that sufficient information be provided to undertake an assessment of potential impacts on the matters of national environmental significance. The Northern Territory Government encourages proponents to provide information to key stakeholders in order to promote understanding of project proposals.

#### *Proposal 3*

The Northern Land Council commented that it is necessary to ensure that further streamlining of the assessment process is not undertaken and that extensions to the public comment period are granted

to the Northern Land Council by negotiation with Northern Territory Department of Natural Resources, Environment and the Arts and not the proponent.

#### *Response*

Extensions to public comment period will depend on circumstances pertaining to each particular actions assessed under the accredited Northern Territory processes. The requirement in the Bilateral Agreement is for the public comment period to be a minimum of 28 days (clause 4 of Schedule 1 to the Agreement). Under the Northern Territory Administrative Procedures the Northern Territory Minister can extend the public consultation phase following consultation with the proponent.

#### *Proposal 4*

The Northern Land Council suggested that formal public comment should be permitted on documents raised 'supplementary' to the draft documents already available for comment. The Northern Land Council felt that this may help to ensure that the concerns raised during public comment are addressed to the satisfaction of the public.

#### *Response*

The EPBC Regulations require that assessment documentation prepared after public comments on the draft assessment documentation (ie any revised or supplementary PER or EIS) must summarise, or take into account, the issues raised by the public (paragraph 5.02 of Schedule 1). Clause 5 of Schedule 1 to the Agreement requires that the proponent prepare a written statement that summarises and addresses, to the greatest extent practicable, the issues raised in relation to the impacts of the action on the relevant matters of national environmental significance. In such circumstances, it is not a requirement that public comment be sought on the actual supplementary documentation, only that it summarise, or take into account, issues raised by the public on the draft PER or EIS.

The Northern Territory Government encourages proponents to make supplements publicly available and for the most part permission is given. The Northern Territory EPA Program will recommend that the Northern Territory Administrative Procedures are changed to have supplements made publicly available but not for public comments as this would prolong the assessment process unnecessarily. This will be governed by the Northern Territory Administrative Procedures.

#### *Proposal 5*

The Environment Centre Northern Territory Inc commented that the bilateral agreement is "extremely complex" as other legislation needs to be understood along with the bilateral. The need to understand the interaction of the bilateral and other legislation makes it difficult for members of the public to understand the process.

#### *Response*

Schedule 1 to the Agreement provides a transparent overview of the manner of assessment required for the Northern Territory processes to encompass the assessment of impacts on matters of national environmental significance. Schedule 1 specifies how the requirements of the EPBC Act and the EPBC Regulations are met through the accredited Northern Territory assessment processes, guiding the public, where necessary, to relevant provisions of the EPBC Act and the EPBC Regulations. The Northern Territory assessment process is outlined in the *Environmental Assessment Act* and Administrative Procedures, with information about how the process works provided on the NRETA website.

## **2. Consideration of environmental impact**

Submissions received as part of the public consultation phase and feedback from Australian Government and Northern Territory assessment officers provided a generally positive appraisal of assessments carried out under the Agreement in terms of providing for an adequate and proper assessment of the likely impacts of actions on matters of national environmental significance. The assessments undertaken in relation to each of the five projects for which assessment under the Agreement has been completed (McArthur River Mine Expansion; Cobalt and Nickel Mine – Browns Oxide Project; Andranangoo Creek & Lethridge Bay mineral sand mining; Victoria Highway Upgrade; and Frances Creek Iron Ore Mine) were considered to have adequately encompassed all relevant impacts of the actions on the relevant matters of national environmental significance. Assessment guidelines had encompassed all the relevant impacts of the action. An approval decision has been made under the EPBC Act in relation to those actions.

Compass Resources NL submitted that the outcomes of the assessment under the Agreement of the Browns Oxide Project contributed to the protection of the environment. For example, it noted that the assessment resulted in an approval of the proposed action with stringent conditions which put in place management plans which include mitigation of likely impacts should they occur.

### ***Proposals***

The submission received from Compass Resources NL, and a submission by the Environment Centre Northern Territory, also raised concerns in relation to the assessment of impacts on matters of national environmental significance. A summary of their concerns together with suggested responses is outlined below.

#### ***Proposal 1***

Compass Resources NL commented that the assessment guidelines provided are, in general, very broad and all encompassing. Furthermore that they seek detail beyond what is reasonably practical at the stage necessary to seek environmental assessment, yet ignore other aspects such as the continually changing ecosystem, patterns of change over preceding years and other new or emerging threats.

#### ***Response***

In order to satisfy the requirements in the Agreement, the assessment guidelines need to ensure that the assessment documentation will encompass all the impacts of the proposed action on the relevant matters of national environmental significance. Whilst Compass Resources NL considered that the guidelines are too broad, relevant to this review is that the guidelines encompass all the impacts of the action on the matters of national environmental significance. Guidelines need to meet the needs of the Northern Territory assessment process to ensure sufficient information is provided to determine the impacts and the required responses to minimise those impacts is provided.

#### ***Proposal 2***

The Environment Centre Northern Territory Inc commented that there is too much scope for Ministerial discretion in relation to assessments under the Agreement, citing the assessment for McArthur River Mine, and that there is a lack of provision for explicit public appeals against decisions under the Agreement.

#### ***Response***

The scope for Ministerial discretion under the Agreement is dictated by the requirements of the EPBC Act and Northern Territory legislation. For example, the EPBC Act provides for the Australian

Government Environment Minister to extend the decision-making period under section 132 of the Act, if additional information is required to make an informed decision on whether or not to approve the action. Review of administrative decisions made under Commonwealth legislation is provided for under the Commonwealth *Administrative Decisions (Judicial Review) Act 1977*.

### **3. Efficient, effective and timely process, minimising duplication of two assessment processes**

The clear consensus in comments received as part of the review process, was that the Agreement has ensured that duplication between the Australian Government and Northern Territory environmental assessment processes in respect of matters of national environmental significance has been minimised. The Northern Territory EPA Program commented that there are some very positive outcomes from the operation of the Agreement, including that it stops duplication of process and is not difficult to administer. Compass Resources NL commented that there was no doubt that the Agreement had minimised duplication between the two processes and that the Agreement should be continued in the future. McArthur River Mining acknowledged that there was little duplication in the process in relation to the assessment of the impacts on matters of national environmental significance.

Submissions received as part of the consultation phase raised key issues in relation to the timeliness of the assessment process under the Agreement and communication between the Northern Territory and the Australian Government. A summary of comments by Compass Resources NL, McArthur River Mining and the Northern Territory EPA Program in relation to timeliness and communication, together with suggested responses, is outlined below.

