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SUBMISSION

DISCUSSION PAPER ON NT CLIMATE CHANGE ISSUES

We congratulate the government on its participatory approach to climate change policy development for the NT and welcome the opportunity to comment on the NT Government's Discussion Paper on NT Climate Change Issues (**Discussion Paper**).

In this submission we highlight the body of policy and law reform work the Australian Network of Environmental Defenders Office has produced which focuses upon climate change strategies for mitigation and adaptation. We then turn our minds to the Discussion Paper and express concern about the primacy afforded by the Discussion Paper to the development of the NT economy in light of an impending national emissions trading scheme with only cursory reference to other environmental considerations. In addition, we comment on the necessary framework for development of climate change policy and the need for clear and consistent legislative mandatory requirements for decision-makers, if a genuine, holistic and integrated approach to mitigating, and adapting to climate change is truly to be implemented in the NT. Finally, we briefly comment on the approach to land clearing proposed in the Discussion Paper in light of current work EDO NT is undertaking on this issue.

Climate Change policy and law reform work by the Australian Network of Environmental Defenders Office

The Australian Network of Environmental Defenders Offices (**ANEDO**) is a network of nine community legal centres in each state and territory, including EDO NT, specialising in public interest environmental law and policy. Increasingly ANEDO's policy and law reform work is focused on climate change strategies for mitigation and adaptation.

ANEDO has commented extensively on the design of an Australian emissions trading scheme and has made separate submissions on the various Garnaut review papers. All submissions can be found at <http://www.edo.org.au/policy/policy.html>. ANEDO has consistently advocated for widest possible coverage of an emissions trading scheme, the full auctioning of permits, sufficiently high penalties to deter non-compliance, and make-good provisions. Further, ANEDO has maintained that the overarching objective of the scheme must be an environmental one – to assist in reducing Australia's greenhouse gas emissions by a minimum of 60% by 2050¹.

ANEDO has also prepared a detailed submission on the range of climate change and environmental impacts on coastal communities and measures to address those impacts. This submission can be found at <http://www.edo.org.au/policy/policy.html>.

Recently, EDO NSW has prepared a paper to generate discussion on Best Practice Climate Law. The paper draws on developments in other jurisdictions and outlines key areas that should be addressed in national climate change legislation. The paper can be accessed at http://www.edo.org.au/edonsw/site/pdf/pubs/model_climate_law_project080417.pdf.

ESD as the guiding principle for Climate Change Policy Development and Law Reform

The NT Government has committed to inform both policy and decision making with the principles of Ecologically Sustainable Development (ESD)². Certainly, ESD and its constituent elements set out below, in particular the obligation to consider inter-generational equity and the need to act with precaution in the face of scientific uncertainty, should be the guiding principle for the NT government's approach to climate change mitigation and adaptation.

The precautionary principle – *“where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation”*. Although there is an incontrovertible body of scientific evidence to demonstrate that human induced climate change is already impacting on the planet, there remains significant scientific uncertainty regarding precise consequences of climate change. It is this uncertainty that triggers the precautionary principle.

Intergenerational equity – *the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations*. Climate change has increasingly been framed as an ethical and moral issue – not only because of the need to ensure continued environmental health for future generations but in light of the communities who are at greater risk of the impacts of climate change and whose carbon footprint are relatively small. This is particularly relevant for indigenous communities in the Northern Territory. While not necessarily politically expedient in the short term, a focus on maintaining current lifestyle standards must be tempered by long term perspectives which aim to ensure the NT's rich and varied natural resources are present and available for future generations to use and enjoy.

Conservation of biological diversity and ecological integrity – *conservation of biological diversity and ecological integrity should be a fundamental consideration*. Climate change and habitat destruction are regarded as the two greatest threats to global biodiversity³. We understand that, given the interrelationships between landscape processes, the impacts of climate change in tropical regions are difficult to predict and there is uncertainty as to what the changes to biodiversity will be. However, it is likely that these changes will be negative, particularly given the likelihood of inundation of wetlands, resulting from sea level rise. In any event, there are significant threats to the NT's biodiversity operating at the present time. Instances of threatened species in the NT are increasing as a result of the combination of a range of factors, including habitat fragmentation, change to fire regimes and weed and feral animal infestation⁴. An increase in the instances of threatened species extrapolates to a decrease in biodiversity.

