

## Executive Summary

The NT environment is currently under significant and increasing threat from a wide range of developmental and other human induced activities. Scientists are warning that these accumulated activities are driving a major extinction wave across northern Australia and increasing pollution and unsustainable resource use. Such threats will only continue to increase in the future, yet the environmental institutions which are in place in NT to deal with environmental issues are inadequate to deal with the existing pressures, let alone the future pressures.

While the staff of the NT's current environmental institutions may be committed to environmental protection, the structure of these institutions means they are simply no longer appropriate to deal with NT's environmental issues. The Environment and Heritage Division of the Department of Infrastructure, Planning and Environment is beset by an increasingly large and complex workload, potential conflicts of interest and inadequate resources. It lacks a statutory basis or statutory functions, and is therefore liable to be changed or abolished by mere executive action without any parliamentary or public scrutiny. It is not independent or individually accountable to the public or parliament, which means it lacks credibility in government, industry and in the wider community. There is therefore a need for it to be completely overhauled and for a new independent environmental regulatory agency such as an EPA to be established.

The NT has an opportunity to put in place an EPA with accords with world's best practice. Such a regulator would have the following characteristics:

- Be an independent, stand alone, statutorily constituted agency with statutory objects and statutory responsibilities
- Be governed by an independent Board
- Have formal accountability
- Be constituted in separate divisions to avoid conflicts of interest developing
- Be adequately resourced (including appropriate funding and expert and experienced staff)

and would undertake the following functions:

1. Environmental planning
2. Environmental policy development
3. Environmental impact assessment
4. Monitoring
5. Enforcement
6. Provide a registry of information
7. Facilitate community consultation
8. Encourage voluntary initiatives
9. Design environmental economic instruments
10. Environmental Education
11. State of the Environment reporting
12. Audit other government institutions
13. Implement sustainability

Implementing such an EPA would also require the introduction of an environmental appeals system to provide a check and balance on the EPA's decisions and ensure a robust environmental decision making process generally.

## **Submission to the Sessional Committee on Environment and Sustainable Development**

This submission is made on behalf of:

- Environment Centre Northern Territory
- Australian Conservation Foundation
- Australian Marine Conservation Society
- Environmental Defender's Office (Northern Territory)
- World Wide Fund for Nature Australia
- Threatened Species Network

We thank you for the opportunity to make a submission to your inquiry into the efficacy of the Northern Territory (NT) operating with an Environmental Protection Authority (EPA). We understand that the terms of reference for the inquiry are:

- 'arguments for and against establishment of an EPA';
- 'options for the structure of an EPA taking account of the demographic, geographic and financial context of NT';
- 'if a particular model is recommended, options for its staged introduction'.

We would appreciate the opportunity to appear before the Committee to present this submission and answer any questions which the Committee may have.

### **1. Introduction**

The NT environment is currently under significant and increasing pressure from a wide range of developmental and other human induced activities including mining, landclearing, irrigation, industrialisation and urbanisation, fishing and aquaculture, weed infestation and feral animals, inappropriate burning regimes and climate change.

Scientists are warning that these accumulated activities, resulting in habitat loss, fragmentation and modification, are driving a major extinction wave across northern Australia and contributing to rapid loss of biodiversity<sup>1</sup>. They are also leading to increasing problems of pollution, hazardous materials generation and transportation, and waste management. Such pressures will only continue to increase in the future. Yet the institutions which are in place in NT to deal with environmental issues are inadequate to deal with the existing pressures, let alone the future pressures.

Environmental regulation in the NT is primarily carried out by the Environment and Heritage Division (EHD) within the Department of Infrastructure, Planning and Environment. While the staff of the EHD may be committed to environmental protection, the structure of the EHD means it is simply no longer an appropriate body to serve as the NT's environmental regulator. It is beset by an increasingly large and complex workload<sup>2</sup>, potential conflicts of interest and inadequate resources. It lacks a statutory basis or statutory functions, and is therefore able to be changed or abolished by mere

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<sup>1</sup> Australian State of the Environment Committee *Australia State of the Environment Report 2001*

<sup>2</sup> For example, it is currently dealing with several large gas-related development projects, each of which has its own specific serious environmental implications and therefore must be separately assessed.

executive action without any parliamentary or public scrutiny. The EHD is not an independent agency and therefore is not separately accountable to the public or parliament, which means it lacks credibility in government, industry and in the wider community. This submission outlines these problems and concludes that there is an urgent need for current environmental institutions to be overhauled and for a new independent environmental regulator such as an EPA to be established with the goal of providing effective and accountable governmental action and leadership on environmental issues.

In overhauling the NT's environmental institutions, the NT has an opportunity to put in place an EPA in accordance with world's best practice. In order to be world's best practice, an NT EPA would need to undertake the following activities:

1. Environmental planning
2. Environmental policy development
3. Environmental impact assessment
4. Involvement in decisions about developments and management schemes
5. Monitoring
6. Enforcement
7. Provide a registry of information
8. Encourage voluntary initiatives
9. Design environmental economic instruments
10. Facilitate community consultation
11. Environmental Education
12. State of the Environment reporting
13. Audit other government institutions
14. Implement sustainability

This submission outlines why it is necessary for environmental regulation in the NT to include all of these activities, and why it is necessary for an independent, well resourced and expert EPA to undertake them.

Given that the phrase "Environmental Protection Authority (EPA)" is commonly understood as an environmental regulator, any new regulator in the NT should be known as the EPA. However, in saying that an environmental regulator should be known as the EPA, it is important to note that the term "EPA" is actually used in Australia to describe several types of environmental regulator, each with varying functions and responsibilities. There is therefore no one model or structure which an EPA in the NT should follow. Rather, NT should take the best parts of each EPA in Australia to create a world's best practice environmental regulator with the following characteristics:

- Be an independent, stand alone, statutorily constituted agency with statutory objects and statutory responsibilities
- Be governed by an independent Board
- Have formal accountability
- Be constituted in separate divisions to avoid conflicts of interest developing
- Be adequately resourced (including appropriate funding and expert and experienced staff)

This submission describes why an EPA in the NT will need these characteristics, and how it can be constituted to ensure that it has them. It also details the appeals system which

will be necessary to provide a check and balance on the EPA's decisions and ensure a robust environmental decision making process generally.

Constituting an EPA will necessarily take time and resources, and it will therefore probably be necessary to stage its introduction. This submission therefore concludes by describing how the EPA could be introduced into the NT in stages. Appendix 1 then contains a summary of the law reform which will be necessary in order to establish an EPA for the NT.

## **2. Existing environmental regulator in the Northern Territory**

### **2.1. Environment and Heritage Division**

At present, environmental regulation in NT is primarily carried out by the environment section of the Environment and Heritage Division (EHD) within the Department of Infrastructure, Planning and Environment (DIPE).

The functions of the environment section of the EHD are to:

- Provide advice to the Minister for Environment and Heritage on environmental impact assessment of development proposals throughout the NT.
- Prepare and coordinate government environmental protection policies.
- Coordinate NT Government representation on the Australian and New Zealand Environment and Conservation Council (ANZECC), the National Environment Protection Council (NEPC) and associated committees.
- Provide information and advice on environmental management matters<sup>3</sup>.

The environment section of EHD currently consists of 22 full time employees. It is responsible to the Minister for Environment and Heritage.

There are six other divisions in the DIPE besides the EHD. Those divisions are responsible for matters such as developing government infrastructure, developing and managing national parks, developing and managing Crown land, administering the NT Planning Scheme, issuing building approvals, managing water resources and managing pastoral lands. All of the divisions of DIPE other than the EHD are responsible to the Minister for Transport, Infrastructure, Lands, Planning and Parks and Wildlife.

