North Australian Indigenous Land and Sea Management Alliance Ltd
Building H, 23 Ellengowan Drive, Brinkin NT
PO Box 486 Charles Darwin University
Darwin NT 0815 Australia
admin@nailsma.org.au
www.nailsma.org.au
ABN 80 149 061 174

Looking after Our Country... Our Way

Environment Policy,
Department of Environment and Natural Resources,
GPO Box 3675,
Darwin NT 0801
environment.policy@nt.gov.au

Tuesday 28th of June 2017

To whom it may concern,

RE: Submission on the Proposal for Environmental Regulatory Reform in the Northern Territory.

On behalf of NAILSMA I would like to provide input to the proposed environmental regulatory reform in the Northern Territory.

Kind Regards

Melissa George

Chief Executive Officer

NAILSMA Ltd

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1 Introduction

NAILSMA welcomes the opportunity to participate in the Territory's process for environmental law reform. Comprehensive re-design is essential to support Aboriginal people in their efforts to secure enduring benefits from ownership and sustainable use of land.

It is regrettable that it has taken so long to respond to the serious need for fundamental change; and essential to take full advantage of this important initiative. The process must be resourced properly and conducted competently. There is much to be done but the scale of the task demands urgency rather than over-cautious dilly-dallying.

Reports from the NTEPA and Independent Monitor of the McArthur River Mine demonstrate beyond doubt that present Territory assessment and regulatory systems invite recurring failure and, too often, all but irreversible environmental damage. The major and accumulating biophysical, social, cultural and economic costs of these failures cannot be permitted to further degrade Territory landscapes and social cohesion.

Problems occur in development assessment, setting conditions, enforcing conditions, and correcting failures to observe conditions. The technical solutions to many of those failures of policy and practice canvassed in the discussion paper are considered in some detail by our colleagues in the Land Councils. We endorse their conclusions. In particular, we support the proposal for environmental approvals and related conditions to be issued by the relevant (Environment) Minister. Our additional comments here should be interpreted in that context.

In this submission, we focus on those failings that particularly affect the interests of Aboriginal people who accept an array of responsibilities for the health of land and resources in which they have interests. We propose change that will have the greatest positive impact on those interests. Whilst we do not follow the sequence of questions in the discussion paper, our arguments address a number of those questions. NAILSMA is committed to provide whatever support it can to a serious effort to drive productive change, because we consider this work to be a critical component of the full suite of measures needed to improve the well-being of the Territory's regional and remote people.

And our submission is about more than addressing weaknesses in present practice. Related positive initiatives also have the potential to reinvigorate land management to restore environmental values damaged during the absence of Aboriginal custodians from their lands. We particularly focus on revitalising the Aboriginal presence and influence on land management practice to improve the condition of Territory landscapes.
We will be happy to provide whatever additional information or explanation you may require and would welcome the opportunity to meet with relevant staff.

2 Critical issues

Big issues requiring serious and priority treatment are: proper engagement of developers and regulators with Indigenous and other remote and regional landowners; genuine recognition of Indigenous values and perspectives on environmental quality; serious (re)application of Indigenous knowledge to protect those values and drive improvement in environments; ongoing monitoring of environmental values and management capabilities; immediate restoration of environmental offsets that cover Indigenous values and offer enterprise opportunities; and relevant and productive application of variants of strategic environmental assessment, designed explicitly to engage and support Aboriginal people in land use planning.

If these issues aren't resolved, then advances on other technical issues as explored in the discussion paper and the Land council and other submissions will be ineffective in advancing Aboriginal interests.

2.1 Engagement of Indigenous people

Disenfranchisement of Indigenous people from full participation in the environmental assessment process must be overcome. It is inconceivable that the interests of the owners of half of the Territory's lands, most of its coast and tidal waterways and holders of native title interests in most of the remaining area should continue to be marginalised by processes grossly biased to other interests. Causes of poor performance are reasonably well understood (e.g. O'Fairchellaigh 2007). Among the most important in assessment performance are:

- no or mostly rhetorical commitment to Indigenous participation;
- time frames too short to inform people fully on complex matters to which they have had little or no prior exposure, but which affect the most important aspects of their lives;
- language and related communication difficulties;
- weak, in fact often derisory, treatment of alternatives in assessments, so Aboriginal interests gain no familiarity with other options available to them;
- treatment of Aboriginal values (when acknowledged at all) as fraudulent, dispensable or inherently malleable and so capable of accommodating virtually any other perspective (Lane et al. 2003; NLC 2017);
- actual or threatened intervention from government when confronted with concerns about unfamiliar values not presently evaluated in formal assessments;
- absence of options to initiate review of operations and correct poor environmental performance; and

- developer exploitation of information gaps to promote contestation among Aboriginal interests: the divide and rule strategy.