#### ***Proposals***

##### *Proposal 1*

Compass Resources NL commented that in relation to the assessment of the Browns Oxide Project, the Agreement had ensured that the assessment process was generally clear and effective, but timeliness was a significant issue. Compass Resources noted that whilst the Agreement did not meet the requirement of the assessment being achieved in a timely manner, timing would have been much worse without the Agreement. Compass Resources indicated that they felt communications were generally good, with meetings held regularly with the assessment team, communications also via telephone and email and a case manager appointed as the conduit for communications. A summary of the points made by Compass Resources in relation to timeliness, together with suggested responses, is outlined below:

- Timeliness is a significant issue. There are statutory timeframes for much of the process and these should be adequate. They should certainly not be extended.
- Where statutory timeframes are not in place, timeliness is still important.
- The number of applications or the volume of work should not be used to prolong non-statutory timeframes or the start date of statutory timeframes.
- Extensions of time at both the Northern Territory and Commonwealth level have been readily provided and much more discipline is required at both levels of government. This is especially so where comment is requested from other government departments and time frames are not met. The effect of such time frames appears to be to delay consideration of the project until the time limit is imminent.
- Compass notes that the assessment teams at both government levels appear to be significantly understaffed. At the detail at which the assessment is made, there is insufficient staffing to conduct the work in a timely manner.

- The level of detail required is often unrealistic and consumes extra time and resources.
- The requirement for comment by multiple government departments is time consuming and it appears not to be given priority. If comment is not received back within the time frame it should be considered as “no comment”. This should ensure that such departments prioritise those issues where comment is justified and the level of detail which is justified.
- Dates for receipt of data, transfer of data etc should not be flexible... “We have determined that our statutory date starts on ...” is not acceptable.
- Statutory dates should start on the date of receipt or no later than the next business day.
- The form in which the data is required should be reviewed and clarified. Ideally electronic data should be sufficient.

### *Response*

The comments by the Compass Resources in relation to the timeliness of the assessment process raise important issues for the Australian Government and Northern Territory Government. A number of the points raised relate to the actual process of undertaking environmental assessments rather than the operation of the Agreement. Timeliness is an issue which will be further considered when revising the Bilateral Agreement Administrative Procedures under any amended Agreement. It is important to note, however, that the circumstances surrounding certain projects, in particular complex projects, may require extended timeframes.

### *Proposal 2*

McArthur River Mining’s submission pointed to the apparent lack of communication between Northern Territory and Australian Government officials as being a key issue in relation to the operation of the Bilateral Agreement. For example, McArthur River Mining felt they had responsibility to keep the Australian Government informed of the status of the Northern Territory process. The assessment of the McArthur River Mine Expansion project was considered to have been a difficult process, however difficulties associated with the operation of the Agreement were considered by McArthur River Mining to have been comparatively minor in relation to the overall assessment.

### *Response*

The concerns raised by the McArthur River Mining in relation to the need for strengthening of communication between Australian Government and Northern Territory governments during the assessment of projects under the Bilateral Agreement will be considered when revising the Administrative Procedures under any amended Agreement. Agencies will seek to ensure that such communications are as efficient and effective as possible.

### *Proposal 3*

The Northern Territory EPA Program commented that there is an expectation by both parties that close consultation will occur with regard to guidelines for PER and EIS documentation. Draft guidelines prepared by the Northern Territory EPA Program are submitted to the Australian Government Environment Department for comment/approval in relation to matters of national environmental significance. In some instances the Northern Territory EPA Program has been required to follow up with the Commonwealth Department to ensure the Department’s requirements have been met. The Northern Territory EPA Program suggested that firm commitments to response timelines should be clearly in place and be linked to the Northern Territory statutory time frames, given the Northern Territory Government depends on the responses from the Australian Government Environment Department to complete the statutory processes. A similar situation can arise with draft Assessment Reports.

## *Response*

The concerns of the Northern Territory EPA Program in relation to comments on the guidelines for PER and EIS documentation will be considered in the context of reviewing the Bilateral Agreement Administrative Procedures under any amended Agreement.

## **4. Further comments**

A number of the submissions received from the Northern Territory Government and conservation interests included additional suggestions to strengthen the Agreement. A summary of these comments together with suggested responses are outlined below.

### **4.1 Assessment of impacts on matters other than matters of national environmental significance**

#### *Proposal 1*

The Northern Territory EPA Program sought clarification on any implications resulting from amendments to the EPBC Act in relation to the requirements for States and Territories to provide section 130(1B) notices. Currently the Northern Territory prepares a s130(1B) notice upon completion of an assessment (being assessed under the Agreement) and forwards it to the Australian Government. Any changes in this process will need to be reflected in the Agreement.

#### *Response*

A recent amendment to the EPBC Act by the *Environment and Heritage Legislation Amendment Act (No. 1) 2006* ('Amendment Act'), removed the requirement for a section 130(1B) notice from a State/Territory stating that the impacts of an action on things other than matters protected have been assessed to the greatest extent practicable. Pursuant to subsection 48A(3) of the EPBC Act, a Bilateral Agreement must still include an undertaking by the State/Territory to ensure that the environmental impacts of actions covered by the agreement (other than impacts on matters of national environmental significance) will be assessed to the greatest extent practicable. Any amended agreement should reflect the changes to the section 130(1B) notice requirements.

#### *Proposal 2*

The Northern Land Council commented that they felt the assessment process could be improved by ensuring cultural, social, and intergenerational equity issues were addressed. The Council suggested that it may be of benefit to the system to ensure that a separate and detailed Social Impact Assessment based upon the cultural and social views of the impacted parties is performed.

#### *Response*

To meet the requirements of the EPBC Act, EPBC Regulations and the Agreement, issues related to cultural, social and intergenerational equity need only be addressed as part of the assessment process to the extent that they are relevant to the assessment of the impacts of the action on the relevant matters of national environmental significance. It should be noted that for Northern Territory purposes the Northern Territory assessment process allows for social and cultural impacts to be considered with regard to all environmental matters, not just those of national environmental significance.

## 4.2 Referral of actions

The Northern Territory EPA Program submitted that the Agreement is premised upon a Notice of Intent (NOI) being received by the Northern Territory at the same time a referral is made with the Australian Government. The Northern Territory EPA Program suggested that in reality this does not always occur and the Northern Territory Government may commence assessment of a NOI before a referral has been made. The Northern Territory is obligated to undertake its process. The Agreement cannot assume the Northern Territory will not progress a NOI until it has been referred to the Australian Government. Similar concerns in relation to the referral of actions were raised at the EPBC Bilateral Agreement Review Workshop, which involved representatives from the Northern Territory Department of Primary Industries, Fisheries and Mines, and the Department of Natural Resources, Environment and the Arts Environment Protection Agency (EPA) Program and Natural Resource Management Division.

