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By email: Ruth.Mendones@act.gov.au

Dear Ms Mendones,

Review of the *Environment Protection Act 1997* (ACT)

1. The Environmental Defender's Office (ACT) (EDO) welcomes the opportunity to comment on the review of the *Environment Protection Act 1997* (ACT) (the Act).

2. The EDO is a non-profit, community legal centre specialising in public interest environmental law. Our office is one of nine independently constituted and managed Environmental Defender's Offices in each state and territory of Australia. We provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer education programs designed to facilitate public participation in environmental decision-making.

3. The EDO supports a number of measures contained in the *Review of the Environment Protection Act, 1997 Discussion Paper 2012*. Rather than address all of the issues raised in the Terms of Reference, this submission addresses the immediate priorities. These primarily revolve around the implementation of the mechanisms employed by the Environment Protection Agency (the EPA) for protection of the environment, and compliance assessments and enforcement of the obligations created by the Act.

4. The EDO's interest is in environmental protection and the prevention of environmental harm. It is our concern that the EPA addresses these matters during its review, and that the Act be upgraded to a proactive instrument used to achieve protection results before the harm is done, as opposed to being reactive with its

current focus on orders for reparation and creation of extra conditions. The EDO looks forward to an Act which is forceful and specific in its objectives, coupled with an effective implementation of its protection measures. The EDO encourages the EPA to adopt as a theme during its process of review and renewal – *the EPA is a proactive not a reactive agency.*

An independent EPA

5. At the heart of protecting the environment is a requirement that the EPA be independent from other government agencies, and that it have sufficient functions and enforcement options in its 'toolkit' to achieve its objectives. The expansion of existing functions would necessarily involve the growth of the current office and associated funding. This broadening of roles could be achieved by rolling out a long term strategy and would involve the integration of other agencies and authorities' compliance and enforcement roles and powers. The *Nature Conservation Act* 1980 (ACT) is a pivotal piece of legislation and its administration could result in improved environmental outcomes if the EPA's role were to be expanded to incorporate relevant provisions from it.

6. In this regard we note the models in other jurisdictions. The Western Australian ('WA') EPA is an independent agency. It is not subject to direction by the minister and its advice to government is available to the public. The EPA's members are not public servants. In South Australia ('SA') the EPA is an independent statutory authority within the Environment and Conservation portfolio with a Chief Executive and Board. In New South Wales ('NSW') the EPA is also an independent authority.

7. Further, an expanded independent EPA should have the capacity to build on its current work including the administration of the environmental impact assessments (EIA) currently managed by the Environment and Sustainable Development Directorate ('ESDD'). The EDO is of the opinion that impact assessments ought to be conducted by an independent body in the ACT. An independent agency overcomes and avoids situations of conflict for the government. Independence would also enhance the reputation of the ACT's environment management framework, and ideally it would enable a clear, consistent application of standard-setting policies together with transparency throughout each process. Impact assessment documents should be available to stakeholders via a website. Currently the stages that make up a strategic environmental assessment ('SEA') process are set out in the *Planning and Development Regulation 2008* (ACT). The EDO submits that an independent EPA ought to have a cross-over function with ESDD in relation to those processes, especially in stage C of an SEA which involves the assessment of environmental benefits and impacts. EPA involvement should also be had in Stage B, during the process of preparing a scoping document which involves, amongst other things, the

identification and discussion of the environmental impacts of a development proposal.

8. Under the current regime, an EIS is initiated through the *Planning and Development Act 2007*, the *Environment Protection Act* and the *Public Health Act*. The Planning Act does not require a preliminary assessment or public environment report for the environmental assessment of development proposals and hence the EIS (prepared by the proponent of a development proposal) is the main mechanism for an environmental assessment of a development proposal that may impact upon the environment. We submit that it is essential an independent EPA plays a role in this process, and to this end must be integrated with the planning regime. Further, under current bilateral arrangements, the Commonwealth may refer to the ACT an assessment of a development proposal that requires EPBC Act Add Act approval. The EDO believes this set of circumstances highlights again the importance for independent EPA involvement at this stage of the planning and development process. The EDO submits that the integration of the EPA's function within all of these processes is vital for the proper implementation of the Act's objectives.

9. In this regard we note there are other state EPAs that conduct EIAs. For example, in WA, Part IV of the *Environmental Protection Act 1986* (WA) makes provision for the EPA to carry out the EIA for significant proposals, strategic proposals and schemes in WA. EPAs in other states also perform one of the main functions discharged by the Office of the Commissioner for Sustainability and the Environment in the ACT — the preparation of regular *State of the Environment* reports. The SA EPA provides current data reports on air quality and water quality, as well as producing a *State of the Environment Report* every four years.[1] The NSW EPA also provides specialist input into the *State of the Environment Report* which reports on people and the environment, climate change, human settlement, atmosphere, land, water and biodiversity. The scientifically based report seeks to address major concerns, developments and policy implementation regarding environmental impact and that new developments in environmental protection and preservation are addressed or maintained as seen fit. [2] In WA the EPA prepares the *State of Environment Report* on behalf of the WA Government.[3]

10. A further function of an independent EPA would be to administer legally enforceable environment protection policies ('EPPs') and to conduct investigations and prosecutions for non-compliance of environmental legislation, as discussed below.