And in framing conditions and approaches to management of risks, gaps in developer and regulator thinking include:

- lack of consideration of the full array of customary/legal sea county interests and management capabilities
- poor recognition of and support for enterprise development among Indigenous land owners and managers as a mechanism to secure sustainable management practice, enhance skills and customary values.
-

Resolving these and other issues demands multiple responses to improve quality and depth of engagement. Among the most important and achievable are:

- establishing in law a specific obligation to secure real Indigenous engagement in assessment and, where necessary, in aspects of project design to minimise negatives and optimise benefits
- matching statutory time-frames to the scale, complexity and significance of projects: assigning the same short fixed period to consider and respond to proposals with temporary or restricted impacts and those that have permanent severe and widespread impacts makes little sense
- discretion for the assessment authority to extend time-frames until satisfied that engagement with Aboriginal stakeholders has been comprehensive and effective: risk of extended time-lines will be an important disincentive for developers to shortcut the engagement process
- systematic support for Aboriginal landholders to plan for use of their lands for commercial and other purposes, in advance of specific external proposals.

International guidelines regarding free, prior and informed consent (see http://firstpeoples.org/wp/making-free-prior-and-informed-consent-available-to-all/ for a list and links to relevant documents) promote access “to all relevant information reflecting all views and positions ... for consideration by the Indigenous peoples concerned” with “adequate time and resources for Indigenous peoples to find and consider impartial, balanced information as to the potential risks and benefits of the proposal” (Doyle and Carino 2014). Others argue that “ ... indigenous peoples must be fully equipped with the technical capacity to set the terms of an arrangement that is sustainable and conducive to their well-being, and the conditions exist for them to make choices that include, but go beyond, choosing between saying yes or no to a predefined project proposal, and extend to choices between various possible negotiated options” (Carmen 2010).

Land councils have statutory roles to ensure that landowners understand the nature and implications of development proposals, including environmental impacts. But in an effective and

efficient system, that role will be about independently "testing" with landholders and other Aboriginal interests the quality of communications and understanding achieved by the developer about their proposal. In meeting the statutory obligation to ensure that decisions to offer or withhold consent are fully informed, land councils should not be required to compensate for shoddy engagement processes and/or inadequate assessment analysis and documentation: to become, *de facto*, a parallel, under-resourced Indigenous environmental assessment authority.

We return to a number of these concerns and options in considering other major issues below.

2.2 Recognising and protecting Indigenous values

The invisibility of Indigenous rights, interests and views in environmental matters is a recurring theme in the related literature (see. p 325 in O'Fairchellaigh 2007). Objects in the *Environmental Protection and Biodiversity Conservation Act* 1999 to "recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and .... to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge" are certainly not realised in the environmental assessment process. The complete absence of equivalent provisions in Territory law exacerbates that failure.

For example, we are aware of no case in which protection of natural values important to Aboriginal people has been given priority in terms of reference for an environmental impact assessment. Yet obligations to deal with impacts on listed species that may or may not be under threat and may not be present are routinely applied and accepted. Lists that are based, in little-studied Territory environments, on opinion rather than evidence take precedence over expert local knowledge and opinion about values important to local people and their futures.
This "cultural" bias is so deeply embedded in present law and practice that the resulting deflection of attention - from real and pressing issues about integrity of landscapes and the ability to use them safely and securely for other purposes - onto "imagined" risks is rarely questioned. Dealing with lists that are built on and invite speculation may have become routine and treated as tractable because they can be dismissed in responses also based on speculation. But in the exchange they debase and discredit the assessment process.

We propose that obligations for developers to

1. identify matters of particular significance to Indigenous landowners and rights holders; and
2. specify how Indigenous knowledge applied by relevant Indigenous interests will secure their protection and management;

should be explicit in new environmental law.

2.3 Application of Indigenous Knowledge

Indigenous people will most often hold intergenerational knowledge directly applicable to a development site and encompassing long time frames, which can and should be applied to assessment and problem-solving. Such knowledge, because it has not been codified but is exercised by experts with traditional authority recognised by their communities, can only be accessed and applied by direct and serious engagement with those experts.

If references to IEK are to be more than rhetorical, great improvements in engagement policy and practice and the resources devoted to it are essential precursors. The ultimate goal in design of developments and operating methods must be to identify and agree the roles that Indigenous land owners and managers will continue to play at the development site, during and after development, to assure them that important values are actively protected. This might be done directly through contracts with developers or by funding that landholders and their managers reinvest in caring for their lands.