### **2.2. No statutory basis**

The EHD has no formal statutory basis. This means that it can be amended or disbanded at any time by mere executive action. There need not be any parliamentary or public scrutiny of any changes to the constitution of the EHD, or indeed any scrutiny of a decision to dissolve it altogether. This is problematic for several reasons, including:

- The EHD is the primary government body with responsibility for the environment. Both industry and the community rely upon it to provide necessary environmental services, and therefore have an interest in the manner in which it operates. They should therefore also have some input into changes to its constitution and operation.

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<sup>3</sup> <http://www.ipe.nt.gov.au> accessed in April 2004

- The EHD is the only body which undertakes the functions listed in 2.1. If the EHD were dissolved or amended, it is unclear who, if anyone, would have the capacity or expertise to carry out these functions.
- The EHD has no formal statutory objects. While it carries out the functions listed above, it need not carry them out with environmental protection objectives in mind. This means, for example, that it could lawfully provide advice to the Minister on environmental impact assessment in a way which was not consistent with the protection of the environment or sustainability. Such advice would, however, be inconsistent with what the public's reasonable expectation that the EHD should only provide advice in a way which aims to protect the environment.

### **2.3. No statutory functions**

Just as the EHD does not have any formal statutory basis, neither does it have any formal statutory functions. While it currently carries out the functions listed above in 2.1, these functions could be amended at any time by mere executive action taken without any legislative or public scrutiny. This means that the government bodies, industry and the community who depend upon the EHD to perform these functions would not have any input into how and why the functions should be changed. And as noted above in 2.2, there is no guarantee that anyone else would have the capacity or expertise to carry out those functions.

### **2.4. Lack of accountability and independence, and potential conflicts of interest**

The informal and non statutory nature of the EHD has several other repercussions. For example, it means that the EHD does not have to produce its own separate annual report and is not independently accountable to parliament for its actions. Given that these are the primary means by which government and the community evaluate the effectiveness of government bodies, the informality of the EHD's structure is a serious obstacle to assessing whether it is achieving the NT's environmental objectives or not. The non statutory nature of the EHD also means it is subject to executive and Ministerial direction. This leaves it open to claims of political interference, which undermines public confidence in the EHD.

As noted above in 2.1, the EHD carries out its environmental regulatory functions while operating as a division of the DIPE. At the same time, other divisions of this Department are required to carry out development projects. If those development projects may have a significant impact on the environment, the EHD will necessarily be involved in assessing them. Even if there is no formal assessment of such projects, the EHD will be involved in setting policy which may affect them. This automatically involves the DIPE/EHD in a conflict of interest – being both the proponent and regulator of a particular project. (A recent example of this problem can be seen in that the DIPE is the proponent of the Glyde Point Industrial Estate project and the EHD is conducting a formal environmental impact assessment of that same project.) And although EHD staff may be committed to environmental protection and report to a separate Minister than the other divisions of the DIPE, at a day to day departmental level this does remove the potential for a conflict of interest to operate. This constant potential for a conflict of interest can seriously undermine public confidence in the environmental regulatory system in NT.

### **2.5. Limited resources**

Due to the fact that it is a mere division of a much larger government department, the EHD does not have an independent source of funding. And the funding it does have supports a relatively small staff dealing with an increasingly large and complex workload with increasingly serious implications for the environment and the community. This means it is greatly constrained in the programmes it can operate and the assistance it can provide to industry and community in respect of environmental issues.

As outlined in the introduction, a world's best practice environmental regulator has several important functions. However, the small scale of the EHD necessarily means that it simply cannot carry out many of those functions. For example, the EHD does not play a significant role in strategic environmental planning, in development control, or in monitoring and enforcement. And significantly for industry, it does not play any role in developing incentives for improved environmental performance, in developing environmental economic instruments or in conducting environmental educational programmes. This places NT industry at a competitive disadvantage with industry in the rest of Australia. Neither is the EHD able to undertake the important task of preparing comprehensive State of the Environment reports for the NT.

The small size of the EHD also means that, no matter how professional and committed its current staff are, it simply cannot have the depth and breadth of experience and expertise in the various technical and environmental disciplines which an effective environmental regulator needs.

Finally, the small scale of the EHD means that it must choose to focus on particular, usually high profile issues, and therefore is prevented from carrying out its functions in a consistent and strategic fashion. For example, it must choose what developments or industries to become involved with or what regions to provide assistance to. The industries or regions it doesn't provide assistance to are disenfranchised, again undermining both industry and community confidence in environmental regulation in the NT. Conversely, if the EHD chooses to closely scrutinise one industry but not others, those scrutinised industries may feel singled out.

### **3. Functions of an environmental regulator**

In order to protect its environment from current and future degrading activities, NT needs to completely overhaul its current environmental regulatory institutions and establish a world's best practice environmental regulator such as an EPA. Such a body would have the following functions:

#### **3.1. Environmental planning**

It is widely recognised that environmental land use and marine planning is the most important general means of environmental protection because it cuts across all aspects of environmental management and ensures the sustainable use and development of land and seas in a fair and orderly manner<sup>4</sup>.

The first part of the environmental planning process assesses the natural resources and conservation values in an area and the carrying capacity of that area for the cumulative impacts of certain types of land/sea use and development. It then identifies areas of

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<sup>4</sup> Bates G *Environmental Law in Australia* (5<sup>th</sup> edition) Butterworths Australia 2002 Chapter 10

greater or lesser ecological suitability for particular development purposes<sup>5</sup>. This ensures that particular developments will be undertaken in the areas where they will have the least environmental impact. It also provides certainty for developers and land/sea managers from the outset of their own planning process, as they immediately know where they should plan to undertake projects. This prevents them from planning to carry out activities in an area where it is likely that their activities would be environmentally unacceptable. It also saves them the costs of operating in an area where expensive measures to mitigate environmental damage would be necessary.

Currently in NT environmental planning takes the form of the broad high level land use objectives which are described in the Northern Territory Planning Scheme and some of the resource planning undertaken by the Conservation and Natural Resources Division of the DIPE. However, proper environmental planning should take place on several other levels. For example, planning must be done at an NT-wide level, regional level, and on a local level<sup>6</sup>. It must also be based on ecosystem and catchment management principles<sup>7</sup>. As such planning can only be effectively carried out by a well resourced, expert body with knowledge about the environmental issues across whole of the NT environment, an environmental regulator such as an EPA is required to conduct it. In addition, as environmental planning requires consideration of cross border environmental issues, a peak body such as an EPA is ideally placed to consider those cross border issues and liaise with the relevant State bodies about them. Local environmental planning can be undertaken by local bodies<sup>8</sup>. However, as the local environmental plans must be consistent with the regional and NT wide plans, there is again a need for a centralised environmental regulator such as an EPA which is able to co-ordinate them.

Examples of where strategic environmental planning by an EPA could have prevented environmental problems are:

- The Phelps-Panizza Shoal Bay prawn farm which had to be relocated to Blackmore River and a second Public Environment Report completed following community concern about the original proposed location.
- Protection of the Darwin Harbour mangroves via conservation zoning could have averted environmental damage and community concern about developments at Bayview Haven, Wickham Point, Cullen Bay and the proposed Elizabeth River dam.