[1] <http://www.epa.sa.gov.au/environmental_info/state_of_the_environment_sa_reports>
[2] <http://www.environment.nsw.gov.au/soe/>. The Department of Environment, Climate Change and Water (DECCW) compiled the *NSW State of the Environment 2009.* However, specialist input was provided by members of the NSW State of the Environment Advisory Council, which in 2007 was formed as a subcommittee of the Environment Protection Authority Board.
[3] <http://www.epa.wa.gov.au/AbouttheEPA/SOE/Pages/default.aspx>.

Environment protection policies

11. Environment Protection Policies ('EPPs') are administrative, non-mandatory and non-legally binding documents providing information to both business and the community about how legislation will be administered and interpreted by the EPA. The Act requires EPPs to be in accordance with relevant '*best practice'*. EPPs are one of the ways in which national environment protection measures (NEPMs) are incorporated into the ACT's environmental management framework. NEPMs outline agreed national objectives for protecting particular aspects of the environment. The *Discussion Paper* also notes that the value of EPPs in terms of regulatory consequences is negligible and this is in contrast with comparable policies in other jurisdictions. The EDO believes strongly that the current use of EPPs is in need of a review and update.

12. The legal effect of EPPs should be explicitly spelt out in the Act. Obligations should be defined as binding, enforceable legal duties. General policy statements should be moved into policy guidelines. EPPs should have a clear standard setting function and should spell out how relevant environmental values, environmental quality objectives, and environmental quality indicators are interpreted. Attached to these standards must be specific, enforceable obligations and (civil) penalties to achieve these standards.

13. The EDO submits that EPPs ought to be made legally binding for the following reasons:

- EPPs are a key feature of the Act and are important interpretive documents. The EPA must be able to enforce them with the gravitas of a document supported by the rule of law.
- The policies must establish boundaries for the operation of the Act and its regulatory devices. They are essential for an effective and successful environmental management framework.
- EPPs are pivotal in furthering the objectives of the Act.
- EPPs must set clear standards of permissible and impermissible pollution levels for all business and industry.
- EPPs must be a recognised and enforceable document through the planning process and other planning decisions made by ESDD. They ought to be taken into account by the minister responsible for the environment and planning. Clear, standard setting policies are a reliable and useful tool for entities such as the ESDD especially where, unlike in other states, these portfolios are co-located within the same administering entity.

14. Similarly the standard setting and content of each EPP must be such that it can be relied upon in proceedings either before the ACT Civil and Administrative Tribunal (ACAT) or the Supreme Court. In this regard, the documents must be clear and specific in furtherance of the Act's objectives so that there is little room for

misinterpretation. EPPs must aim to excel in their standard setting function and encourage a focus on achieving environmental outcomes. It is too often that policy fails to achieve acceptable environmental outcomes.

15. The EDO also submits the EPPs should possess the following characteristics:

- The EPPs should be clear, specific and simple if they are going to be understood and used by both the public and business communities as well as the experts and authorities affected by the Act.
- The EPPs need to be strictly enforceable and drafted with legal precision. If the EPPs are non-legally binding and informative only, then they are of little consequence. Policies need to give the relevant industries certainty and confidence in the parameters within which they can act and what they need to do in order to meet the policy standard. If the aim is to control and check industry and protect the environment, then the terms need to be enforceable and the penalties for non-compliance made clear.
- The standards set by the EPP must be high in order to achieve the objectives of the Act. They must establish benchmarks that are effective and successful in protecting the environment including those activities that are likely to cause environmental harm. This may include targets that need to be set over the long term as well as more achievable targets that can be enforced immediately. The standards and objectives ought to be set at where we aim to have the state of our environment not just at a level that is easy to achieve.
- Vague and aspirational terms such as 'best practice' ought to be avoided.
- Where there is application of an EPP by other entities such as ESDD, the requirements and obligations should be in clear, enforceable and integrated through the other entity's regulatory regime such as the *Planning and Development Act 2007* (ACT)
- The EDO supports the current process of public consultation at the initiation stages of a policy. The EDO suggests that all variations and revocations of EPPs ought to be subject to similar processes as set out in Part 4 of the Act. The variation process of an EPP needs to incorporate safeguards to prevent a weakening of environmental standards.
- The specific enforceable legal rights and obligations must be clear and separated from the other aspirational goals, general policy, policy guidelines and other guidance documents.

16. The EDO is of the view that EPPs must intersect with other planning regimes and regulators. Where there is a cross over with other agencies, the EPPs must allocate clear responsibilities and specific obligations to these other agencies. The EPPs must make it easy for the agencies to discharge their responsibilities. For example, the EPA Act must be integrated with the *Planning and Development Act 2007* (ACT) making it easier for the authorities to reconcile the requirements and to understand the primacy of obligations imposed by the different regimes. It must be clear which legal obligation takes precedence in times of conflict, and equally clear whether a requirement is a policy guideline only. The EDO is concerned that whilst the EPPs are non-legally binding guidelines they can be easily ignored and regarded by business and government alike as just another item on the list. In other words, more

bureaucratic tape to get through. If EPPs are clear and enforceable with clearly stated penalties, then business and government will be more likely to comply with their obligations.