Local knowledge is particularly important in:

- choice of biophysical phenomena and cultural values requiring active protection
- methods adopted for protection and management
- identification of parts of the landscape requiring particular management attention
- selection of targets for monitoring and design of monitoring systems
- selection of monitoring sites
- interpretation and reporting of monitoring results.

We do not argue for the substitution of Indigenous knowledge for formal scientific knowledge. Both approaches are important and are best deployed by relevant experts working together to bring different experiences and skills to bear. Yibarbuk (2001) and others have called this the two-tool-kit method and Tengo et al (2014) the multiple evidence base approach.

To reiterate, we propose that obligations for developers to (1) identify matters of particular significance to Indigenous landowners and rights holders and (2) specify how Indigenous knowledge applied by relevant Indigenous interests will secure their protection and management must be incorporated in new environmental law. That treatment must go beyond aspirational statements in objects of acts to require evidence of related consultations; and provisions for statutory guidelines to specify mechanisms appropriate for different development types. For the NTEPA to make valid judgements about quality of Indigenous engagement, treatment of Indigenous values, and application of Indigenous knowledge, Board composition will clearly need to expand to include relevant knowledge and skills. Support staffing may also need review to strengthen relevant skills.

2.4 Environmental offsets

An additional important pathway for enhancing the capacity of Indigenous custodians to apply their knowledge is offered through the offsets component of the mitigation hierarchy (Kiesecker et al. 2010).

Development often fails to deliver benefits to local people (Stoeckl et al. 2013) and even if "trickle-down" reaches the few, it may exacerbate inequalities in Indigenous communities (O'Fairchellaigh 1998). Well-designed offsets offer options to improve equity of access to benefits by increasing the total quanta of benefits and the number of local people accessing them. They can do this by requiring that actions offset compensating for residual detriment on the development site are properly funded by the developer and performed by local Indigenous interests. The fit of this sort of obligation to options for Indigenous engagement and applications of Indigenous skills and knowledge in land and resource management is surely too obvious to require elaboration.

The extraordinary opportunities available to improve the environmental management of large areas of the Territory, where diffuse degradation requires skilled intervention (Whitehead et al. 2002), have already been demonstrated in savanna fire greenhouse gas offset projects (see Russell-Smith et al. 2009). Active fire management has been restored across millions of ha to protect universally recognised environmental values and to generate incomes estimated at $30m pa.

Unfortunately the Territory's recent treatment of offsets has done more than leave an important gap in the mitigation hierarchy. The NTEPA's guidance for dealing with offsets required under Commonwealth law (NTEPA 2013) has conflated social impacts with biophysical in ways that threaten the integrity of standards and outcomes for both sets of obligations. To replace this deeply flawed approach, an offsets policy that improves environmental outcomes while also offering opportunities for Indigenous people will:

- require net (biophysical) environmental benefit;
- generate benefits, especially in supporting on-country activity, for those who are most directly affected by the residual detriment being offset;
- favours local offset providers who, on Indigenous land or where native title rights have been recognised, will be Indigenous rights holders or their nominees; and
- apply Indigenous knowledge and methods as well as enhancing capacity to apply formal scientific knowledge.

NAILSMA, The Nature Conservancy and the NLC have done much background work on the options available and we would welcome the opportunity to discuss this issue with agency personnel.

We propose that the Territory (1) restore environmental offsets immediately through a policy statement to guide regulators in applying offsets in conditions of approval (2) encourage the

NTEPA to withdraw their flawed guidance and (3) incorporate requirements for developers to identify environmental offsets in new environmental law.

2.5 Strategic environmental assessment (SEA)

Participation of Indigenous stakeholders in development decisions is compromised by lack of financial resources and limited access to technical resources. Overcoming these constraints must be sought for individual assessments, but more enduring arrangements must also be considered.

We note that the discussion paper includes SEA among assessment options. SEA is described there as supporting strategic planning: it is argued that it:

> *would assist in the development of regional plans (detailed community plans) as well as Indigenous business enterprises, allowing a holistic approach to the environmental assessment (rather than communities trying to navigate through individual assessment processes).*

We agree that SEA is an important option for looking at the environmental implications of major developments, plans and policies. Critically, raising SEA as an option in this set of reforms is an essential recognition of the need for much better land use planning outside the environmental assessment process. New approaches to planning - that help developers, land owners and managers and the community more broadly to understand emerging opportunities and the obligations that go with them - are required urgently.