### **3.2. Policy development**

Environmental protection policies are strategic environmental plans designed to protect either particular aspects of the environment, such as air quality or mangroves, or address a specific environmental problem, such as waste, or a specific industry, such as hydrocarbon refining<sup>9</sup>. There is scope for the development of a range of different policies in the NT, from development of statutory Environmental Protection Objectives under the *Waste Management and Pollution Control Act* to development of guidelines and codes of

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<sup>5</sup> Westman W *Ecology, Impact Assessment and Environmental Planning* John Wiley and Sons USA 1984 Chapter 1

<sup>6</sup> Bates (above) Chapter 10

<sup>7</sup> Preston B *Some Elements of Effective Environmental Laws* Environmental Planning and Law Journal Volume 4 December 1987

<sup>8</sup> Kwasniak A *Municipal and Land Use Planning* in Hughes, Lucas and Tilleman "Environmental Law and Policy" (2<sup>nd</sup> edition) Canada 1998 Chapter 13

<sup>9</sup> Bates (above) Chapter 10

conduct such as the *Guidelines for Mineral Exploration in Coastal Areas of the Northern Territory*.

In the six years since the *Waste Management and Pollution Control Act* has been in force, no Environmental Protection Objectives have come into force. And while some non statutory environmental protection policies have already been developed in the NT (such as the *NT Waste Minimisation and Recycling Strategy*, *A Conservation Strategy for the Northern Territory*, the *National Ozone Protection Strategy*, and the *National Cleaner Production Strategy*), there is a great need for environmental protection policies to be developed and enforced in many other areas. Such areas include water planning and allocation, mine site rehabilitation, aquaculture site identification and rehabilitation, and introductions of new exotic pasture species. There is also a need for a formal system of review of NT environmental policies to determine whether they are effective and how they could be amended to better achieve their environmental objectives.

Due to the fact that environmental policies address either specific portions of the environment, specific problems or specific industries, policies must be prepared by an environmental agency with expertise in that particular area. The agency must also be responsible for implementation of the policy, as having a policy which no one knows about or which no one adheres to is futile. The agency must also monitor the uptake and effectiveness of the policy. This is necessary so that if it becomes apparent that a policy is not resulting in improved environmental protection it can be reviewed and modified as required. An EPA is therefore required to make, implement and review environmental policies. In addition, as environmental policy making often requires consideration of cross border environmental issues, a peak body such as an EPA is ideally placed to consider those cross border issues and liaise with the relevant State bodies with respect to these.

Examples of where an EPA with the ability to prepare and implement environmental policies could have prevented environmental problems are:

- A policy requiring mining rehabilitation bonds could have provided a source of funds for the rehabilitation of the Mt Todd mine. The operators of this mine were not required to lodge a rehabilitation bond equivalent to the cost of remedial works at Mt Todd. When the mine failed in 2000 the NT public was left with either a major environmental problem or a huge bill for rehabilitation. To date this issue has still not been addressed.
- A policy on pasture improvement and environmental weeds could have prevented the massive problem NT now faces from weeds.

### **3.3. Environmental impact assessment**

The aim of environmental impact assessment legislation is to enhance the congruence of future developments with broad environmental goals, through clear, open, transparent and accountable processes<sup>10</sup>. The importance of environmental impact assessment has long been recognised in NT by the *Environmental Assessment Act 1982* and the *Environmental Assessment Administrative Procedures 1984*. However, due to the lack of an EPA to administer these legislative instruments, there are problems with the existing approach to environmental impact assessment in the NT which compromise its effectiveness.

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<sup>10</sup> Westman (above) Chapter 1

Under the current system, government agencies with responsibility for developments or land/sea management refer proposals to the Minister for Environment when they believe there is a significant environmental issue. However, given that those agencies may not have any relevant environmental knowledge, they may not always refer proposals which should be referred. An EPA should therefore be established to develop statutory or administrative criteria to assist these agencies in determining how significant any particular proposal might be in terms of environmental harm. Specifically, an EPA should develop an indicative list of activities which usually have, or could be expected to have, an environmental impact, and require all such proposals to be referred to it. The EPA should also be given the power to “call in” proposals which should be referred by an agency but are not. And to further ensure that no proposals which should be referred fall through the cracks, any member of the public should also be given the ability to refer proposals to the EPA.

Once a proposal is referred, under the current system the Minister determines 1) which proposals should be subject to assessment under the Act and 2) the appropriate level of assessment. This places a huge administrative and time burden on a Minister who may often be new to the field of environmental science, thus compromising the efficiency and effectiveness of the system. It can lead to decisions being made not to assess a project on the basis that it would be too costly to assess, rather than on a thorough analysis of the environmental issues involved. It may have also contributed to the fact that the assessment process has largely been confined to assessing only very large and visible proposals, rather than all proposals with significant environmental impacts.

Having a Minister make environmental impact assessment decisions brings the independence of the environmental impact assessment process into question, as a Minister is necessarily a political decision maker. This undermines both developer and public confidence in the system and leaves all decisions open to accusations of political bias. Further, it may appear that the Minister’s decisions about assessments are made “behind closed doors” in conjunction with other Ministers who have portfolio responsibility for the proposal. A statutorily based independent EPA, however, would not be subject to the same accusation and would be able to access sufficient administrative resources to undertake efficient and effective environmental impact assessment. An EPA should therefore be established and given the Minister’s current powers to 1) decide which proposals should be assessed and 2) what level of assessment should apply.

Just as the EHD does now, the EPA should prepare a report on the environmental impact of proposals which are being formally assessed. However, unlike the EHD, the EPA should be given sufficient resources to carry out its own investigations of the potential impact of the proposal where the proponent’s own documents are deficient. The EPA would then have sufficient information to prepare a recommendation about whether the proposal should go ahead, and if so, what conditions should be placed upon it to protect the environment<sup>11</sup>.

Having an independent EPA, rather than the EHD, involved in the environmental impact assessment process would remove the potential for the impact assessment process to become tainted by the perception of conflicts of interest. As noted above, the current EHD is part of the DIPE, other divisions of which undertake development and management projects. When those projects have a significant impact on the environment, the EHD is involved in assessing them. This automatically involves the DIPE in a

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<sup>11</sup> Bates (above) Chapter 12

conflict of interest – being both the proponent and regulator of a particular project. Having an independent EPA carry out the assessment would remove this conflict of interest and enhance public and industry confidence in the environmental regulatory system in NT.

One of the most important roles of environmental impact assessment is to ensure that the cumulative impacts of all of the development and land/sea management in a region be considered<sup>12</sup>. However, individual environmental impact assessments will usually deal primarily with the impacts of their specific proposal, and in a more cursory fashion with the cumulative impact the proposal will have when combined with other developments and management schemes in the area. This is not always due to poor environmental impact assessment preparation, but rather can simply be the result of the fact that the developer or manager does not have sufficient information about the other developments in the area to properly assess the cumulative impact. This is particularly the case where other developments are planned but not yet established. The only person with sufficient information about all the development in a region, and therefore the only person who can properly assess the cumulative impacts of proposals, is an environmental regulator such as the EPA.

Examples where a well-resourced, independent statutory environmental impact assessment system administered by an EPA could have prevented, or could still prevent, environmental problems are:

- Assessment of the Tiwi Island Barramundi Cage fish farm developed in 2001 would have allowed some scrutiny of the potential environmental impacts associated with the project.
- An updated assessment of the Darwin to Alice Springs Railway (the previous assessment was completed in 1982) may have averted the clearing of important Gouldian Finch (a nationally listed endangered species) feeding grounds in 2002.
- Many pasture improvement grasses have been introduced into NT which have escaped into the environment and become weeds. In most instances there were no environmental impact assessments carried out with respect to the grasses before they were introduced. Had such assessments been carried out, they would have identified either that the grasses would have such virulent impacts they should not be introduced at all, or that they should only be introduced within a particular environmental management regime.
- The proliferation of gas-related developments proposed across the coast of the NT with little or no strategic planning or environmental assessment, with the prospect of major long term impacts and costs arising from relatively short lived projects.

### **3.4. Involvement in decisions about developments and management schemes**

Once environmental planning has been done, environmental regulation reaches the development decision stage. This is the stage at which the specific environmental impacts of a development or management scheme are considered and a decision is made about whether those impacts are acceptable and therefore whether the development or scheme can go ahead or not.