17. It is essential that EPPs maintain a focus on the Act's objectives, that is, to achieve good environmental outcomes. As such, the EDO encourages reform to ensure that the EPPs standard-setting is directed at actually protecting the environment and that this standard be coupled with legal obligations that bind industry, the community and government to reduce their pollution.

18. As discussed above, these standards may not be attainable overnight, however the EPA can work with organisations to help them comply and plan a long term strategy through their EPPs. The high environmental standards must be tied to tough mandatory obligations or regulations that will provide effective incentives for potential polluters to operate within the prescribed boundaries.

19. Policies that set high standards for good environmental outcomes will have a stronger weight if they are drafted as statutory instruments and are not disallowed by the ACT Legislative Assembly.

20. Statutory policies in WA and SA are readily enforceable. They contain clear, direct and mandatory requirements, non-compliance with which constitutes an offence. This makes them easy to understand, and ensures that their requirements are not ignored. This ensures that environmental quality objectives are actually achieved.

21. Whilst the setting of high environmental protection standards is essential, it is vitally important that the overarching priority is compliance with those standards. This is more likely to be achieved if there are obligations imposed on polluters to reduce their pollution and that these obligations are enforced rigorously.

Responses to questions in the *Discussion Paper*

Q1 – *Are the objects of the Act appropriate?*

22. The EDO believes that the objects are appropriate. However it also believes, for the reasons examined above, that the EPA must be an independent agency capable of pursuing additional objectives. The EDO submits that there is no point in listing objectives that are aspirational and do not have any practical or substantial effect when it comes to protecting the environment. For example, according to the most recent *Annual Report* (2011–12) there have only been four prosecutions in total since the Act's inception.[4] The total number of agreements currently being administered by

[4] Environment and Sustainable Development, *Annual Report 2011–2012,* ACT Government, <http://www.environment.act.gov.au/__data/assets/pdf_file/0011/255647/ESDD_Annual_Report_2012-11-Annexed_reports.pdf> 307.

the EPA is 153.[5] The EDO believes that these figures are low and that there will need to be a shift in the current EPA's structure and an injection of resources if the objectives of the Act are to be fulfilled.

Q2 – *Should the Act broaden the scope of its environmental harm offences to include those which are 'likely' or have the 'potential' to cause harm?*

23. The EDO agrees that the definition of 'environmental harm' should be updated and expanded to include offences 'likely' or have the 'potential' to cause harm. This important amendment would result in the following benefits:

- It would bring the ACT legislation into line with the other state and territory's definitions of environmental harm. In this regard, we note the *Discussion Paper* identifies other jurisdictions that use the broader definition of 'environmental harm'. The relevant Act in SA also has similar provisions. This is especially important if this Act, and eventually all other Australian Acts, have extra-territorial effect.
- It would provide a greater scope for successful prosecution in circumstances where a prosecution is appropriate.
- It would create a stronger, 'we mean business' EPA as it would enable the enforcement of an obligation under the Act in circumstances where there is a risk of environmental harm when or before it becomes apparent and not after the harm has occurred and reparation is needed.

24. A fundamental aim of the Act is to protect the environment from harm. A pollutant is taken to have caused environmental harm if the measure of the pollutant entering the environment exceeds the measure prescribed, or it is a prescribed pollutant. The prescribed measures are set out in the *Environmental Protection Regulation 2005.* The EDO is concerned that the maximum penalties set out in the regulations is very low. For example, 10 penalty units for contravention of a fire ban (s.11) or discharge of prohibited substances in the waterways (s.44). We suggest these ought to be reviewed.

25. The bulk of environmental offences are dealt with in Part 15 of the Act. The main offences of causing environmental harm are from s.137 – 142 and are predominantly limited to 'causing' harm. Pursuant to the current regime the EPA can prosecute actual instances of 'environmental harm'. The *terms of the Act inhibits the EPA's abil*ity to effectively prosecute as it does not have the capacity to implement and enforce the Act's obligations for polluting activities that are likely to have or have the potential to harm or impact upon the environment. Without civil penalties the Act has similar enforcement limitations hence the EDO is of the opinion that the low

[5] Environment and Sustainable Development, *Annual Report 2011-2012,* ACT Government, <http://www.environment.act.gov.au/__data/assets/pdf_file/0011/255647/ESDD_Annual_Report_2012-11-Annexed_reports.pdf> 305.

number of prosecutions discussed above is a result of the combination of the current limiting terminology and lack of a civil penalty enforcement regime.

26. We note this terminology of 'likely' is already used in relation to environmental improvement plans and audits.

27. The EDO strongly supports this amendment. It is overdue and necessary. If the EPA is to fulfil its objectives and protect the environment then it needs to build its reputation that it is a contemporary agency effective in its protection of the environment *before* damage occurs. The expansion of the definition as discussed would help to achieve this.

Q3 – *Does the Act contain a sufficiently comprehensive and appropriate range of enforcement mechanisms? Are those mechanisms capable of deterring and responding to contraventions of the Act?* AND

Q10 - *Do you think there should be changes to the Act's licensing system particularly in relation to the use of environmental protection agreements and environmental authorisations?*

28. Protection of the environment is implemented through the enforcement of a hierarchy of tools, the choice of which depends on the nature of the potentially harmful activity. The Act seeks to control potential and actual harms through the enforcement of environmental authorisations, environmental protection agreements, environment improvement plans, environment protection orders and audits (as well as prosecution which is dealt with elsewhere in this submission).

