



COMMENT RE PRINCIPLES FOR ACHIEVING ESD

I. What work is your organisation involved in that is leading the Northern Territory towards sustainable living?

The EDO(NT) is a specialist public interest environmental law community legal centre. Its services are threefold:

- Free legal advice on public interest environmental law matters
- Community legal education
- Policy and law reform

The work we do promotes sustainable living in the Territory in two ways:

- Through advice and community legal education, EDO NT focuses on empowering the community to participate meaningfully in environmental decision-making. Broad public participation in decision making is recognised at the international level as “*one of the fundamental prerequisites for the achievement of sustainable development*”¹.
- Through Law and Policy Reform work we review and comment on current NT policy, and legislative and administrative frameworks, for their sufficiency in providing for ESD as an outcome of decision making.

For example, we have recently undertaken an extensive review of the legislative framework for Marine Protected Areas in the NT in light of the aspirations of the draft NT Marine Protected Areas Strategy for biodiversity conservation together with the sustainable use of marine resources.

We have also recently responded to the NT Government’s Discussion Paper on Climate Change advocating for:

- i. positioning ESD and its constituent elements as the guiding principles for NT climate change policy development; and
- ii. incorporation of ESD and its constituent elements, as well as climate change impacts, into legislation as mandatory considerations for decision-makers.

II. What does the concept of Ecologically Sustainable Development mean to your organisation?

As a legal centre providing services to the community, EDO(NI) draws on international policy and legal instruments², Australian policy and law, and decisions of Australian Courts and Tribunals to inform its understanding of ESD.

It is well established that ESD centres around a concept of integration of environment protection and development. While there are various definitions of ESD, four common and overlapping themes have been identified³:

- i. The need to maintain properties, processes and functions of natural ecosystems necessary to support human life.
- ii. The need to pursue an integrated approach to decision-making, which seeks to balance economic, environmental and social values.
- iii. Equity – the need to have regard to future generations and distribute fairly between and within generations.
- iv. Development should encompass non material well being, satisfaction and quality of life elements in addition to material wellbeing. For example, recognition of the special and cultural needs of indigenous people.

There are various international and Australian sources that discuss the principles relevant to achieving the objective of ESD. In Australia, the following four principles are generally included within policy or legislation as principles for achieving ESD:

- i. The precautionary principle
- ii. Biodiversity Conservation
- iii. Inter-Generational Equity
- iv. Improved Valuation, Pricing and Incentive Mechanisms⁴

These are notably included at a Federal level in the objects of the *Environmental Protection and Biodiversity Conservation Act 1999*, in addition to various statutes in State and Territory jurisdictions.

Other stated principles include⁵:

- v. Establishing adequate environmental protection standards, and adequate monitoring of changes in environmental quality and resource use, in addition to publishing results of monitoring.
- vi. Prior environmental assessment of proposed activities which may significantly affect the environment or use of natural resources
- vii. Prior notification to persons likely to be affected by a planned activity, in addition to granting of equal access and due process in administrative and judicial proceedings.

The decision of Justice Biscoe of the NSW Land and Environment Court in *Walker v Minister for Planning*⁶, particularly at pages 20 to 47, discusses ESD and its constituent principles in a legal context, and provides a comprehensive overview of how ESD has been conceptualised internationally and implemented in Australia through policy, legislation and decisions of the Courts. A copy of this decision is attached (*).

III. What sort of issues do you think should be considered/ incorporated when developing overarching principles of sustainability?

Overarching principles are themselves largely ineffective to achieve the goal of ESD unless they are recognised through legislative implementation, and by appropriate administrative and judicial structures. Without a legal framework, it is too easy for lip service to be paid to ESD while a ‘business as usual’ approach is taken. Indeed, Agenda 21⁷ notes that laws and regulations in each country are the most important instruments for transforming environment and development policies into action.

In relation to legislation, the legal framework referred to is not merely the EPA Act, but the body of Territory legislation and regulation relevant to the environment and development. The EPA has a legislated role, through sections 5(2)(b) and 7(2)(b) of the EPA Act, in relation to the setting of “objectives, targets and standards”, with ESD being a cornerstone of these.