In the cases where an environmental impact assessment is carried out, the EPA will produce a report and recommendation about whether the proposal should go ahead or not.

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<sup>12</sup> Bates (above) Chapter 10

At present, the Minister sends any such report to the agency/Minister responsible for the proposal (for example, the Minister for Mines who issues mining leases, the Minister for Lands who manages pastoral leases and Crown land, PWCNT who manage parks, the Development Consent Authority or Minister who issues approvals under the Planning Act). That agency/Minister then has sole discretion as to whether or not to adopt the report. If it decides not to adopt it, the proposal may well go ahead without any conditions which protect the environment, in which case the entire impact assessment process has been futile. To avoid this, the agency/Minister which is responsible for approving the proposal should be required to act in accordance with the EPA's report and recommendations unless it produces written, publicly available reasons for its decision. There should then be a process where any person can appeal from that decision. This will ensure that the outcome of the environmental impact assessment process is transparent and accountable.

Obviously a formal environmental impact assessment process will only apply to individually significant proposals and will not be undertaken in respect of every new development. However, even proposals which are not subject to a formal assessment process have some impact on the environment and therefore some consideration needs to be given to the what conditions should be put on them in order to protect the environment. However, the Minister/agency with responsibility for the proposal often does not have sufficient environmental expertise to give this issue adequate consideration, or even the statutory responsibility to consider environmental issues. Still less do they have the ability to consider and assess the cumulative impact of other developments/schemes in the area, especially other development/s schemes which are not in their jurisdiction/portfolio.

An EPA could therefore assist even when no environmental impact assessment is prepared by being given the power to consider the environmental issues about the proposal and prepare a report recommending the environmental conditions which should be placed upon the proposal. The EPA could develop standard conditions so that this recommendation process does not unduly delay proposals. Similarly to above, the Minister/agency should be required to adopt the EPA's recommendation unless they prepare written, publicly available reasons for not doing so. Appeals should be available from that decision. These measures will ensure that measures will ensure that environmental matters are given appropriate consideration and weight in all decisions about developments and management schemes.

The only specific environmental approvals which are currently required in the NT are licences under the *Waste Management and Pollution Control Act* for development of landfills servicing the waste disposal requirements of more than 1000 people. The EPA, as the expert environmental regulator in NT, should become the administrator of this licensing system. The EPA should also be given the responsibility to investigate whether licences under this Act should be required for any other developments, and if so, administer those licences.

Examples of where an EPA's involvement in the development/management scheme decision making process could have prevented environmental problems are:

- Prevented damage to mangroves resulting from development at Bayview Haven and Cullen Bay real estate and marina developments.

- Mining leases with inadequate rehabilitation requirements could be prevented by environmental conditions placed on the projects at the start.

### 3.5. Monitoring

Ongoing environmental and development monitoring is vital for two reasons<sup>13</sup>. Firstly, it is necessary to establish whether the conditions placed on the development have been complied with (for example, to determine whether waste water discharge limits are being met, or whether water allocations are being exceeded). Secondly, it is necessary because of the inherent difficulty in accurately predicting environmental impacts. Only monitoring can establish whether or not the impact assessment was accurate or not, and whether or not the management of the impacts is sufficient. If either the assessment was not accurate or the management is not appropriate, only monitoring will reveal the problem in order that it may be addressed and mitigated.

There are several approaches which can be taken to monitoring. These include:

- an environmental agency conducting the monitoring and recouping the costs from the developer (most reliable and most resource intensive);
- a developer being required to pay an independent consultant accredited by the agency to undertake the monitoring (mid level reliability and resource intensity);
- or
- a developer undertaking the monitoring itself and providing the results to the agency (least reliable and least resource intensive).

Regardless of the approach taken, an environmental agency must have sufficient resources and expertise to analyse and interpret the monitoring results, and to develop mitigation responses if the monitoring reveals unexpected environmental impacts. This means that an agency such as an EPA is required to develop and implement monitoring approaches and systems.

Examples of where EPA involvement in monitoring could have prevented environmental problems are:

- Contaminated water releases from the McArthur River, Ranger and Alcan mines.
- Diesel leaks at the GEMCO mine on Groote Eylandt from 1992 to 1995.

### 3.6. Enforcement

Most of the NT's environmental laws rely on what environmental law academics commonly call a "command and control"<sup>14</sup> type system, in which a limit is supposed to be set on the release of a pollutant into the environment and penalties should apply if the limit is not met. It is widely recognised that command and control regulation is only effective where there is a credible enforcement threat. In circumstances where people do not believe they will be "caught" or penalised (for example, for breaching the pollution limit), the law will not act as any deterrent against causing environmental damage, and people may well act with disregard for the law. This has several problems:

- the environment will be harmed by the unlawful pollution

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<sup>13</sup> Westman (above) Chapter 1

<sup>14</sup> Gunningham and Sinclair *Instruments for Environmental Protection* in Gunningham and Grabosky (eds) "Smart Regulation: Designing Environmental Policy" (1998) Clarendon Press UK

- the public quickly become disillusioned with environmental regulation which is not enforced and will not believe that the government is actually doing anything to protect the environment
- those people who do the “right” thing and comply with the law by using resources to obtain the appropriate pollution control equipment and adopting environmental management systems suffer a competitive disadvantage by comparison with those who don’t

It is therefore vital that any environmental law have a credible deterrent threat associated with it. This requires an environmental regulator such as an EPA which has the statutory power, the expertise and the resources to properly conduct investigations for breach and to take appropriate enforcement action. The regulator must also be experienced enough to properly consider and take an array of enforcement action, from written warnings and infringement notices in minor cases to prosecution in serious cases. As enforcement action must include the possibility of taking serious steps such as suspending development approval or prosecution, the environmental regulator must be sufficiently robust to withstand the political pressure which is usually brought to bear in order to forestall such enforcement action<sup>15</sup>.

The EPA should have the power to bring prosecutions for any breach of *any* Act which results in environmental damage (for example, a breach of the *Mining Act* or the *Planning Act*). The agencies who currently have the power to bring prosecutions for breaches of approvals, for example, for breach of mining approvals or development approvals, have usually been involved in issuing the very approval which has been breached. They are therefore necessarily in a conflict of interest when they are put in the position of having to consider whether or not to prosecute a breach of that approval. In some cases, the agency may be so aligned with the industry that they could be said to have been “captured” by it. This conflict of interest or capture often means they are not always the appropriate person to consider whether to take enforcement action or not. When a breach results in environmental damage, however, an EPA would be ideally independently placed to consider whether or not to prosecute or not.

In order to investigate whether to bring any enforcement action or not, the EPA must have appropriate powers to require the production of information, to carry out inspections, to conduct monitoring etc.

Examples of where an EPA with the ability to carry out enforcement action could have prevented environmental problems are:

- Clearing at Wickham Point in 2003
- Clearing of Gouldian Finch habitat associated with railway in 2002
- Ranger leaks in 1999 and 2002
- McArthur River mine leaks in 2001
- Cyanide dumping incident on the Tanami Highway in March 2002

### **3.7. Registry of Information**

One of the important roles of any environmental agency is to act as a register of public information. Currently in the NT, public information registers include things such as the NT Coastal Resources Atlas, the public Register of Environmental Impact Assessment, and the Waste Management and Pollution Control Register. An up to date and

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<sup>15</sup> Duncan L *Enforcement and Compliance* in Hughes (above) Chapter 9

informative register is an invaluable tool for industry as it provides them with information about existing developments and environments. It also provides important information to the public about the environment in which they live. The utility of an information register is maximised if it links information together, so that it is immediately clear what environmental regulation applies to a particular development or environment. An environmental regulator such as an EPA could not only maintain the registers, but could also establish the linkages between the information so that the various registers provide information in the most efficient way.