29. The EDO is concerned that there is insufficient implementation and monitoring of the use of these tools and compliance with them. There is little reporting or analysis of the results of the application of these tools, and whether they are having an effect in reducing pollutant levels and therefore preventing environmental harm. The EDO submits there ought to be greater transparency and accountability so that the operation of the Act and its application can be analysed. Improved transparency builds confidence in the ability of the EPA to regulate, and this increases the EPA's reputation for having an effective compliance and enforcement process. Compliance monitoring may also be further hampered by a lack of a coherent plan to monitor and assess current arrangements and approvals. Further, increased compliance will not occur without a properly implemented incentive program.

Environmental authorisations

30. Conditions can be attached to an authorisation to ensure compliance with the Act; however the EDO queries whether the conditions have a practical effect in protecting the environment and whether these conditions are adequately monitored. There

were 289 authorisations administered by the EPA in 2011–12.[6] See below for discussion on the implementation of authorisations.

31. The EPA is required to place a notice of an application for an authorisation in the ACT legislation register and *The Canberra Times* inviting submissions on the application within 15 days. However, the minister can make a declaration that public consultation is not required for a particular prescribed activity. This declaration is a disallowable instrument and therefore is tabled in the Legislative Assembly. The EDO submits that this ministerial discretion detracts from the transparency of this aspect of the Act and that it is unreasonable to require parties who are interested in obtaining information about applications for environmental authorisations to make inquiries at the Legislative Assembly or in the ACT *Legislation Register*.

32. Under the current Act, the EPA may suspend or cancel an environmental authorisation where it has reasonable grounds for believing that the holder has contravened the authorisation or an environment protection order ('EPO'). Authorisations generally apply for an unlimited period or a specified period of not longer than three (3) years (depending on whether they are standard – the most common – or accredited environmental authorisations. However, such authorisations are subject to review (every five (5) years, annually, or from time to time). After the authorisation is granted, the opportunity for community input is limited. Further, a variation of environmental authorisations does not have to be notified. A variation can be substantial such as a change of ownership or a change in the type of activity carried out. Again greater transparency is required here to enhance the public's ability to challenge, test or learn about a proposed variation.

33. The EDO supports the ongoing annual reviews as provided for in the Act; however, there ought to be public notification of annual reviews, and there should be opportunity for public input during that review, and not merely a communiqué of an annual review after it has been completed. If all authorisations were subject to a three (3) year term then an application for a further authorisation or renewal could be treated as a fresh application under the Act. The application would be subject to the procedures set out in Division 8.2, including public consultation and the setting of conditions.

Environment Protection Orders

34. Where the EPA has reasonable grounds for believing that a person has contravened or is contravening an environmental authorisation or a provision of the *Environment Protection Act*, it may serve an environment protection order ('EPO') on the person.

[6] Environment and Sustainable Development, *Annual Report 2011-2012,* ACT Government, <http://www.environment.act.gov.au/__data/assets/pdf_file/0011/255647/ESDD_Annual_Report_2012-11-Annexed_reports.pdf> 305.

Since the inception of the Act, 36 protection orders have been issued.[7] This number is low and suggests there are monitoring issues with regards to enforcing compliance of obligations either under the Act and/or pursuant to authorisations. Requirements attached to an EPO include stopping, not beginning, and/or remedying environmental harm, and/or preventing and mitigating further environmental harm in certain circumstances. Further, an EPO may require a person to undertake other specified actions including restoration, provision of information, or to not conduct a specified activity (except during specified times or subject to specified conditions). These measures are all conditions suitable in situations where the harm has already occurred. The EDO submits this is a shortfall in the current system. EPOs might be described as an intermediate enforcement mechanism, however they are only imposed where the EPA has 'reasonable grounds' for believing that a person has contravened or is contravening an environmental authorisation or a provision of the Act.

35. The EDO submits that the effectiveness of EPOs could be improved by the following:

- Employment of proactive tools to ensure compliance with the Act and/or the authorisations before environmental harm takes place. For example, where the EPA has reasonable grounds for believing that person is 'likely to' contravene and cause 'environmental harm'.
- The introduction of civil penalties at this intermediary level i.e. between minor contraventions that attract an infringement notice and those contraventions that justify criminal prosecutions.

36. We note Q13 - *Would enforceable undertakings be a useful addition to the Act's enforcement toolkit?* The EDO agrees the introduction of enforceable undertakings would be an effective intermediate mechanism to safeguard from further contraventions and to achieve future enforcement of obligations, but because this enforcement option relates to circumstances where the harm has already occurred (i.e. it is reactive not proactive) we would insist this needs to be coupled with the initiation of civil sanctions.