### *Response*

As recognised in clause 12 of the Agreement, the final responsibility for referring actions which may require approval under the EPBC Act lies with the person proposing to take the action. Accordingly, the Agreement does not assume the Northern Territory will delay progress on a NOI until an action has been referred to the Australian Government. The issuing of guidelines for a PER or EIS may be delayed where a referred matter remains under consideration after the Northern Territory has determined the level of assessment required. Any Bilateral Agreement Administrative Procedures will need to recognize that the differences in timing that can occur.

## 4.3 Monitoring and enforcement of conditions to approvals

### *Proposal 1*

A number of comments arising from the EPBC Bilateral Agreement Review Workshop related to the monitoring and enforcement of conditions of approvals, including comments related to duplication in conditions and responsibility for monitoring of compliance with conditions. It was considered desirable to explore opportunities for the parties to use their 'best endeavours' to put in place cooperative arrangements in place for monitoring compliance with conditions on any action approved by both the Australian Government and the Northern Territory Government, in accordance with subclause 17.2(b) of the Agreement.

### *Response*

Under subclause 17.2 of the Agreement, the Australian Government and the Northern Territory Government agree to cooperate in monitoring compliance with conditions relating to the protection of matters of national environmental significance. The comments arising from the EPBC Bilateral Agreement Review Workshop and the advantages of putting in place cooperative arrangements will be considered further by the Australian Government and the Northern Territory.

### *Proposal 2*

The Northern Territory EPA Program also noted that Clause 17.1(c) of the Agreement does not include the Northern Territory *Environmental Assessment Act* in relation to monitoring compliance with conditions.

### *Response*

Clause 17.1(c) of the Agreement relates to conditions attached to approvals. Accordingly, reference is made to Northern Territory legislation under which approval is required.

### *Proposal 3*

The Environment Centre Northern Territory Inc commented that the Agreement does not assist with the enforcement of environmental conditions.

### *Response*

The Australian Government retains responsibility for the enforcement of any approval conditions that the Australian Government imposes in accordance with the relevant provisions of the EPBC Act. Clause 18 of the Agreement provides for the parties to inform each other before commencing action relating to the enforcement of conditions of approval. See also the response to Proposal 1 above.

## **4.4 Actions involving Commonwealth land**

### *Proposal 1*

The Northern Territory EPA Program recommended that the Agreement should include a process for dealing with development on Commonwealth land, particularly Defence and Airport land but including Aboriginal land and that a consistent, agreed approach is required. They sought clarification of any implications on the Agreement with reference to discussions between the Australian Government and the Northern Territory Government in relation to implementing Attachment 3 of the Council of Australian Governments (COAG) Heads of Government Agreement on Commonwealth/ State Roles and Responsibilities for the Environment.

### *Response*

As set out in subclause 10.3 of the Agreement, consistent with section 49 of the EPBC Act, the Agreement does not have any effect in relation to an action in a Commonwealth area or an action by the Commonwealth or a Commonwealth agency. The Agreement provides for further discussions to take place between the Australian Government and the Northern Territory Government in relation to implementing Attachment 3 of the COAG Heads of Government Agreement on Commonwealth/ State Roles and Responsibilities for the Environment. Such discussions are to be undertaken separate to this review.

### *Proposal 2*

The Northern Territory EPA Program also commented that assessments undertaken by the Australian Government Environment Department under the EPBC Act are restricted to the assessment of impacts on matters of national environmental significance, the impacts of actions involving Commonwealth land or the impacts of actions by the Commonwealth. This can potentially result in a very focused and limited assessment being undertaken, as it means that projects which are located across an area that includes both Commonwealth land and land under Northern Territory jurisdiction, are potentially restricted in their assessment, particularly if either the Northern Territory or the Australian Government does not require formal assessment when the other does. For example, where the Australian Government Environment Department could only assess a part of a project, located in Kakadu National Park, or only the offshore component of a proposal. If these, or similar scale projects, do not trigger formal assessment under Northern Territory legislation and the Australian Government Environment Department only assesses the Commonwealth land component some environmental matters may be missed. Where the Agreement needs to apply to the majority of an assessment, one agency should undertake the whole assessment.

### *Response*

The comment by the Northern Territory EPA Program relates to the legislative scope of the EPBC Act, which in large part is based on the 1997 COAG Heads of Government Agreement on Commonwealth/

State Roles and Responsibilities for the Environment. The EPBC Act cannot extend beyond the assessment of actions that are likely to have a significant impact on matters of national environmental significance; actions that are likely to have a significant impact on the environment on Commonwealth land; actions taken on Commonwealth land that are likely to have a significant impact on the environment anywhere; and actions by the Commonwealth that are likely to have a significant impact on the environment anywhere. If a proposed action does not trigger the EPBC Act, then an assessment will not be required and the Agreement will not apply to that action.

#### **4.5 Variations to Northern Territory's assessment processes**

The Northern Territory EPA Program also commented that the Agreement needs to consider how future changes in process or approach can be accommodated and accordingly the role of the Australian Government Environment Department in any amended Northern Territory process. Examples of such changes, could include amendments to Northern Territory's administrative procedures, such as changing statutory timelines or implementing a risk assessment hierarchy for impacts to the environment.

##### *Response*

Any changes to the Administrative Procedures of the Northern Territory would need to be consistent with the requirements of the Agreement and the EPBC Act. Pursuant to clause 33 of the Agreement, if the Northern Territory *Environmental Assessment Act* or the Northern Territory *Inquiries Act* is amended in a manner that affects the operation of this Agreement, the parties are to agree as soon as practicable on whether it is necessary to amend or replace the Agreement. As noted in clause 34, a reference to these Acts includes a reference to the Administrative Procedures made under section 7 of the Northern Territory *Environmental Assessment Act*. Accordingly, the parties would need to consider whether any proposed amendment to the Administrative Procedures, such as an amendment to statutory timeframes, would affect the operation of the Agreement.

#### **4.6 Variations to assessed actions**

The Northern Territory EPA Program sought clarification of the relationship between Clause 14A of the Administrative Procedures of the Northern Territory *Environmental Assessment Act* and the Agreement. Under the Northern Territory *Environmental Assessment Act*, if a project is altered prior to commencing it or during the course of executing it, in such a way that the environmental significance of the project may be changed, the Minister may determine that formal assessment is required and it will be assessed as a new project. The Northern Territory EPA Program suggested that implications for timeliness and determinations should be investigated. In addition, the Northern Territory EPA Program suggested that clarification was required of how the Agreement applies to a clause 14A amendment where an action has already been approved under the EPBC Act, or a decision whether to approve an action has not yet been made.