### **3.8. Facilitate community involvement**

The benefit of involving the community in environmental decision making has long been recognised<sup>16</sup>. Benefits include:

- It leads to a greater acceptance of developments
- It provides access to a wealth of local knowledge about the local environment
- better risk management
- It is integral to sustainable development
- It can reduce delays and the cost of redesigns, enforced negotiations and even possible litigation resulting from widespread community opposition
- It can indicate at an early stage that a project may not be feasible
- It can reduce some of the uncertainties in the approvals process by identifying and addressing possible contentious issues at an early stage
- It can identify potential negative social impacts of the proposal and allow the rapid development of strategies to mitigate these
- It can reinforce legitimacy in the decision-making process

Limited community involvement is currently permitted in both the development control and environmental impact assessment processes. However, merely permitting community involvement is not sufficient to ensure that the benefits of it are realised. Community involvement must actually be sought, supported and fostered. Facilitating community involvement therefore requires the expertise and resources that an environmental regulator such as an EPA can provide. And law reform is required to provide that community consultation is adequate and compulsory, rather than cursory and optional.

Examples in the NT of where an EPA who facilitated community involvement could have reduced environmental problems include:

- Greater consultation in relation to aquaculture developments could have prevented resource conflicts over proposed prawn farm at Shoal Bay.
- Community consultation could have averted resource conflicts in the Daly Basin.
- The current project to develop the Darwin Wharf arena has little real community participation in the process of developing options for how the project should look and what impacts it might have.

### **3.9. Voluntary Initiatives**

As noted above, most of the NT's environmental laws rely on a "command and control" system of regulation in which a specific environmental standard is determined and then enforced. Although important, such regulation is not sufficient on its own as it tends to

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<sup>16</sup> Preston (above)

lead to developers aiming to operate at a level just above the minimum environmental standard, rather than aiming to operate at their optimum level<sup>17</sup>.

It is therefore necessary for an environmental regulator to operate programs which encourage developers to voluntarily meet compliance standards and to even go “beyond compliance”. Voluntary initiatives are also important to regulate areas where traditional command and control is ineffective. For example, land degradation is often not caused by any single pollutant or specific activity – it is caused by the many impacts of diffuse users. It is therefore difficult for command and control type regulation to set a standard to control the environmental harm, let alone enforce the standard against someone.

An example of voluntary initiative schemes which are operated by environmental regulators include agreements with landholders to protect their land in return for some financial assistance or public recognition. Another example is sustainability covenants, which are agreements between an industry, regulator and community about how to manage an industry so it is sustainable in the long term. These agreements provide industry with the long term regulatory stability which is crucial for optimal business planning, and provide the regulator and the public with pollution standards which are beyond what is currently required by the law<sup>18</sup>. Other examples of voluntary initiative schemes in Australia include industry waste reduction agreements, environmental improvement plans, environmental management systems and conservation covenants.

NT’s current focus on command and control regulation means that it currently has very few voluntary initiative schemes. Consequentially there is little assistance or encouragement for developers to move beyond compliance, and little progress in the regulation of environmental issues such as land degradation which do not respond well to command and control type regulation. An environmental regulator is necessary to develop NT specific voluntary initiative programs, then to monitor their effectiveness and to review them as necessary.

Examples of where an EPA with the ability to implement voluntary initiative programs could have prevented environmental problems are:

- agreements with land users to conserve biodiversity on their land.
- agreements with developers to encourage environmentally friendly commercial and residential buildings.
- development of on-farm environmental management systems in pastoral areas.
- fisheries bycatch reduction.

### **3.10. Environmental Economic instruments**

Environmental Economic instruments are an important part of the environmental regulation tool kit. They are instruments which produce either a financial reward or penalty depending on the degree of environmental harm caused by a particular activity<sup>19</sup>. Most economic policy initiatives are designed to focus on “front of pipe” improvements to reduce resource use or improve the efficiency of its use in the first place, rather than focussing on reducing “end of pipe” pollutants. Economic instruments include performance bonds, deposit refund systems and the creation of markets for the trading of

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<sup>17</sup> Gunningham and Sinclair (above)

<sup>18</sup> Gunningham and Sinclair (above)

<sup>19</sup> Saunders J *The Economic Approach* in Hughes (above) Chapter 10

rights to use or pollute to an environmental good, such as air or water<sup>20</sup>. Economic instruments can also include diffuse regulation by influencing the behaviour of financial institutions such as banks, project financiers and insurance companies. The advantage of using economic instruments is that they give firms great flexibility in tailoring responses to their individual circumstances, thereby achieving the most efficient form of regulation. And because of the flexibility they provide, many firms respond well to economic incentives and reduce environmental damage accordingly.

While environmental economic instruments programmes' success depends upon their allowing firms the flexibility to achieve environmental objectives without prescription by an environmental regulator, the programmes still require a strong regulatory underpinning to discourage abuse of the system, and to adequately punish those who thwart the objectives of the programmes. And economic instruments such as trading systems require additional input from an environmental regulator, due to the fact that the trading systems require a regulator to establish a market for the trading to take place in the first place.

There are currently very few environmental economic instruments operating in the NT. However, the importance of these will become more important as firms begin to pressure the NT to include economic instruments as part of its environmental regulatory mix. An environmental regulator in the NT is therefore necessary to develop economic instrument programmes. Once these programs are developed, the regulator will need to enforce breaches of the instruments (eg those which pollute more water than they have bought a tradable water entitlement for). The regulator will also need to liaise with firms to monitor the effectiveness of the programmes and review them as necessary.

Examples of where an EPA with the ability to implement develop economic instruments could have prevented environmental problems are:

- trading in water entitlements could ensure that water is used more efficiently. Indeed, the need for the development of a water trading system was one of the key recommendations of the Council of Australian Governments (COAG) Water Resources Policy and Reform group.
- incentives to reduce greenhouse gas emissions (eg. lower registration for smaller cars, carbon credit trading).
- buy-back of fishing licenses.

### **3.11. Education**

Education and training are essential to improving the capacity of industry and the community to address pressing environmental issues<sup>21</sup>. Education is critical in changing attitudes and behaviour with respect to the environment and is an invaluable tool when used in association with another form of environmental regulation, such as command and control or voluntary initiatives.

While it is recognised that educational instruments generally deliver improved management practices, they are most effective when the education is specifically targeted at the intended audience. For example, education about biodiversity loss works best when targeted at those involved in land clearing. An environmental regulator such as an

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<sup>20</sup> Gunningham and Sinclair (above)

<sup>21</sup> Gunningham and Sinclair (above)

EPA is therefore necessary to develop educational programs to compliment its other regulatory initiatives.

Examples of where an EPA with the ability to carry out educational programs have prevented environmental problems are:

- educating the community about the urban air pollution causes by car use.
- educating farmers about the impacts of clearing on biodiversity and productivity.

### **3.12. State of the Environment reporting**

“State of the Environment” reports describe the condition of the environment in an area, the main pressures affecting it, and management responses to protect, enhance and restore the quality of the environment<sup>22</sup>. The reports are produced in each State, usually on a regular basis of between 3 to 5 years. Such reports are vital to give government, developers and the community accurate information about the state of the environment, the pressures to which it is subjected and the values embodied by it.

In order to prepare a State of the Environment report, NT specific environmental indicators must be developed to measure the state of and pressures on the environment. Environmental indicators range across a range of environmental measures. In order to be useful, these indicators must be scientifically sound, easily understood, show trends over time, be sensitive to the change they are designed to measure, and be based on readily available up to date data.