37. The EDO supports the implementation of environmental protection legislation allowing authorised officers to give oral directions or notices within a specified time period (usually 72 hours) by a written notice. The EDO agrees that the nature of environmental harm and potential harm is such that immediacy of enforcement action can be crucial to effective environmental protection, and believes that the use of authorised officers to address immediate issues of harm to the environment would bring the ACT in to line with other jurisdictions. The EDO believes that the EPA ought to be able to institute proceedings as outlined in the *Discussion Paper* at page 11. As

[7] Environment and Sustainable Development, *Annual Report 2011–2012,* ACT Government, <http://www.environment.act.gov.au/__data/assets/pdf_file/0011/255647/ESDD_Annual_Report_2012-11-Annexed_reports.pdf> 307.

all other state and territory jurisdictions have EPA boards that, inter alia, determine whether the EPA should institute proceedings for serious environment protection offences, the empowerment of the ACT EPA to institute proceedings would be a positive step towards ensuring the ACT EPA is in line with other jurisdictions.

Environment protection agreements

38. There were 153 Agreements administered by the EPA in 2011–12.[8] The EDO is concerned that this is a low number relative to the number of businesses carrying out potentially polluting activities in the ACT. The EDO believes the entering into such agreements ought to be compulsory for all such businesses and if they are not so compulsory then the EPA needs to devise a model that creates incentives for businesses to enter into such an agreement. If they are not made compulsory then the EPA needs to expand its role as educator with more attention given to the publicising of education measures and the promoting of environmental awareness of the EPA and of the Act. An effective model may be to integrate the EPPs with the relevant industry licensing bodies, for example bodies that licence trades that involve the use of chemicals such as paint, cleaning fluids and other chemicals. Further, similar inroads need to be made by dedicating resources and attention towards identifying businesses that may be sources of pollution, and which do not require licenses.

39. The EDO agrees with the ideas discussed on page 15 of the *Discussion Paper* and with the observation that there is no 'middle ground' for enforcement in respect of agreements and authorisations. The Agreements have no enforcement element and there is inherent limitation in the requirement that an authorisation is needed only if the activity falls within those activities described in the Schedule to the Act. We concur with the concern that the activities in the Schedule are not inclusive of all environmentally harmful activities and urge the EPA to review this aspect of the Act.

40. The EDO believes it is unsatisfactory to define 'activities' and would prefer a model whereby organisations are compelled to apply for an authorisation or an agreement). The very nature of the application should compel them to describe the processes used in their business. The EPA would then 'grade' the application or apply a point system to determine which regulatory mechanism ought to apply. This model might be similar to the 'permitting system' currently used in the UK and the US where organisations must apply for an environmental permit and demonstrate where their activities belong on the scale of potential environmental harm.[9] In short, the *Environmental Permitting Regulations (England and Wales) 2010* combined the

[8] Environment and Sustainable Development, *Annual Report 2011-2012,* ACT Government, <http://www.environment.act.gov.au/__data/assets/pdf_file/0011/255647/ESDD_Annual_Report_2012-11-Annexed_reports.pdf> 306.

[9] See: <*http://www.environment-agency.gov.uk/business/topics/permitting/32330.aspx*>.

Pollution Prevention and Control (PPC) and Waste Management Licensing (WML) regulations. They also cover water discharge and groundwater activities, radioactive substances and provide a number of Directives. The permitting regulations include 'e*xemptions*' which are for activities that don't need a permit, but many of these need to be registered so the activities are known; 's*tandard permits'* which are a set of fixed rules for common activities and if the organisation can meet the requirements then a standard permit is authorized for a fixed charge; and 'b*espoke permits'* which are written specifically for the activity, they take longer to process and cost more. If the requirements for an exemption or standard permit are not met then the application must be for a bespoke permit. Otherwise, if the current system is maintained then the classification of activities in the Schedule as Class A and Class B should be updated, made tighter and regularly reviewed.

41. The EDO agrees that an effective evolution of sound enforceable regulatory mechanisms will be achieved by moving away from administrative tools such as licensing and authorising, towards mechanisms whereby organisations submit to an agreement to behave responsibly, where failure to do so will attract civil or criminal sanctions. However, the EDO would like to see these agreements be made compulsory. The EDO would like to see the facilitation of these authorisations and agreements within the licensing and regulatory industry bodies so that *all persons/organisations* carrying out a potentially harmful activity are aware of their obligations. The EDO acknowledges that to implement this enforcement regime would require an upfront investment of time and effort, but that the EPA would be rewarded with a stronger, more effective and expedient mode of regulatory enforcement. Should these agreements not be compulsory and should the agreements (and policies) not be integrated with other governing bodies then it is absolutely vital that the EPA rapidly and substantially increases its role as educator of the community so that potential polluters are made aware of the requirements and responsibilities.

42. Environmental agreements are notified in the ACT legislation register and in *The Canberra Times*, but there is no public input by way of submissions, as is the case with authorisations. The EDO submits that this ought to be rectified to make way for public input. The minister may declare that the notification requirements for agreements do not apply if the minister is satisfied that the agreement is not likely to cause environmental harm. Such a declaration is a disallowable instrument. The EDO submits that if the process of monitoring who must enter into an agreement is tightened then this should increase the numbers of agreements and may increase the likelihood of such a declaration being made. The EDO is concerned about this provision as it stands.

Environment improvement plans

43. Environment improvement plans are formal plans devised to rectify problems, minimise environmental impacts and achieve compliance with the Environment Protection Act (Div 9.1). They can be put in place either to prevent harm or to rectify harm. The EPA can require a plan if there is, or is likely to be, serious environmental harm caused by a contravention of the Act or of an environment protection order and the EPA considers that an improvement plan would help to rectify the situation. These plans can also be required as part of an environmental authorisation.