Outside urban centres, the Territory presently lacks a coherent planning framework. We are aware of only one occasion in which a local community was supported by government to develop a detailed land use plan for a substantial area (2003/4 in the Daly River), and the then planning agency declined to be actively involved, arguably contributing to the collapse of that initiative. Clearly fundamental change in regard to land use planning is required before SEA will add value or have much influence.

NAILSMA and the NLC have developed detailed proposals for empowering Indigenous landowners to develop integrated approaches to customary, commercial and conservation use of their estates through “whole of country” land use planning. In our view many SEA principles (see p. 17 Dalal-Clayton and Sadler 2005) are applicable to this work, and priority should given to supporting this practical expression of integrated planning for sustainable land use. Exposure to land use options and their benefits and costs and strengths and weaknesses, in advance of specific proposals is the best mechanism for promoting genuinely full, prior and informed consent while containing the time needed for individual assessments.

We would welcome the opportunity to discuss with relevant agencies how Indigenous interest in and development of practical approaches to SEA could be built around a government-supported Indigenous land use planning (a.k.a Business on Country) initiative.

3 Summary and conclusions

There are no one dimensional solutions to the challenges faced by Indigenous people in becoming full, participating members of the Territory socio-economy. Stepwise progress on many fronts is required. And reform of the Territory's environmental assessment system is one of the steps warranting early attention. But greatly improved EIA processes will be ineffective in improving environmental and socio-economic outcomes on Aboriginal land unless people have both the means and the incentives to take advantage of them.

Improved means of gaining access will depend on much greater efforts from developers to consider the needs and aspirations of the owners and inhabitants of the lands on which they operate; and to shape interactions accordingly. Support from governments and NGOs will also be important to help build familiarity with EIA systems and productive ways of interacting with them. Obstacles like time frames that are ridiculously short - for large, complex, high-impact projects involving dramatic change to which would-be consenters have not previously been exposed - must be addressed. Improved standards of EIA documentation, in which regulators and assessors demand focus on the larger, real and long-term threats to ecosystem integrity and healthy function, ahead of peripheral conservation concerns, will allow land councils to make better use of limited resources (and limited time) to secure full and informed consent. Positive incentives for Indigenous individuals and groups to seek greater engagement in development issues requires greater awareness that they have real options and the rights and capacities to influence design and operation of developments on their lands. And that improved capacity to protect both customary and production values over the whole of their estates is available through well-designed environmental offsets that draw on Indigenous knowledge and skills.

Across all industry sectors and segments of society, great synergies in sustainable development and environmental management performance are available by combining new environmental law with good land use planning. This opportunity is foreshadowed in the discussion paper but not seriously developed. We consider that environmental reforms must be designed and implemented in tandem with frameworks for land use planning, shaped to meet the needs of Indigenous people.

4 Recommendations

We recommend that new law:

(a) provide that environmental approvals and related conditions are issued by the Environment Minister based on recommendation from an independent NTEPA, subject to strong supporting legislation and consequential amendment of other law to:

- prevent environmental approvals and conditions being over-ridden or compromised by related development approvals

- expand Authority membership to require skills in assessment of quality of Indigenous engagement and options to apply Indigenous knowledge and other capabilities;

(b) provide for NTEPA to assess quality of public participation and in particular Indigenous engagement, and to start the regulatory clock only when satisfied;

(c) offer discretion to match statutory time-frames to scale complexity and significance of projects and their implications for local communities, especially rights and other interests of Indigenous people:
- here and in (b) above prior exposure of relevant interests to planning for land use change would be considered in the need for extra time;

(d) oblige development proponents to consider matters of particular significance to Indigenous people and to show in proposals how they have identified and responded to them;

(e) oblige developers to identify options for application of Indigenous knowledge and skills to management of environmental impacts, including:
- where they affect matters of particular significance to Indigenous interests;
- in targets for and design of monitoring systems; and
- conducting and reporting on monitoring results

(f) require environmental offsets for all assessed developments to:
- generate net (biophysical) environmental benefit;
- generate other benefits, particularly in supporting on-country activity for those who are most directly affected by the detriment being offset;
- favour local offset providers who, on Indigenous land or where native title rights have been recognised, will be Indigenous owners or rights holders or their nominees; and
- apply Indigenous knowledge and methods as well as enhancing local capacity to apply formal scientific knowledge.

In addition, prompt action should be taken to:

(g) implement environmental offsets immediately, by:
- issuing a policy statement to direct regulatory agencies;
- encouraging the NTEPA to withdraw its existing guidance on offsets;

(h) use the offsets experience to refine approaches to recognition of Indigenous values affected by land use change and application of Indigenous knowledge to their management; and

(i) design and implement environmental law reforms in tandem with support for improved land use planning, within a Business on Country framework for Aboriginal land interests.

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