In our view the following legislative and administrative reforms are essential for principles of ESD to have appropriate and practical effect within the NT:

- i. Incorporation of ESD and its component principles into both the objects and machinery provisions of relevant legislation **and** as mandatory considerations for decision makers.
- ii. Accountability for pursuing sustainable outcomes. For example, legislated obligations for reasons to be given, accounting for how the decision fares against the principles comprising ESD.
- iii. Rights for public participation in decisions **and** access to information.
- iv. Access to appropriate avenues of appeal and independent review.
- v. Open standing provisions and opportunities for third party merits appeals
- vi. Enforcement and compliance mechanisms in legislation **and** sufficient resourcing for departments to monitor and enforce compliance.
- vii. Robust and participatory environmental impact assessment legislation, which includes mandatory triggers for assessment.
- viii. Requirements in legislation for monitoring of the sustainability of outcomes.
- ix. Legislated incentive mechanisms, for the creation of positive obligations for environmental protection.

While inclusion of ESD into legislation (as both an object and a mandatory consideration) is essential, what do principles like the precautionary principle actually mean in practice for decision-makers?

Unfortunately the NT does not have expanded rules of standing or third party appeals rights, and as such there has been little opportunity for Courts or Tribunals to be involved in developing an understanding of ESD in a practical context which could ultimately give guidance to decision-makers.

In jurisdictions such as NSW, which do have expanded rules for standing and merits appeals (as well as a dedicated Land and Environment Court), a number of cases have applied principles of ESD to particular circumstances/decisions⁸. For example, in *Walker*, Biscoe J found that an obligation to take ESD into account (specifically the precautionary principle and intergenerational equity) meant an obligation to consider climate change impacts and flooding risk when determining an application for a coastal development.

In lieu of an expanded role for Courts and Tribunals in the NT in the immediate future, there is a significant opportunity for the EPA to now determine how principles such as the precautionary principle, intergenerational equity and biodiversity conservation should be implemented in practice. Sections 5 and 7 of the EPA Act, and the second reading speech for the Act, effectively provide that the EPA has a primary leadership role and responsibility in this regard.

The legal situation in other Australian jurisdictions, particularly best practice examples from jurisdictions such as NSW, is also relevant, due to the Intergovernmental Agreement of the Environment of 1 May 1992, to which the NT is a party.

IV. What are the priorities for the Northern Territory when achieving ecologically sustainable development?

EDO(NT) believes the legislative reforms described above, including improved accountability and access to administrative or judicial proceedings, are essential to achieving ESD in the NT, and should be given priority. The immediate priority for the NT in this is for the EPA to be relevant and effective. This can be achieved by the EPA through both the terms of the principles it is now considering and, in the longer term, by the EPA ensuring the appropriate establishment, application and status of the component principles of ESD within the Territory's legal framework.

V. Are there any barriers that need to be identified that would inhibit the Northern Territory achieving ecologically sustainable development?

Drawing on the above discussion, particularly the importance of legislative implementation, there are few NT statutes that specifically include ESD and its constituent principles in their objects, and even fewer that include these as mandatory relevant considerations. The insufficiency of the current legislative and regulatory framework, in addition to limited 'access to justice' and accountability, represent a significant barrier to achieving ESD in the NT.

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¹Chapter 23 of Agenda 21; Action Plan adopted by the 1992 UN Conference on Environment & Development

²Including, among others, the Brundtland Report, Rio Declaration, and Agenda 21

³Adapted from Bates, G. *Environmental Law in Australia* 5th Edition p122

⁴See EDO NT Climate Change Submission for description of each principle

⁵See World Commission on Environment and Development Experts Group on Environmental Law "Summary of proposed legal principles for environment protection and sustainable development" p128

⁶ [2007] NSWLEC 741; available on Austlii site; NSW section.

⁷ Action Plan for Sustainable Development, arising from the UN conference in Rio (see n1 above)

⁸ These are helpfully summarised in *Walker v the Minister for Planning* (see n7 above)