44. The EDO believes that if there is a stricter implementation of the authorisations, agreements and orders, as discussed above, then such plans might not be necessary. Improvement plans can be prepared on a voluntary basis, but the EDO queries what is the incentive for business here? Plans ought to be mandatory for all potentially harmful activities and the placement of a regular audit process would ensure proper implementation of industry obligations. The EDO believes that if an activity has the potential to seriously harm the environment then there must be a strategy in place for the safe conduct of the activities *before* they take place. An annual auditing of the adequacy of the plans would increase the EPA's ability to ensure compliance. The implementation of an EI plan after the damaging activity has occurred is inadequate and contrary to the objectives of the Act. This situation would be avoided if the EI plans made harm reduction and prevention a priority by employing the above measures.

45. The plans have to have regard to relevant 'best practice'. From the Act's inception only four (4) improvement plans have been implemented.[10] The EDO submits there must be an issue with the implementation of this mechanism for there to be such a low number of EI plans.

Environmental audits

46. The Act can control potential and actual harm through environmental audits. Pursuant s 51, audits can be implemented as a condition of an authorisation. Further, the authority may require a person conducting, or proposing to conduct, an activity to commission an environmental audit if there is a contravention, or a likely contravention, of an authorisation, an environmental protection order, an environmental protection agreement or a provision of the Act. The authority may also require a person to commission an environmental audit of contaminated land. Again this tool is used after the environmental harm is done. It is not proactive; it does not protect the environment from harm; it only seeks to protect the

[10] Environment and Sustainable Development, *Annual Report 2011-2012,* ACT Government, <http://www.environment.act.gov.au/__data/assets/pdf_file/0011/255647/ESDD_Annual_Report_2012-11-Annexed_reports.pdf> 307.

environment from *further* harm. The EDO would like to see audits used routinely and regularly. We would like to see audits form part of all authorities and agreements if industry or business is going to conduct any activity that might involve a damaging activity. We believe that environmental audits are an essential characteristic of an effective environment protection framework. Victoria has the power to appoint auditors, thus enabling auditing (Part IXD, *Environmental Protection Act 1970*). So too can NSW (Part 4, *Contaminated Land Management Act* 1997) and SA (Division 4 of Part 10A of the *Environment Protection Act 1993*, and the *Environment Protection Regulations 2009* together provide the legislative framework for the audit system).

47. The EDO is concerned that audits are not used to protect the environment *per se*, but rather are used in circumstances where the business or person has a poor environmental record or is only a priority if it is economical to do so. The EDO believes that an audit is a useful way of checking compliance and monitoring performance as the potential damaging activity progresses; that it ought to be mandatory and it ought to set benchmarks of protection and prevention. It should be relatively easy to employ audits in business incentive schemes which should be transparent and where enforcement actions are reported as well as the details and results of an enforcement action. Regular mandatory audits would improve implementation of the Acts protection tools as it would apply to all authorisation and agreement holders. There would be minimal opportunity for individuals to avoid breach detection; it would be harder for contraventions to continue unnoticed and it would dramatically increase compliance (or otherwise a discovery of breach) of the terms of the approvals. We also note the penalty units for not complying – 50 penalty units – is inadequate.

48. Under the Act, voluntary audits may afford protection from prosecution. If the EDO's suggestions are adopted then this section would become superfluous. However if this section is maintained then it is submitted that the ability to avoid prosecution should be able to be used by an offending party once only. Otherwise, it provides a way for an entity to damage the environment with the knowledge that a voluntary audit will give them a leave pass. This policy does not protect the environment and it is contrary to the Act's objectives.

Q4 – *Do you think the ACT Government, and/or the Commonwealth, should be bound, without exception, by the Act?*

49. The ACT is in significant proportion a government town and therefore it is inappropriate and unreasonable that the Act offers government immunity from prosecution in relation to the key environmental offences provided by the legislation.

50. As stated in the *Discussion Paper*, all other Australian jurisdictions bind their state or territory governments. For example, the *Protection of the Environment Operations*

Act 1997 (NSW) separates the prosecution process from the political arena. While, in general terms, the EPA is subject to the control and the direction of the Minister, the EPA is specifically exempted from that control and direction in relation to any decision to institute or approve of the institution of *criminal or related proceedings*. The phrase criminal or related proceedings is defined in the Act as any proceedings for an offence against the environment protection legislation or any proceedings under Division 4 of Part 8.2 and Part 8.4 of the *,1997*.

51. The EDO submits if the EPA wants to be taken seriously then it needs to get serious with the enforcement provisions. The ACT Government should be subject to the offence provisions under the Act. That the government can undertake an activity contrary to the Act and its objectives makes a mockery of the Act and of the EPA. This part of the legislation also highlights the need for independence. If an object of the Act is to protect the environment then it ought to apply to any activity conducted by any entity that is capable of producing an environmental harm. A modern and contemporary EPA is fair and respectful of business, and it applies its implementation processes even-handedly and proportionately.