While some SOE reporting has been done in the NT in the past (for example, the Biodiversity Unit in DIPE has done work on terrestrial biodiversity) only a body such as an EPA will have the extensive knowledge about the whole of the NT environment necessary to develop appropriate NT specific environmental indicators and to prepare a comprehensive State of the Environment report. In addition, only an EPA would have sufficient resources to undertake the significant task of undertaking State of the Environment reporting.

### **3.13. Audit other government institutions**

As noted in the introduction, this submission does not deal with the existing environmental institutions which are established in the NT to deal with such matters as national parks, mining, pastoralism and fishing. However, it is important to note that an environmental regulator such as the EPA should have the role of auditing the work of those institutions, as well as an overall cross-disciplinary co-ordinating role. By doing so the EPA envisaged in this submission can make the work of other departments and other sectors of government more efficient and more effective while instilling greater public confidence in whole-of-government environmental performance.

For example, any activities occurring in a national park must be carried out in accordance with the plan of management. However, there is no transparent formal process to monitor when those plans of management are created, when they are reviewed, or if they are being complied with. Neither is there any transparent formal process to determine whether the plan actually results in environmental protection. An EPA could carry out these activities.

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<sup>22</sup> Australian State of the Environment Report Committee (above)

In respect of fisheries, the Department of Primary Industries and Fisheries (PIF) and Parks and Wildlife Commission of the Northern Territory (PWCNT) have an agreement detailing the working arrangements for management of aquatic life in marine and freshwater environments within parks. Under the terms of this agreement, management of wildlife, habitats and ecosystems rests with the PWCNT while the taking of aquatic life, particularly fish and invertebrates, for commercial and recreational purposes is managed by the DPIF. There is no formal process to monitor whether this agreement is achieving environmental goals – an EPA could do this.

Crown land may be reserved for recreation, wildlife or the preservation or protection of places of historic interest. However, currently there is no requirement for management plans to be drawn up in respect of such land, and so no structure to ensure that the land is managed in accordance with its reservation. An EPA could be given the responsibility to develop and implement plans to protect the environment on Crown land which is reserved for environmental purposes. An EPA could also audit major legislative landholders in the NT such as the Northern Territory Land Corporation and the Conservation Land Corporation.

An EPA could also advise upon or coordinate activities with other government agencies whose decisions impact upon the environment. For example, the EPA could provide advice during the PWCNT Master Plan process for enhanced biodiversity conservation strategies, or could consider the environmental impacts of whole of government purchases and develop a green purchasing policy for government.

### **3.14. Sustainability**

The NT government has committed to implementing sustainable development of natural resources<sup>23</sup>. Sustainable development requires the thorough consideration of economic, social and environmental matters. If the information about the environment is incomplete or is not properly understood, it will be impossible to adequately consider the environment and therefore impossible to achieve real sustainable development. An environmental agency such as an EPA can provide the necessary information and analysis about the environmental impacts of developments. It is only then that there is an opportunity for the NT to lead the world in achieving real sustainable development.

## **4. Structure of the EPA**

From the discussion above of the shortcomings of the present primary regulator in the NT and the functions that an environmental regulator must carry out in order to protect the NT environment, it is clear that a new environmental regulator such as an EPA is essential in the NT. However, what should that EPA look like?

### **4.1. EPAs across Australia**

This submission has so far used the term EPA interchangeably with environmental regulator. However, across Australia the term “Environmental Protection Authority” is used to describe various different environmental regulators with differing constitutions

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<sup>23</sup> <http://www.ipe.nt.gov.au> accessed in April 2004

and responsibilities. This submission will now summarise the structure and role of the various EPAs which exist across Australia.

#### **4.1.1. New South Wales**

The NSW EPA is a statutory public sector agency. The EPA carries out various statutory functions such as operational and licensing decisions, as well as non statutory functions such as research. Specifically, the EPA is involved in:

- environmental education
- environmental research
- environmental policy setting and statutory reform
- developing economic instruments
- regulation, primarily through licences
- administering grants
- State of the Environment reporting
- enforcement

The EPA also supports a number of statutory committees, including the Load-based Licensing Technical Review Panel, NSW State of the Environment Advisory Council, NSW Council on Environmental Education and the Site Auditor Accreditation Panel.

The Director-General of the EPA is directly accountable to the Minister for the Environment.

The EPA has an independent statutory Board with expertise in environment protection, agriculture, industry, environmental science, regional issues, law and local government. The Board's role is to provide strategic direction to the EPA, to develop environmental policy and to make key decisions on enforcement. It also includes the Director-General of the EPA.

Most environmental impact assessment in NSW is carried out at the local level by local government. However, environmental impact assessment for large scale developments is carried out by the Department of Infrastructure, Planning and Natural Resources. Environmental impact assessment of development proposals by government are also carried out by this Department.

Planning at State and Regional levels is undertaken by the Department of Infrastructure, Planning and Natural Resources. Planning and development control at a local level is undertaken by local governments.

#### **4.1.2. Victoria**

The Victorian EPA is a statutory agency. It is governed by an independent Board which is empowered to advise the Minister and the Authority on the administration, functions, policies and strategic directions of the Authority, the Authority's corporate plan and national and international trends in environment protection. The Board comprises three members with scientific community and business expertise. The EPA is involved in most of the functions set out in section 3.

#### **4.1.3. Queensland**

The Queensland EPA is a non statutory government department. It has separate divisions for environmental impact assessment, policy development and environmental planning. It carries out research and education, and is responsible for issuing some environmental approvals and conducting enforcement activities. It is also responsible for State of the Environment reporting.

Local government are involved in local area environmental planning and some environmental impact assessment, as well as local development control.

#### **4.1.4. South Australia**

The Environment Protection Authority in South Australia is a statutory government agency. It prepares environmental protection policies, carries out environmental impact assessment of major projects, issues environmental approvals and is involved in enforcement activities. It also implements voluntary and education programmes.

The EPA is governed by an independent Board constituted by members with experience in environmental protection, industry, waste management, law and the public sector. It also includes the CEO of the EPA.

Each year the EPA is required to hold a round table conference. At this conference participants from the general community, industry and government agencies join members of the Board to discuss the management of the environment in South Australia, to comment on the current approach and activities of the EPA, and to suggest improvements.

Most local area planning and development control is carried out by local government.

#### **4.1.5. Tasmania**

Tasmania does not have an EPA. Rather, most environmental regulation is carried out by the Department of Primary Industries, Water and Environment. The Director of Environmental Management within this Department has responsibility for most areas of regulation.

Tasmania also has a Board of Environmental Management and Pollution Control. The Board is an independent statutory body. The functions of the Board are to administer and enforce the provisions of Tasmania's primary environmental legislation, and in particular, to use its best endeavours:

- To protect the environment of Tasmania;
- To ensure the prevention or control of any act or emission which causes or is capable of causing pollution;
- To co-ordinate all activities, whether governmental or otherwise, as are necessary to manage the use of, protect, restore or improve the environment of Tasmania; and
- To ensure that valuation, pricing and incentive mechanisms are considered in policy making and programme implementation in environmental issues.

The Board also undertakes the assessment of major projects. Board members include representatives from Government, industry and the community.

#### **4.1.6. Australian Capital Territory**

The EPA in the ACT is a statutory position. It is responsible for some environmental authorisations, enforcement and for voluntary environmental agreements. Environmental impact assessment is carried out by the Minister with the assistance of the EPA.

#### **4.1.7. Western Australia**

Western Australia's system is unique in Australia in that it has both an EPA and a Department of Environment (DOE).

The EPA is a five person independent statutory body. It is responsible for conducting environmental impact assessments on major projects in WA, for preparing environmental protection policies and for advising the Minister for the Environment on environment matters generally. It also prepares State of the Environment reports. Although the EPA itself is independent, it receives support from the EPA services unit within the DOE.