##### *Response*

Under section 156A of the EPBC Act, introduced by the Amendment Act, the Australian Government Environment Minister may, in accordance with the EPBC Regulations, accept a variation to a proposed action prior to making an approval decision in relation to the action. The Minister may only accept a varied proposal if satisfied that the character of the varied proposal is substantially the same as the character of the original proposal. If the Minister accepts the varied proposal, it will be assessed in the place of the original proposal. Where the assessment has been finalised the Minister may seek further information in relation to the proposal under section 132 of the EPBC Act. If a variation changes the character of the proposal then it cannot be accepted by the Minister. In those

circumstances, the proponent may withdraw the original proposal and refer the new proposal under the EPBC Act. This may occur at the same time as the project is determined by the Northern Territory Minister to require assessment as a new project under the Northern Territory *Environmental Assessment Act*.

If the project has already been approved under the EPBC Act, consideration will need to be given to the nature of the variation and whether the impacts of the action on the relevant matters of national environmental significance are such that the conditions of the approval require variation, suspension or revocation. A substantially altered proposal may require re-referral under the EPBC Act.

#### **4.7 Review Process for the Agreement**

The Northern Land Council recommended that the period for the review of the Agreement be extended, or that stakeholder feedback be invited in a manner that is cognizant of the normal operations of other statutory bodies.

##### *Response*

The recommendations by the Northern Land Council in relation to the review process for the Agreement are noted and will be considered further in relation to reviews conducted under any amended Agreement.

#### **4.8 Amendments to the EPBC Act**

The Environment Centre Northern Territory Inc commented that it was unclear how recent amendments to the EPBC Act by the Amendment Act would impact on the usefulness of the Agreement.

##### *Response*

A number of recent amendments to the EPBC Act introduced by the Amendment Act relate to bilateral agreements, including the removal of the requirement for a section 130(1B) notice referred to above. These relevant amendments are flagged in the Recommendation in Part IV of the Report below.

## **IV) RECOMMENDATION**

The review has demonstrated that overall the operation of the Agreement is meeting the objects of the Agreement, and is contributing to protecting the environment; promoting the conservation and ecologically sustainable use of natural resources; ensuring an efficient, timely and effective process for environmental assessment and approval of actions; and minimising duplication in environmental assessment of projects in respect of matters of national environmental significance. Concerns raised in relation to timeliness of assessments and communications between Australian Government and Northern Territory agencies are noted and, where relevant, will be considered in the context of reviewing the Administrative Procedures under any amended Agreement.

In light of the outcome of the evaluation it is recommended that the Agreement be amended under section 56A of the EPBC Act, with suggested changes to the following clauses of the Agreement as a result of recent amendments to the EPBC Act by the Amendment Act:

- clauses 4 and 5 be deleted as the Northern Territory Administrative Procedures have been amended consistent with clause 4 and the Agreement entered into force.

- clause 6 be deleted and substituted so as to provide for a new expiry date for the Agreement, with new subsection 56(1) of the EPBC Act providing for the Agreement to specify when it is to cease to have effect;
- subclause 11.4 be deleted as a result of the amendment to the EPBC Act that removed the requirement for States/Territories to provide notices under section 130(1B) of the EPBC Act and substituted with a new subclause detailing the timing of an approval decision under the EPBC Act following the provision of a copy of an Assessment Report;
- clause 22 be amended to provide for a review of the operation of the Agreement to be undertaken once every five years while the Agreement remains in effect in accordance with new subsection 56(2) of the EPBC Act;
- the inclusion of a new clause relating to the ability to make amendments to the Agreement pursuant to new section 56A of the EPBC Act.

It is also recommended that clause 28 be amended to include reference to the National Heritage values of a National Heritage place, as a result of the inclusion of National Heritage as a matter of national environmental significance under the EPBC Act in 2003.

These changes, and corresponding amendments to the associated Bilateral Agreement Administrative Procedures, will allow the amended Agreement to encompass the proposals supported in Part III of this Report. It is also recommended that the amended Agreement provide for the accreditation of the same Northern Territory environmental impact assessment processes as are set out in Schedule 1 of the current Agreement.

**AN AGREEMENT BETWEEN THE COMMONWEALTH OF  
AUSTRALIA AND THE NORTHERN TERRITORY**

**UNDER SECTION 45 OF THE COMMONWEALTH ENVIRONMENT  
PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999**

**RELATING TO ENVIRONMENTAL IMPACT ASSESSMENT**

## **Aim**

- 1 The agreement aims to minimise duplication of environmental impact assessment processes, strengthen intergovernmental cooperation and promote a partnership approach to environmental protection and biodiversity conservation. In particular, this agreement provides for the accreditation of the Northern Territory environmental impact assessment processes (set out in Schedule 1) to ensure an integrated and coordinated approach for actions requiring approval from both the Commonwealth (under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*) and the Northern Territory. This agreement will therefore enable the Commonwealth to rely on the Northern Territory assessment process set out in Schedule 1 in assessing actions under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.
- 2 The specific objects of this agreement are to contribute to:
  - (a) protecting the environment;
  - (b) promoting the conservation and ecologically sustainable use of natural resources;
  - (c) ensuring an efficient, timely, and effective process for environmental assessment and approval of actions; and
  - (d) minimising duplication in environmental assessment of relevant impacts within the meaning of section 82 of the *Environment Protection and Biodiversity Conservation Act 1999* through Commonwealth accreditation of Northern Territory processes.

## **Parties to the agreement**

- 3 The parties to this agreement are the Northern Territory and the Commonwealth of Australia.

## **Term of agreement**

- 4 The Commonwealth notes the intention of the Northern Territory to amend the Administrative Procedures to:
  - (a) remove the statutory limit of 28 days for public comment on a Report (for the purposes of actions assessed in accordance with this agreement); and
  - (b) remove the statutory limit of 14 days for public comment on the description of matters relating to the environment which are to be dealt with in a Report or a Statement.
- 5 This agreement will enter into force on the date specified in a notice given by the Northern Territory as being the date on which the amendments to the Administrative Procedures (referred to in clause 4) commence.
- 6 The agreement will expire five years after it is entered into.

## **Nature of the agreement**

- 7 This agreement is a bilateral agreement for the purposes of section 45 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.
- 8 The parties note that, with the exception of clause 11, assessment means assessment of the relevant impacts, within the meaning of section 82 of the *Environment Protection and Biodiversity Conservation Act 1999*.
- 9 The parties note that any breach of the agreement will not give rise to any right of action, other than as prescribed in the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, against the party in breach.