Q5 – *Do you think the Act should have express extraterritorial application?*

52. Extra-territorial application of the Act is a rational and practical development of environmental law. As discussed in the *Discussion Paper*, *Environment Protection Authority v Queanbeyan City Council [2010] NSWLEC 237* highlighted the need for this development.

53. As the EPA is aware, on 18 September 2012, the Land and Environment Court of NSW found Queanbeyan City Council guilty of one charge of water pollution against s. 120(1) of the *Protection of the Environment Operations Act* 1997 (NSW). The civil offence, to which the Council pleaded guilty, involved the polluting of the Queanbeyan and Molonglo River systems. The untreated sewerage overflowed into the Queanbeyan River and travelled downstream to the Molonglo River and into Lake Burley Griffin which had to be closed as a result. In determining the appropriate sentence, His Honour Justice Pepper found that the Court had jurisdiction to take into consideration the fact that pollution occurred in the ACT as a result of the commission of an offence in NSW, and that the Act operates extraterritorially insofar as it allows the Court to take into account the totality of the environmental harm caused. His Honour found:

> Here waters of both NSW and the ACT were polluted as a consequence of the overflow. While the council is not charged with an offence of polluting ACT waters, nevertheless when assessing the total adverse impact of the commission of the offence regard can, and in my opinion should, be had to the effect of the pollution on all

> of the receiving waters, including those in the ACT. The protection of Australia's unique environment ought not be thwarted by artificially constructed legal boundaries; polluting events do not cease to be polluting merely because they traverse jurisdictional lines.[11]

54. Due to His Honour's reasoning and commonsense interpretation of the facts, the findings and resulting orders were appropriate. This case had a 'happy ending'. The EDO submits that it is absolutely essential that the Act has extra-territorial application. Without it, the Act, its objectives and their enforcement would become meaningless if it has to rely on judicial interpretation to determine that pollutants causing harm in one state can cause environmental harm in another where that pollutant has travelled across the unrestricted borders of our waterways, oceans, land, and air. The EPA should follow other states' lead to support the inclusion of extra-territoriality within its Act.

Q8 – *Given the ongoing advances and improvements to environmental regulation, would there be any benefit in prescribing best practice environmental management in legislation?*

55. The Act requires EPPs to be in accordance with relevant 'best practice'. The objectives, requirements and obligations of the EPPs as well as the Act as a whole need to be presented with clear specific terminology which is resilient to alternative interpretation by business, government or the judiciary. The term 'best practice' is weak. It is vague and non-specific. It is open to misinterpretation and therefore risks an application contrary to the Act's intention. 'Best practice' is not defined in the Act because, in the EDO's opinion, it cannot by its very nature be defined. Any requirement that relies on the standard 'best practice' is intrinsically ineffective and can often result in poor environmental outcomes as they can be interpreted in accordance with current industry standards, economic feasibility or politics in preference to the requirements set by the environmental protection framework. A policy tagged with the standard 'best practice' runs the risk of misinterpretation and eventual dilution. The result is an undermining of the standard that the policy set out to achieve.

56. Further, open-ended terms such as 'best practice' are hard to enforce. Enforceable legal documents are drafted with precision which makes it easier to implement as there is little or no doubt as to the nature of the obligation or requirement, who is responsible and the penalty for non-compliance. The term 'best practice' in fact seeks to describe a complexity of factors as reflected in the Tasmanian legislation and discussed on page 13 of the *Discussion Paper*. An alternative term (or definition) is needed to describe sound environmental management whilst encompassing a number of competing issues such as environmental standards, up to date science, the

[11] Environment Protection Authority v Queanbeyan City Council (No 3) [2012] NSWLEC 220, 152.

best available technology as well as economic feasibility. All of these factors inevitably become outdated and so we would suggest a device which would allow for an easy updating of the policy it seeks to describe. For example, a device which could allow for regular reviews with regards to the science and technology and something that would allow for an improvement and strengthening of the environmental management standard rather than a weakening.

Q12 – *Should civil actions be available for breaches of the Act?*

57. Infringement notices can be issued for minor environmental offences pursuant to the *Magistrates Court (Environment Protection Infringement Notices) Regulation 2005* (ACT). There are also criminal sanctions for more 'serious' or 'material environmental harm' contained in Part 15 of the Act. Since the Act's inception there have only been four (4) prosecutions. This is an alarmingly low figure and may be a reflection of the difficulties in implementing the Act and its objectives. The criminal standard of proof ('beyond reasonable doubt') might be too high to prove a prosecution where an environmental harm has occurred. There must be the introduction of an intermediate suite of offences i.e. civil penalties. There are civil penalties in every EPA Act in every state in Australia. Incentives to adhere to the Act (including the authorisations, agreements, orders and improvement plans) are likely to increase if there are civil penalties. Civil penalties allow for a more easily established standard of proof i.e. on the balance of probabilities. The increased capacity for the EPA to prove an offence would assist enforcement of the Act and its objectives.

58. The current criminal standard of proof might be appropriate in some circumstances and the EDO recognises the important deterrent effect of criminal offence provisions and supports the continued use of criminal sanctions for environmental damage, such as land clearing. However it must often be the case that the standard is too high for a successful prosecution. The EDO believes the lack of civil sanctions must be a contributing factor to the low prosecution count. Civil penalties would send a message to the community that the EPA has a determination to achieve its objectives and enforce its provisions and policies. While the EPA does not have recourse to such a tool, the management of industry and the damaging activities is ineffective and there is a risk that some members of the community regard the objectives of the Act as meaningless. The introduction of civil measures will bring the EPA into line with other states and will increase its reputation as an agency which is serious about protecting the environment.