The DOE is a non statutory public sector department, though the Chief Executive Officer of the DOE is a statutory position. The DOE is responsible for issuing environmental approvals and land clearing permits, and enforcement. It also plays some role in developing voluntary initiative schemes, economic instruments, and education.

### **4.2. Structuring an EPA for the NT**

The discussion in section 2 and 3 of this submission highlighted that it is essential for an environmental regulator to have appropriate expertise, experience and an understanding of NT wide environmental issues. It should also have sufficient resources to carry out its activities in a consistent and thorough manner. The models of EPAs in Australia discussed in section 4.1 reveal that it is commonly accepted that an EPA should be an independent agency, have an independent board, have a statutory basis, and formal accountability. This submission now explains why of these attributes are important and how they can be attained.

#### **4.2.1. Independent Agency**

Given that many of the problems with environmental regulation in the NT are due to the fact that the EHD is a mere division of the DIPE (see section 2 above), it is vital that the EPA itself be an independent agency. Only an independent agency will have the necessary accountability, resources, freedom from political interference and separation from potential conflicts of interest to enable it to operate as a best practice environmental regulator. While it may be thought that efficiencies may be able to be gained by combining some of the activities of the EPA with, for example, some of the activities of the Parks and Wildlife Commission or with the heritage conservation responsibilities of the DIPE, it is in fact the current EHD's association with those agencies which is responsible for much of the current dissatisfaction with it. The EPA must therefore be independent and separate from these agencies. This is particularly so if the EPA is to undertake an auditing function in respect of other agencies and statutory corporations – as it is a fundamental principle of auditing that the auditor is independent of the person being audited.

#### **4.2.2. Independent Board**

Most State's EPA's have an independent statutory board. The Board's role is to carry out some of the functions of the EPA (see section 4.2.4) as well as providing overall strategic direction to the EPA. A similar Board should be established in NT.

The independence of the Board of any NT EPA is vital if the EPA is to establish public and industry confidence in environmental regulation in NT. It is also necessary if the EPA is to properly audit the functions of other government agencies. Independence must be assured in several ways. One is that the Board must be immune from Ministerial direction. The Minister should not have any power to override the EPA Board or to direct it to make particular decisions. Another is that the Board should be constituted by various non government experts who have expertise in the respective fields of environmental protection/conservation, environmental management, community representation, industry environmental issues, rural issues, aboriginal issues and law. The CEO of the EPA should also be a Board member<sup>24</sup>. Vacancies on the EPA Board should be formally advertised, rather than just filled by a Minister. Appointments should be made by a committee representing conservation, government and industry interests.

#### **4.2.3. Statutory basis**

It is vital that any EPA established in the NT have a statutory basis. This is the only way in which to ensure that parliament must approve any change to the constitution of the EPA. It is also the best way to give the EPA the degree of permanence and stability it needs to build the necessary expertise and experience in environmental regulation. Permanence will also give the EPA the ability to form working relationships with both industry and community. Finally, permanence is necessary to ensure that the EPA has the time to develop, implement, monitor and review the educational, economic and voluntary environmental programs which the NT could benefit from.

#### **4.2.4. Objects**

Just as the EPA requires a statutory basis, it requires statutory objects. Objects are important to any legislative body, as it is the objects which give it direction and confine the exercise of its discretion<sup>25</sup>. The objects of the NT EPA must guide the decisions and programmes which it makes, as well as provide it with overall strategic direction and underlying principles. The objects of the NT EPA should include:

- Conservation of biodiversity
- Intergenerational equity
- Polluter pays
- Precautionary principle
- Waste and resource use minimisation

#### **4.2.5. Statutory functions**

As noted in section 2, the EHD does not have any formal statutory functions. This means its functions can be amended at any time by mere executive action. However, the reliance which government, industry and the community place upon the performance of those functions mean that they should be enshrined in statute. This is the only way in which to ensure that it is clear who is responsible to perform those functions and therefore who is accountable if those functions are not adequately performed.

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<sup>24</sup> Gardner A *Reforming the Environmental Protection Authority of WA: Independence and Accountability* Australian Environmental Law News Volume 3 1993

<sup>25</sup> Rohde J *The Objects Clause in Environmental Legislation* Environment and Planning Law Journal Vol 12 1995

Rather than specifying simply that the EPA has some statutory functions, most jurisdictions in Australia specify that the CEO/Director of the EPA (and therefore the agency headed by that CEO) has particular functions, and the independent Board of the EPA has other functions. This model should be followed in the NT, with the following functions being ascribed to:

#### **4.2.5.1. Functions of the EPA Board**

- Environmental planning and policy development and review
- Environmental impact assessment decisions, advice and recommendations
- Enforcement action
- Audit of other government institutions
- Recommendations for law reform

#### **4.2.5.2. Functions of the CEO/Director of EPA**

- Support for the Board and any specialist environmental bodies
- Monitoring and investigations
- Licensing (for example, under the *Waste Management and Pollution Control Act*)
- Environmental plan and policy implementation
- Educational programmes
- Voluntary initiative and environmental economic instrument programmes
- Registry
- State of the Environment reporting
- Management plans for Crown land
- Facilitating community involvement

Some functions need not be statutorily prescribed and may be carried out by either/ both the Board and the CEO/Director, such as liaison with Commonwealth and State environmental agencies, representing the NT government on various Councils and committees, etc.

#### **4.2.6. Accountability and Transparency**

If government, community and industry are to have confidence in the NT EPA, there must be mechanisms established to ensure that the EPA is accountable for its actions. These mechanisms should include:

- Having the EPA prepare an annual report of its actions
- Having the independent Board prepare an annual report of its actions
- Having an annual roundtable where the general community, industry and government agencies join with the EPA to discuss the management of the environment, to comment on the current approach and activities of the EPA, and to suggest improvements.
- Having the EPA prepare written, publicly available reasons for its decisions and recommendations. (One of the most effective mechanisms to ensure that an agency's decision is sound is to require it to provide reasons for its decision<sup>26</sup>).

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<sup>26</sup> As Volker notes:

*“Probably the most significant of all the changes for improving administration was the requirement to provide written statements of reasons and findings of fact. This meant that public servants had to be more systematic and disciplined in their approaches to decision making. They even had to ensure that their decisions were*

#### **4.2.7. Separate divisions**

As noted above in section 3.6, government agencies with responsibility for both issuing approvals and taking enforcement action in respect of breaches of those approvals necessarily become entwined in a conflict of interest. In order to ensure this does not happen in respect of the EPA, the EPA should be constituted in separate divisions. Those divisions should be:

- Auditing, monitoring and enforcement (including support for the EPA Board's functions in this regard)
- Assessments
- Approvals
- Education, voluntary initiatives and economic instruments
- Planning and policies
- State of the Environment reporting

Regional offices can deliver services efficiently and can best utilise local knowledge and relationships. Regional offices will also be in the best position to utilise the knowledge and expertise of, and provide the necessary support to, remote Aboriginal communities. The EPA should therefore aim to deliver many of its services through regional offices. However, a central EPA office will still be necessary to coordinate its activities and to ensure that the regional offices do not become too close to those they are regulating and therefore subject to the same "regulatory capture" which this submission contends that some other government regulators may be subject to.

#### **4.2.8. Proper resourcing**

Obviously the EPA will need to have adequate resources in order to carry out the functions described in this paper and operate as a world's best practice environmental regulator. Those resources include funding, expertise and experience.