Current NT regulatory regimes are currently proving ineffective in addressing the combined impact of a range of threatening processes and more than ever a holistic and integrated approach to decision-making is required⁵.

Improved valuation, pricing and incentive mechanisms – *e.g. the polluter pay principle – those that generate pollution should bear the costs of containment, avoidance or abatement.* Market-based mechanisms that create incentives for the reduction of greenhouse gas emissions such as the proposed national emissions trading scheme are an obvious means of implementing the principle of ESD, provided the caps put in place are robust and meaningful and the scheme is governed by strict rules and tough penalties⁶.

The 2002 *World Summit for Sustainable Development* reaffirmed the three pillars of sustainable development - economic development, social development and environmental protection. This need to account for a “triple bottom line” has been affirmed in the United Nations Framework Convention on Climate Change and adopted by Australia in the *National Strategy for Ecologically Sustainable Development*.

ESD calls for the integration of environmental, social and economic concerns. It is therefore not sustainable to ‘allow one or the other priority to completely fall off the table’. Consequently, true integration envisaged by ESD means according environmental considerations the same weight as economic considerations in all government decisions. Notwithstanding this, the Discussion Paper focuses predominantly on providing certainty for industry and economic growth. NT Policy and action needs to import an effective and discernible balance between economic growth and the needs of the environment in order to satisfy the requirements of ESD. This is particularly relevant to consideration of the appropriate policy approach to land clearing in the NT.

Legal Mechanisms for Incorporation of ESD and Consideration of Climate Change Impacts into Decision-making

The acceptance of ESD as a desirable feature or object of decision-making obliges the NT Government to extend the requirement for consideration of environmental factors, including greenhouse gas emissions and climate change impacts, to all agencies of government.

There are examples of legislation in all Australian jurisdictions that expressly include ESD as a measure for decision-making, and in some circumstances such legislation includes ESD as a mandatory consideration to be taken into account by relevant authorities charged with making a decision⁷.

The Courts in some jurisdictions have been prepared to hold that a requirement under legislation for an authority to take into account the “public interest” when making a decision has required that authority to consider the principles of ESD relevant to the particular issue at hand⁸. Further, the obligation to take into account ESD principles, particularly the precautionary principle and intergenerational equity, has been found to translate to an obligation to consider climate change impacts of proposed development⁹.

At present there are few instances in the NT where decision-makers are explicitly obliged under relevant legislation to take into account ESD when making decisions concerning proposals that have the potential to impact upon the environment¹⁰. There are no instances that we are aware of where there is an **explicit mandatory requirement** for decision-makers to taken into account

greenhouse gas emissions and/or climate change impacts when determining whether to grant consent to a proposal. It is arguable that, based on a interpretation of the Planning Act and Scheme and case law from other jurisdictions, the Development Consent Authority and Minister for Planning are obliged to consider greenhouse emissions and climate change impacts when determining whether to grant consent to proposals under that Act. However, until tested in the Courts, such an interpretation remains conjectural. Without clear legislative amendment there is little certainty in this regard.

We understand that the *NT Environment Impact Assessment Guide – Greenhouse Gas Emissions* identifies information required to be given by a proponent as part of the EIA process to enable the EPA program to assess the impact of greenhouse gas emissions from proposed projects. However, this does not translate to a mandatory and enforceable requirement for such considerations to be taken into account and given weight by the relevant decision-making authority. Further, whether an EIA is undertaken at all is entirely at the discretion of the Minister for Environment.

A true commitment to a holistic and integrated response to climate change in the NT requires legislative amendment and policy development to ensure land use, transport, mining and infrastructure projects are assessed for their climate change impacts. This requires, among other things, clear and consistent legislative mandatory requirements for the application of ESD, particularly the precautionary principle, the consideration of greenhouse gas emissions and climate change impacts of proposals, including cumulative impacts, and defined triggers for instigation of EIA processes.

Adaptation

We note the NT government acknowledges at page 77 of the Discussion paper the limitations and uncertainties in current understanding of extent of impacts on regions in the NT and recognises the need to anticipate plan and respond to the impact of climate change in its research priorities. We support this approach. However, in our view the uncertainty over the precise scale of climate impacts demands a precautionary approach to decision-making, so that uncertainty over the scale or scope of impacts does not act as an excuse for postponing action to enhance adaptive capacity ¹¹.