## Effect of this agreement

- 10 Certain actions do not require assessment under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*
- 10.1 Pursuant to subsection 47(1) of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, it is declared that an action does not require assessment under Part 8 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* if the action is assessed in the manner specified in Schedule 1 to this agreement.
- 10.2 Clause 10.1 applies to actions which are taken wholly within the Northern Territory, including its coastal waters. In relation to actions which are taken in more than one jurisdiction (including the Northern Territory), the parties agree to consult and use their best endeavours to reach agreement with other affected jurisdictions on an appropriate assessment process, such as the process set out in Schedule 1.
- 10.3 Consistent with section 49 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, the parties note that the provisions of this bilateral agreement do not have any effect in relation to an action in a Commonwealth area or an action by the Commonwealth or a Commonwealth agency. However, the parties further note that discussions will take place between the Commonwealth and the Northern Territory in relation to implementing Attachment 3 of the COAG Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment ("Compliance with State Environment and Planning Laws"). Following those discussions, the parties intend to amend this agreement, as necessary, so that it will apply to actions in a Commonwealth area, and actions taken by the Commonwealth or a Commonwealth agency, where it is agreed that those actions will be subject to State environment and planning laws.
- 10.4 Consistent with subsection 49(2) of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, the parties note that this bilateral agreement does not have any effect in relation to an action in Kakadu National Park or Uluru-Kata Tjuta National Park.
- 11 Northern Territory to ensure that impacts other than relevant impacts are assessed
- 11.1 This clause applies to an action that:
- (a) is a controlled action (as determined by the Commonwealth Environment Minister) taken or proposed to be taken in the Northern Territory; and
  - (b) does not require assessment under Part 8 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* if an assessment is conducted in accordance with Schedule 1 of the agreement; and
  - (c) is an action:
    - (i) taken or proposed to be taken by a constitutional corporation;
    - (ii) taken by a person for the purposes of trade or commerce between Australia and another country, between two States, between a State and Territory, or between two Territories;
    - (iii) whose regulation is appropriate and adapted to give effect to Australia's obligations under an agreement with one or more other countries; or
    - (iv) taken in the Northern Territory.
- 11.2 The Commonwealth undertakes that the written notice referred to in clause 13.2 will indicate:

- (a) whether the Commonwealth believes that the action covered by the notice is an action to which this clause applies; and
- (b) if so, which of paragraphs (i)-(iv) in clause 11.1(c) applies to the action.

- 11.3 The Northern Territory undertakes to ensure that the environmental impacts that the action has, will have, or is likely to have (other than the relevant impacts) are assessed to the greatest extent practicable.
- 11.4 The Northern Territory notes that the Commonwealth Environment Minister may not decide whether to approve an action covered by section 130(1C) until a written notice described in section 130(1B) of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* has been received from the Northern Territory. The written notice must state that the impacts referred to in clause 11.3 have been assessed to the greatest extent practicable and explain how they have been assessed. The Northern Territory undertakes to use its best endeavours to provide such a written notice in relation to actions covered by section 130(1C).

### **Procedures to be followed**

- 12 Northern Territory to use best endeavours to encourage actions to be referred
  - 12.1 The parties will work cooperatively to ensure that proponents are aware of their obligations under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, and will use their best endeavours to encourage proponents to refer actions that are proposed to take place in the Northern Territory that may require approval under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* to the Commonwealth Environment Minister.
  - 12.2 The parties agree to develop administrative arrangements which will streamline the referral process for proponents. Where possible the parties will develop administrative arrangements which will allow proponents to simultaneously satisfy both Commonwealth and Northern Territory requirements. In this respect, the parties note that section 69 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* – which provides that a State or Territory or an agency of a State or Territory that is aware of a proposed action may refer the action to the Commonwealth Environment Minister – may, in appropriate cases, provide a mechanism for streamlining the referral process.
  - 12.3 Subject to sections 69, 70 and 71 of Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, the parties recognise that final responsibility for referring actions which may require approval from the Commonwealth Environment Minister under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* lies with the person proposing to take the action. In making the undertakings set out in this clause, the parties do not accept any responsibility for the actions of proponents who may or may not choose to refer actions.
- 13 Commonwealth to inform Northern Territory of decision about whether a proposed action is a controlled action
  - 13.1 This clause applies to an action or proposed action that is:
    - (a) referred to the Commonwealth Environment Minister under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*; and
    - (b) proposed to be taken in the Northern Territory.
  - 13.2 For every decision by the Commonwealth Environment Minister that an action proposed to be taken in the Northern Territory is a controlled action, a written notice of the decision will be

provided to the Northern Territory Environment Minister within ten business days of the decision being made.

14 Confirmation by Northern Territory that an accredited process will apply

14.1 This clause applies where:

- (a) the Northern Territory receives a written notice from the Commonwealth Environment Minister that an action proposed to take place in the Northern Territory is a controlled action; and
- (b) the action does not require assessment under Part 8 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* if assessed in the manner specified in Schedule 1 to this agreement.

14.2 The Northern Territory undertakes that within ten business days of receiving the written notice referred to in clause 13.2, the Northern Territory Minister will indicate in a written notice given to the Commonwealth Environment Minister whether the action is expected to be assessed by the Northern Territory in the manner specified in Schedule 1 to this agreement.

14.3 If the Northern Territory Minister asks the Commonwealth Environment Minister, under section 79 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* to reconsider the decision that the action is a controlled action, then the ten day period referred to in subclause 14.2 begins on the day that the Northern Territory receives the notice described in subsection 79(3) of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*. This notice, amongst other things, informs the Northern Territory of the outcome of the Commonwealth Environment Minister's reconsideration.

15 Assessment documentation

15.1 The Northern Territory undertakes that when an action is assessed in the manner specified in Schedule 1 to this agreement it will:

- (a) provide a copy of the Assessment Report or the Inquiry Report to the Commonwealth Environment Minister as soon as possible after the Report is accepted by the Northern Territory Minister; and
- (b) provide copies of any other assessment documentation relevant to the relevant impacts to the Commonwealth Environment Minister as soon as reasonably practicable (and in any event not more than ten business days) after the date on which the Assessment Report or the Inquiry Report is accepted by the Northern Territory Minister.

15.2 The Northern Territory may, when it provides the Assessment Report or the other assessment documentation referred to in clause 15.1, also provide assessment documentation relating to social and economic matters if such information will be relevant to the Commonwealth Environment Minister's considerations under section 136 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

16 Additional information

If, in deciding whether to approve the taking of an action assessed under this agreement, the Commonwealth Environment Minister uses any information described in paragraph 136(2)(e) of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, the Commonwealth Environment Minister undertakes to provide a copy of this information to the Northern Territory Minister. The intention of this clause is to give the Northern Territory an opportunity to comment on the accuracy of this information before the Commonwealth

Environment Minister decides whether to approve the taking of the action, subject to the requirements of section 130 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* relating to the time period within which the Commonwealth Environment Minister must decide whether to approve the action.