##### **4.2.8.1. Funding**

To ensure that this funding is adequate, the following mechanisms should be put in place:

- Assessment should be done on a cost recovery basis whereby developers must pay for the time that the EPA spends on assessing their development proposals
- Licence and development approval fees should factor in the cost of the environmental degradation which the approved development results in ("load based" fees)
- Monitoring or other services done by the EPA should be done on a cost recovery basis
- The EPA should not be expected to operate on a cost neutral basis – i.e. it should be recognised that the EPA will always operate on a deficit
- Fees, charges and fines collected by the EPA should be allocated to its budget, rather than to general revenue

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*in accordance with the applicable legislation and any policy guidelines that might apply."* Volker, "Just Do It – How the Public Service Made It Work" Volume 8 *Australian Journal of Administrative Law* August 2001 at 204.

- Environmental bonds should be required from developers, and the interest on these allocated to the EPA's budget.

It should be clear that funding for EPA activities is generally in addition to, and not instead of, funding for other government and non government environmental activities.

#### **4.2.8.2. Expertise**

New industrial processes are continually developing, and thus new pollutants, as well as new combinations of pollutants, are being produced. At the same time, knowledge about the environment and ecological systems in particular is increasing. The constant advance in technology and knowledge has significant ramifications for designing any environmental agency, as to be effective that agency must both:

- understand technological processes, and
- understand ecological systems.

In addition, the agency must understand the impact of those technological processes on ecological systems, as it is that impact that causes environmental damage. The agency must therefore have expertise in both areas, and more importantly, in the relationship between the two areas.

The continual advance in technology has another important consequence for designing an environmental agency. That agency must not only control known problems, but anticipate new ones and endeavour to prevent them from occurring. This requires significant expertise.

#### **4.2.8.3. Experience**

An important role for any environmental regulator is to provide advice to developers about how to modify a project so it has less impact of the environment. The agency therefore needs to be staffed by knowledgeable people who have sufficient experience to engage and advise developers.

Environmental problems often cannot be corrected overnight. Yet it is often not feasible for a development to cease operation immediately pollution is produced. Therefore the reality is that extended, bargaining type relationships inevitable develop between an EPA and a developer in order to work out the best way to deal with the environmental problem<sup>27</sup>. This relationship can rapidly become unbalanced if the regulatory staff are not experienced enough to deal with the developer. It is therefore essential that EPA staff are experienced.

### **5. Environmental appeals system**

While the establishment of an EPA would dramatically increase the effectiveness of environmental regulation in NT, there will still be a need for appeals from environmental decisions. An appropriate appeals system is important to ensure that environmental decisions are free from factual error, irrelevant considerations, bias and other issues which bring environmental regulation into disrepute. An appeals system is also a fundamental part of any democratic system of government and provides the "check and

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<sup>27</sup> Duncan (above)

balance” which is necessary to control executive action. A robust appeals system should ensure a robust environmental decision making system<sup>28</sup>.

The main appeal currently available in respect of environmental approval type decisions is a developer only appeal against a Development Consent Authority’s decision about a development permit. This is problematic because:

- The fundamental objective of an appeals system is to correct errors in the original decision. A developer only appeals system means that only errors associated with a rejection of a development are corrected. Errors associated with the approval of a development are not. This defeats the purpose of the appeals.
- A developer only appeals system excludes parties who have a legitimate interest in environmental decisions. This undermines public confidence in environmental regulation.
- A developer only system introduces bias into the decision making process. Decision makers know that if they refuse an application they can be taken on appeal. In the absence of a countervailing right of appeal against the right of appeal against the grant of an application, a bias is introduced into the system.

Environmental decisions should therefore be open to appeal by both developers and those people or groups who can demonstrate they have a legitimate interest in the protection of the environment which the development will affect. Appealable decisions should include:

- EPA’s decisions about whether to assess a proposal
- EPA’s decision about what level to assess a proposal at
- EPA’s report and recommendations about proposals
- Relevant agency/Minister’s decisions about proposals

This will ensure the necessary check and balance on the environmental decisions of these agencies.

In order to determine whether or not they have any reason to appeal a decision, people must be provided with the reasons for that decision. Therefore the EPA and other Minister/agency must be required to prepare written, publicly available reasons for their decisions. This is the only way to ensure that the appeal rights can actually be considered and, as necessary, exercised.

## **6. Staged introduction**

Constituting and resourcing an EPA will necessarily take time and resources, and it will therefore probably be necessary to stage its introduction. We submit that the most important first step will be to appoint the independent EPA Board. Once the Board is established, it will be in the best position to evaluate the state of the NT environment and therefore determine at a strategic level how the remainder of the changes necessary to establish the EPA as envisaged in this submission should be implemented.

Given their experience in working in the area of NT environmental regulation, obviously many of the staff of the EHD will be able to be utilised by the new EPA. In addition, some of the staff from the Conservation and Natural Resources Division of the DIPE, particularly those experienced in environmental and natural resource planning, could also

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<sup>28</sup> Preston (above)

be employed by the EPA. However, more staff will be required if the EPA is to carry out the activities referred to in this submission, and it will not be sufficient to simply re-name the EHD as the EPA. A sea change in the environmental regulatory institutions in NT is required.

May 2004

Signed

### **Appendix 1: Summary of some law reform required to implement an EPA**

The following is a summary of some of the law reform which will be required to constitute an EPA. Other incidental reform will also be required, for example, to provide for an independent environmental appeals system from all development and management scheme decisions.

#### *New: an Environmental Protection Authority Act*

1. The Act must establish the EPA and the EPA Board as a separate, independent agency
2. The Act must specify the objects of the EPA (see 4.2.4)
3. The Act must specify the areas of expertise of Board members and the manner of their appointment (see 4.2.2)
4. The Act must specify the functions of the EPA and the powers of the EPA (see 4.2.5)
5. The Act must specify the immunity of the EPA from Ministerial direction
6. The Act must require the EPA to prepare an annual report and hold an annual round table
7. The Act must bind the Crown
8. The Act must require the EPA to prepare written, publicly available reasons for all its decisions. It should also require the EPA to publish all its reports and recommendations in respect of environmental impact assessment.
9. The Act must enable environmental conditions to be put in place as part of all development decisions and management scheme decisions
10. The Act should provide that the decision making relevant agency or Minister must implement the EPA's recommendation unless it publishes written reasons for not doing so
11. The Act must provide that the EPA is to audit other government agencies and statutory corporations
12. Environmental bonds should be required for approved developments
13. The Act must specify that the EPA has the power to institute enforcement action in respect of a breach of any Act if that breach results in environmental damage
14. The Act must provide for third party appeals to an independent body from the EPA's decisions and reports and recommendations
15. Third parties should have the right to bring enforcement action in cases where the EPA does not choose to

#### *Environmental Assessment Act amendments*

16. The Minister's powers should be transferred to the EPA

17. The EPA should have the power to “call in” proposals for assessment, and any person should have the right to refer proposals to the EPA
18. The EPA should have the power to conduct its own investigations and require further information from proponents
19. The Act should include a list of matters/developments which potentially affect the environment and which must be referred to the EPA. It should be an offence to carry out an activity on that list unless 1) the EPA decides not to assess the activity or 2) until the EPA has carried out its assessment and the activity has received all the necessary approvals
20. The Act should allow for the EPA to recover the costs of carrying out environmental impact assessments
21. The Act should set out the factors which must be considered in assessments, including cumulative impacts and alternative sites
22. The Act should set out the community consultation required

*Waste Management and Pollution Control Act amendments*

23. The EPA should be the administrator of this Act
24. Specified list of activities which need an approval or licence needs to be expanded to include all activities which carry an environmental risk
25. Third parties should have the right to bring enforcement action in cases where the EPA does not choose to
26. Licence fees should factor in the environmental costs of development

*Crown Lands Act amendments*

27. Management plans should be required for Crown land
28. The community should be consulted about management of Crown land