Legal commentators have increasingly drawn attention to potential liability where authorities fail to act to avoid or minimise exposures to climate change¹². Given acceptance by the majority of the scientific community that a certain amount of climate change is ‘locked in’, impacts of climate change are inevitable. Accordingly, it would appear the NT Government has little choice but to implement adaptation strategies and actions.

A possible approach is to explicitly include adaptation measures into both land-use planning and design, and disaster risk reduction strategies; incorporate mandatory risk assessment into decision-making; and explicitly adopt the precautionary principle into relevant legislation. Approaches of other jurisdictions in climate change planning may prove instructive. The Queensland approach to adaptive planning is summarised in McDonald, J, “A risky climate for decision-making: the liability of development authorities for climate change impacts”, (2007) 24 *EPLJ* 405.

Land Clearing regulation

Drawing on the discussion of ESD above, decisions concerning land use, land use change and forestry in particular cannot be made solely with a focus on greenhouse emission reduction and economic development in mind. Biodiversity conservation and ecological integrity should be equally important considerations in determining appropriate policy and strategy. In this respect, the suggested purchase of overseas offsets as a viable clearing policy for the NT is, on the face of it, inappropriate. Additionally, the Discussion paper does not discuss in detail the impacts of climate change on water availability in the NT. Clearly the sustainability of water use will define the extent and viability of agriculture and forestry development in the NT. We understand the lack of certainty in this respect was a key driver in extending the moratorium over clearing in the Douglas Daly region.

The questions concerning an appropriate regulatory framework for land clearing, how to avoid perverse incentives to clear land and means to resolve tension between economic opportunity and biodiversity and climate change gains arising from tightening controls over land clearing would be usefully informed by analysis of approaches by other jurisdictions that have put into place policy and regulatory arrangements to cease broad scale land clearing. EDO NT, in partnership with WWF and EDO NSW, is undertaking such an analysis as part of a review of current regulation of land clearing in the NT. We urge consideration of the resulting report in development of appropriate land clearing policy and regulation for the NT.

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¹ See Submission on the Garnaut Climate Change review – Emissions Trading Scheme Discussion Paper 18 April 2008; *Submission on Prime Minister's Task Group on Emissions Trading*- 7 March 2007 - http://www.edo.org.au/edonsw/site/policy/ets_anedo070307.php; Submission regarding the Possible Design for a National Greenhouse Gas Emissions Trading Scheme - 22 December 2006 - http://www.edo.org.au/edonsw/site/policy/net_anedosub061221.php; *submission regarding abatement incentives prior to the commencement of the Australian Emissions Trading Scheme* - 3 December 2007 - http://www.edo.org.au/edonsw/site/policy/ets_abatement_incentive071207.php

² Inter-Governmental Agreement on the Environment 1992

³ Travis, J.M. 2003 'Climate change and habitat destruction: a deadly anthropogenic cocktail' Centre for Conservation Science University of St Andrews, St Andrews.

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⁵ For an overview of NT legislation for Threatened species see Garnett et al "Analysis of Northern Territory Legislation for the Protection of Threatened Species", 15 August 2007 Charles Darwin University prepared for WWF Australia

⁶ Refer to ANEDO Submissions on a national emissions trading scheme in n1 above.

⁷ See legislation discussed in Bates, G *Environmental Law in Australia*, 2002, Butterworths. In addition, the decision of Justice Biscoe of the NSW Land and Environment Court in *Walker v Minister for Planning [2007] NSWLEC 741* gives an overview of the different means of incorporation of ESD into various legislation in NSW.

⁸ These decisions have been based on consideration of the subject matter and scope of the particular Act in question,. See *BGP Properties v Lake Macquarie City Council* (2004) 138 LGERA 237 at 257 (McClellan CJ); *Telstra Corp Ltd v Hornsby Shire Council* (2006) 146 LGERA 10 at [123] (Preston CJ); and *Carstens v Pittwater Council* (1999) 111 LGERA 1 at 25 (Lloyd J).

⁹ *Gray v The Minister for Planning (2006) 152 LGERA 258; Walker v Minister for Planning [2007] NSWLEC 741*

¹⁰ Several Australian Courts, in particular the NSW Land and Environment Court have fleshed out what the obligation to take into account ESD means. See *Walker v Minister for Planning [2007] NSWLEC 741* for a comprehensive summary of the relevant decisions.

¹¹ See McDonald, J, "A risky climate for decision-making: the liability of development authorities for climate change impacts. (2007) 24 EPLJ 405

¹² *Ibid.*