17 Monitoring compliance with conditions

17.1 Clauses 17, 18 and 19 apply where an action:

- (a) is taken in the Northern Territory; and
- (b) requires the approval of the Commonwealth Environment Minister under Part 9 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*; and
- (c) requires approval (however described) under the Northern Territory *Waste Management and Pollution Control Act, Planning Act, Mining Act, Mining Management Act, Petroleum Act, Petroleum (Submerged Lands) Act, Water Act, Fisheries Act, or Aquaculture Act*.

17.2 The parties agree to cooperate in monitoring compliance with conditions relating to, or affecting, a matter protected by Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* attached to approvals, with the aim of reducing duplication. To this end the parties agree:

- (a) that each party will inform the other of any conditions attached to the approval(s) to take the action; and
- (b) that best endeavours will be used to put cooperative arrangements in place for monitoring compliance with conditions on any action which is approved by both parties. The aim of these arrangements is to ensure that reporting requirements for the proponent, and other monitoring efforts such as site inspections, are not duplicated.

18 Enforcing conditions on approvals

The parties agree to inform one another before commencing enforcement action against a person for breaching conditions of an approval for an action which has been approved by both parties, where the conditions relate to, or affect, a matter protected by Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999*.

19 Conditions attached to an approval

The parties recognise the desirability of avoiding, to the extent practicable, attaching inconsistent conditions to approvals for an action under the *Environment Protection and Biodiversity Conservation Act 1999* and Northern Territory legislation. To this end the parties:

- (a) note that the Commonwealth Environment Minister is required by the provisions of section 134 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* to consider any relevant Northern Territory conditions when deciding whether to attach a condition to an approval; and
- (b) agree to inform one another before varying the conditions attached to an approval for an action which has been approved by both parties, where the condition relates to, or affects, a matter protected by Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999*. The parties also agree to inform one another of any such variation after it has been made.

20 Administrative procedures

The parties agree to jointly develop administrative procedures to ensure that the requirements of this agreement are administered efficiently in accordance with their separate legal requirements. The parties note that the administrative procedures will provide for consultation on draft assessment documentation including draft assessment reports. The administrative procedures will also include guidelines on the exchange of any information about assessments between Environment Australia and the relevant Northern Territory agency.

## **Maintaining the agreement**

### **21 Monitoring compliance with the agreement**

The parties recognise that, under the Commonwealth Auditor-General Act 1997, the Commonwealth Auditor-General may audit the operations of the Commonwealth public sector (as defined in section 18 of that Act) in relation to this agreement.

### **22 Reviewing the agreement**

22.1 The Commonwealth Environment Minister is required by section 65 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* to cause a review of the operation of this agreement to be carried out, and give a copy of the report of the review to the Northern Territory Minister.

22.2 The parties agree that:

- (a) the review of this agreement under section 65 will be carried out jointly by Environment Australia and the relevant Northern Territory agency;
- (b) the review will evaluate the operation of the agreement against the aim of the agreement;
- (c) the views of key stakeholders will be sought as part of the review;
- (d) the review will commence at least eight months before the agreement is due to expire, and will be completed at least three months before the agreement expires; and
- (e) the report of the review will be transmitted jointly to the Ministers.

### **23 Cancelling or suspending the agreement**

23.1 The parties note that sections 57 – 64 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* provide that the Commonwealth Environment Minister may cancel or suspend all or part of this agreement (either generally or in relation to actions in a specified class) under certain circumstances. Sections 57 – 64 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* also set out a process for consulting on the cancellation or suspension of all or part of this agreement.

23.2 In accordance with section 63 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* the Commonwealth Environment Minister must cancel or suspend all or part of this agreement at the request of the Northern Territory Minister, but only if the request is made in accordance with the agreement.

23.3 The parties agree that a request to cancel or suspend all or part of this agreement is made in accordance with this agreement if:

- (a) the request is made on the grounds that the Northern Territory Minister is not satisfied that the Commonwealth has complied or will comply with the agreement; or
- (b) the request is made on the grounds that the Northern Territory Minister is not satisfied that the aim of the agreement is being achieved; and

- (c) before making the request, the Northern Territory Minister has informed the Commonwealth Environment Minister in writing of the reason(s) for requesting the suspension and allowed a period of at least twenty business days for the Commonwealth Environment Minister to respond.

### **Exchange of information**

- 24 Each party agrees to promptly comply with any reasonable request from the other party to supply information relating to the management or administration of assessments covered by this agreement.
- 25 Where feasible, the parties agree that they may each use data within the control of the relevant departments of government of the other party for the purposes of meeting their respective responsibilities relating to the agreement or the assessment of environmental impacts under their respective Acts, and to make data available to the other. The parties agree that data will remain the property of the owner and its use will be subject to such licence conditions as may be agreed. The parties agree that, subject to clauses 29 and 31, data will not be used or communicated to any other person without the permission of the owner.

### **Conflict resolution**

- 26 Acting in a spirit of cooperation, the parties agree:
- (a) in the event that any dispute arises under this agreement, the parties will aim to settle it by direct negotiation using their best endeavours; and
  - (b) discussions aimed at resolution will normally take place at senior officials level in the first instance.

This clause is subject to the rights and obligations of each party under relevant sections of the *Environment Protection and Biodiversity Conservation Act 1999* (including those sections dealing with cancellation and suspension of bilateral agreements).

- 27 The parties will notify and consult each other on matters that come to their attention that may improve the operation of this agreement.

### **Relevant plans and agreements**

- 28 The parties note that a number of agreements and plans may be relevant to assessments under this agreement. The parties undertake that, when actions are assessed under this agreement, relevant agreements and plans will be taken into account as necessary. The parties agree that where the assessment covers impacts on:
- (a) World Heritage values of a World Heritage property, any management plan for the property is relevant;
  - (b) the ecological character of a Ramsar wetland property, any management plan for the wetland is relevant;
  - (c) a listed threatened species or ecological community, any recovery plan for the species or community, and any threat abatement plan for a process that threatens the species or community is relevant;
  - (d) a listed migratory species, any wildlife conservation plan for the species is relevant.

### **Freedom of information legislation**

- 29 If a party receives any request, including under Freedom of Information legislation, for any documents originating from another party which are not otherwise publicly available, the parties will consult on the release of those documents.

- 30 The parties recognise the need for expeditious consultation on such requests so that statutory obligations can be met without delay.

### **Public access to assessment documentation**

- 31 The Northern Territory agrees that documentation relating to the assessment of each action which is assessed in the manner specified in Schedule 1 will be available to the public, except where corresponding information would not have been available to the public if the action had been assessed by the Commonwealth under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

### **Groups with particular communication needs**

- 32 The Northern Territory will, in giving effect to the requirements in Schedule 1, make special arrangements, as appropriate, to ensure that affected groups with particular communication needs have adequate opportunity to comment on actions assessed in the manner described in Schedule 1. The parties note that indigenous people affected by a proposed action may have particular communication needs, and will ensure, where appropriate, that affected indigenous people have adequate opportunity to comment on actions assessed in the manner described in Schedule 1.

### **Interpretation**

- 33 A reference in this agreement to the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, the Northern Territory *Environmental Assessment Act*, or the Northern Territory *Inquiries Act* is a reference to the relevant Acts as in force at the date of this agreement. If any of the Acts are subsequently amended in a manner that affects the operation of this agreement, the parties will seek to agree as soon as practicable on whether it is necessary to make another bilateral agreement varying or replacing this agreement.
- 34 A reference in this agreement to an Act includes a reference to any regulations and instruments under that Act (including the Administrative Procedures made under section 7 of the Northern Territory *Environmental Assessment Act*).
- 35 A reference in this agreement to the impacts of an action (or the relevant impacts of an action), includes a reference to any impacts (or relevant impacts, as the case may be) of that action outside of the Northern Territory.
- 36 Unless the contrary intention appears, the terms used in this agreement have the same meaning as in the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.
- 37 **Administrative Procedures** means the Administrative Procedures made under section 7 of the Northern Territory *Environmental Assessment Act*.
- 38 **Assessment documentation** means any formal report, study, agreement, submission or correspondence prepared by or received as part of the formal assessment processes set out in Schedule 1. This includes draft reports or studies which would normally be publicly available under those assessment processes.
- 39 **Assessment Report** means the report prepared by the Northern Territory in accordance with item 6 of Schedule 1 to this agreement.

- 40 **Commonwealth Environment Minister** means the Minister administering the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* and includes a delegate of the Minister.
- 41 **Inquiry Report** means a report prepared by a Board of Inquiry in accordance with item 6 in Schedule 1 to this agreement.
- 42 **Northern Territory Minister** means the Minister administering the Northern Territory *Environmental Assessment Act* and includes a delegate of the Minister.
- 43 **Relevant Northern Territory agency** means that Northern Territory government agency which is from time to time administering the Northern Territory *Environmental Assessment Act*.
- 44 **Report** means a public environment report prepared under the Northern Territory *Environmental Assessment Act*.
- 45 **Statement** means an environmental impact statement prepared under the Northern Territory *Environmental Assessment Act*.

### **Funding**

- 46 The parties agree that, twelve months after the commencement of this agreement, and every twelve months thereafter until the expiry of this agreement, they will review the additional implementation costs that the Northern Territory may have incurred during the relevant twelve month period of the agreement. The Commonwealth agrees to reimburse the Northern Territory the additional implementation costs.
- 47 In clause 45, the additional implementation costs are the costs that the Commonwealth and the Northern Territory agree:
- (a) have been incurred by the Northern Territory in implementing this agreement; and
  - (b) would not, in the absence of this agreement, have been incurred by the Northern Territory in carrying out an adequate assessment of each action to which Schedule 1 applies.

Signed for and on behalf of the  
COMMONWEALTH OF AUSTRALIA  
by:

Signed for and on behalf of the  
NORTHERN TERRITORY by:

*SIGNED*

*SIGNED*

The Hon Dr David Kemp MP  
Minister for the Environment and  
Heritage

The Hon Kon Vatskalis MLA  
Minister for the Environment

Date: 1 May 2002

Date: 31 May 2002

# Schedule 1

## Preamble

Subsection 47(1) of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* provides that a bilateral agreement may declare that actions need not be assessed under Part 8 of that Act if the actions have been 'assessed in a specified manner'.

Clause 10.1 of this agreement declares that an action does not require assessment under Part 8 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* if it is assessed in the manner specified in this Schedule.

## The specified manner of assessment

For the purposes of clause 10.1 of this agreement, an action is assessed in the manner specified in this Schedule if it is assessed in accordance with the following requirements.

For the purposes of regulations made under section 50 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, the manner of assessment specified in this Schedule provides for the following assessment approaches:

- (a) an Environmental Impact Statement (Statement) prepared under the *Environmental Assessment Act* – this assessment approach corresponds to assessment by environmental impact statement under the *Environment Protection and Biodiversity Conservation Act 1999*; and
- (b) a Public Environment Report (Report) prepared under the *Environmental Assessment Act* – this assessment approach corresponds to assessment by public environment report under the *Environment Protection and Biodiversity Conservation Act 1999*; and
- (c) an Inquiry carried out under the Northern Territory *Inquiries Act* – this assessment approach corresponds to assessment by inquiry under the *Environment Protection and Biodiversity Conservation Act 1999*.

## 1 Law under which the assessment has been carried out

The action is assessed:

- (a) under the Northern Territory Environmental Assessment Act, or
- (b) by an inquiry carried out under the Northern Territory Inquiries Act.

## 2 Selecting the assessment approach

### 2.1 The Northern Territory Minister decides:

- (a) under paragraph 8 of the Administrative Procedures, that:
  - (i) the preparation of a Report is necessary; or
  - (ii) the preparation of a Statement is necessary; or
- (b) for the purposes of section 10 of the Environmental Assessment Act, that an inquiry shall be conducted under the Inquiries Act.

### 2.2 When making the decision referred to in clause 2.1, the Minister has information that he or she considers to be sufficient and considers criteria equivalent to those set out in guidelines (if any) issued under section 87(6) of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (to the extent relevant to the decision whether it is appropriate to use an approach corresponding to a public environment report, or an environmental impact statement, or an inquiry).

### 3 Guidelines for assessment

3.1 Where the action is assessed by the preparation of a Statement or Report, the Northern Territory Minister prepares in accordance with the Administrative Procedures a written description of matters relating to the environment ('guidelines') which are to be dealt with in the Statement or Report. The description ensures that the assessment:

- (a) assesses all relevant impacts that the action has, will have or is likely to have;
- (b) contains enough information about the action and its relevant impacts to allow the Commonwealth Environment Minister to make an informed decision whether or not to approve the action under Part 9 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*;
- (c) if a Report is being prepared, addresses the matters prescribed in regulations for the purposes of paragraph 97(2)(b) of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* relating to the preparation of guidelines for a draft public environment report under that Act; and
- (d) if a Statement is being prepared, addresses the matters prescribed in regulations for the purposes of paragraph 102(2)(b) of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* relating to the preparation of guidelines for a draft environmental impact statement under that Act.

3.2 Where a proposed action is assessed under the *Inquiries Act*:

- (a) the instrument of appointment issued under section 4 of that Act ensures that:
  - (i) the inquiry assesses relevant impacts on the matters protected by Part 3 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*; and
  - (ii) the report of the inquiry contains enough information about the action and its relevant impacts to allow the Commonwealth Environment Minister to make an informed decision whether or not to approve the decision; and
- (b) the terms of reference are published in accordance with clause 7.

### 4 Setting the public comment period

If the action is being assessed by the preparation of a Report or a Statement, the Report or Statement is prepared in accordance with the guidelines and is released for public comment, and the public is given at least 28 days to provide comments to the Northern Territory Minister on the action or on the Report or Statement. During this period (the public comment period):

- (a) copies of the Report or Statement are available for public inspection; and
- (b) copies of the Report or Statement are available for purchase.

Before the public comment period begins, notice is given by public advertisement of the availability of copies of the Report or Statement and the opportunity for the public to provide comments.

### 5 Responding to public submissions

If the action is being assessed by the preparation of a Report or a Statement, the proponent prepares, and submits to the Northern Territory Minister, a written statement which

- (a) summarises issues relating to the relevant impacts of the proposed action raised in submissions received during the public comment period referred to in clause 4 of this Schedule; and
- (b) addresses, to the greatest extent practicable, those issues.

### 6 Assessment reports

- 6.1 The Northern Territory Minister prepares an Assessment Report (if the action is assessed by preparation of a Statement or Report) or the Board of Inquiry produces an Inquiry Report (if the action is assessed by an inquiry).
- 6.2 The Assessment Report takes into account:
- (a) the Report or Statement (as the case may be);
  - (b) any comments provided by the public during the public comment period;
  - (c) the statement submitted by the proponent under Clause 5 of this Schedule; and
  - (d) any other relevant information available to the Northern Territory Minister.
- 6.3 The Assessment Report, or Inquiry Report, contains enough information about the relevant impacts of the action to let the Commonwealth Environment Minister make an informed decision whether or not to approve the taking of the action under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, including:
- (a) a description of:
    - (i) the action; and
    - (ii) the places affected by the action; and
    - (iii) any matters of national environmental significance that are likely to be affected by the action; and
  - (b) a summary of the relevant impacts of the action; and
  - (c) a description of feasible mitigation measures, changes to the action or procedures to prevent or minimise environmental impacts on relevant matters of national environmental significance proposed by the proponent or suggested in public submissions; and
  - (d) to the extent practicable, a description of any feasible alternatives to the action that have been identified through the assessment process, and their likely impact on matters of national environmental significance; and
  - (e) a statement of conditions for approval of the action that may be imposed to address identified impacts on matters of national environmental significance; and
  - (f) a statement of State or Territory approval requirements and conditions that apply, or are proposed to apply, to the action when the report is prepared, including a description of the monitoring, enforcement and review procedures that apply, or are proposed to apply, to the action.

## 7 Inviting public comment/advertising

- 7.1 When the public is invited to comment on draft assessment documents or guidelines, or terms of reference for an inquiry are advertised, the invitation or terms of reference are published in newspapers circulating generally in each State and self-governing Territory.
- 7.2 The advertisements include: the name of the action, a brief description of the action, its location(s), what matters are protected by Part 3 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, the name of the person proposing to take the action, the name of the designated proponent (if not the person intending to take the action), how any relevant documents may be obtained, and any deadline for public comments.

## VI) APPENDIX 2 - SET OF REVIEW QUESTIONS

### Review Questions

The aim of the review is to evaluate the operation of the agreement against the object of the agreement. The specific objects of the agreement are to contribute to:

- (a) protecting the environment,
- (b) promoting the conservation and ecologically sustainable use of natural resources,
- (c) ensuring an efficient, timely, and effective process for environmental assessment and approval of actions, and
- (d) minimising duplication in environmental assessment of relevant impacts within the meaning of section 82 of the *Environment Protection and Biodiversity Conservation Act 1999* through Commonwealth accreditation of Northern Territory processes.

### Public comment and consultation

1. Have the assessment processes conducted under the Bilateral Agreement provided an adequate opportunity for public consultation and access to assessment documentation?

For example:

- Have draft guidelines been published and public comments sought?
- Have the notifications seeking public comment on draft assessment documentation or guidelines been published in a newspaper circulating generally in each state and territory?
- Has the draft assessment documentation been on public display?
- Has the draft assessment documentation released for public comment contained sufficient information about the action and the potential relevant impacts?
- Has public comment been properly taken into account?
- Have the needs of any interest groups with particular communication needs been catered for?

### Consideration of environmental impact

2. Have assessments carried out under the bilateral agreement ensured that there has been an adequate and proper assessment of the likely impacts of actions on matters of national environmental significance (relevant to the *Environment Protection and Biodiversity Conservation Act 1999*)
  - Have the assessment guidelines encompassed all the relevant impacts of the actions?
  - Have the environmental impact statements/development proposals/environmental management plans and the assessment reports contained sufficient information about the action and its relevant impacts?
3. Have the outcomes of the assessments carried out under the bilateral agreement contributed to:
  - the protection of the environment; and

- promoting the conservation and ecologically sustainable use of natural resources?

**Efficient, effective and timely process, minimising duplication of two assessment processes**

4. How did you find the process – for example did you know who to provide information to and were procedures clear?
5. Has the bilateral agreement ensured that the assessment of proposals has occurred in a timely manner?
6. Do you believe the process was efficient? And if not, how could its efficiency be improved?
7. Has the bilateral agreement minimised duplication between Australian Government and Northern Territory environmental assessment processes in respect of matters of national environmental significance?
8. Can you tell us more about your experience – eg were you informed of the outcomes, satisfied with communication?
9. Any further comments in relation to the operation of the bilateral agreement?

**Extra question for government agencies only**

10. Have the procedures set down in the bilateral agreement, including the administrative procedures referred to in clause 20, been complied with?
11. If yes to the above, what was your experience – eg what did you have to do?

**VII) APPENDIX 3 - LIST OF SUBMISSIONS**

	<b>Organisation</b>	<b>Name</b>	<b>Title</b>
1.	Compass Resources NL	Rodney D Elvish	Consultant Metallurgist
2.	McArthur River Mining Pty Ltd	Brian Hearne	General Manger
3.	Northern Land Council	Norman Fry	Chief Executive Officer
4.	Environment Centre of the Northern Territory Inc	Peter Robertson	Coordinator
5.	Northern Territory Environment Protection Agency Program	Diana Leeder	Acting Executive Director
6.	Notes from the EPBC Bilateral Agreement Review Workshop – involving representatives from Northern Territory Department of Primary Industries, Fisheries and Mines, and the Northern Territory Department of Natural Resources, Environment and the Arts Environment Protection Agency Program and Natural Resource Management Division	Compiled by Wendy Hutchison	Manager, Environmental Assessment