59. The introduction of civil penalties with its lowered threshold of standard of proof together with the expansion of the definition of 'environmental harm' as discussed above will lead to a higher degree of compliance and will improve the EPA's ability to enforce obligations. The ACT does not have a Land and Environment Court; however

the introduction of civil penalties may create a need for the employment of a dedicated enforcement and prosecutions officer.

60. The Act encourages everyone to take responsibility for the environment by imposing a general environmental duty on the whole community, and to take all practicable and reasonable steps to prevent or minimise environmental harm or nuisance resulting from their activities. Failure to comply with this general environmental duty is not in itself an offence. The Act permits compliance with the general environmental duty to be used as a defence in a prosecution for other offences. The EDO suggests a failure to comply with this general duty should form a basis for specific offences. The actual offences need to be specific and clear. Terms such as 'general environmental duty' are inherently meaningless, open to interpretation and aspirational only.

Appeals and barriers to injunctive relief

61. Applications for injunctive orders can be made by the EPA or by an individual, however the court will only grant leave to that individual where they have first asked the EPA to take action and it has failed to do so and where the proceedings are brought in the public interest (s.127). In other Australian jurisdictions there are no such barriers. For example, in NSW any person can make an application to the Court under s.252 of the *Protection of the Environment Operations Act 1997* (NSW) where they must establish a relevant breach of that Act. The EDO submits that a similar open standing provision is required in the ACT legislation. Further, if proceedings are brought in the spirit of public interest then the question of costs should not be a barrier. We note s.130, however we support a review of the provisions for security of costs and compensation under ss 131 and 132. The EDO believes that the question of costs and compensation ought not be a barrier to the EPA or any other party when wishing to legitimately call upon the Court's injunctive powers to prevent or put a stop to alleged environmental harm. To date no application has been brought for an injunctive order pursuant to s.127. This contrasts with the history of such matters in other states, for example Victoria.[12]

62. Two applications have been made to ACAT for a review of an EPA decision (both matters involving the same party) and four to the AAT as it then was. *Schedule 3 - Reviewable Decisions* makes no allowance for third parties to have a decision reviewed. Two appeals have been taken to the ACT Supreme Court. One from an ACAT decision and one from the AAT as it then was. These numbers are very low. The EDO strongly encourages a review of the appellate process to allow standing of

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http://epanote2.epa.vic.gov.au/EPA/Publications.nsf/2f1c2625731746aa4a256ce90001cbb5/e764b2d6c8a3a425ca2579c6000460b6/$FILE/1471.pdf

persons affected by EPA decisions and those who wish to make a case in the public interest.

Further submissions

63. The EDO submits that there is need for the national harmonisation of contaminated land and brownfield development legislation and EPA legislation as the services industry in these areas include national and transnational firms who find dealing with different state and territory regimes inefficient and an impairment on productivity. From an environmental perspective, different state and territory legislation also reduces the likelihood that best practices legislation is in place across Australia. State and territory experiences in reviewing EPA legislation should be compared and the legislation harmonised. This could be a very worthwhile proposal for the Council on Environment and Water under the Council of Australian Governments. There are international guidelines to assist and support such an initiative.[13]

64. The EDO also submits that the EPA ought to consider climate change in its policies and regulatory models. Under the requirements of s 14 of the *Climate Change Act 2010* (Vic), the EPA must consider climate change in works approval and licensing decisions, as well as when recommending new or amended state environment protection policies and waste management policies. Specifically, when making decisions relating to works approvals and licences, the EPA must consider climate change in the following two ways: the potential impacts of climate change; and the potential contribution the application will have to greenhouse gas emissions. These duties do not alter EPA's existing powers and obligations as set out in the *Environment Protection Act 1970*. Rather, it requires the consideration of additional matters when making the relevant decisions.

65. The ACT EPA would also benefit from taking note of the recent developments in the United States, where the U.S. Court of Appeals for the District of Columbia Circuit recently upheld the validity of the EPA's climate change regulations. The judges recognised an 'endangerment finding' that greenhouse gases are a threat to human health and welfare, and left intact EPA's first-time regulations and authority to craft future rules to help combat global warming. The EPA's rules on carbon emissions from automobiles, and the 'tailoring rule' that shields smaller stationary sources from

[13] The World Bank, *International Experience in Policy and Regulation frameworks for Brownfield Site Management* (Sustainable Development – East Asia and Pacific Region Discussion Papers) (2010); The World Bank Europe and Central Asian Region, Sustainable Development Department, *The Management of Brownfields Redevelopment – A Guidance Note* (2010).

greenhouse gas permitting (licensing) that the EPA is using to target emissions from big sources like power plants, were also held as legally valid.[14]

66. The EDO suggests that these are worthwhile policies for any contemporary EPA to consider, but particularly the ACT EPA if it is to provide effective and valuable input towards the ACT Government's target of a 40% reduction in emissions by 2020.[15]

67. The EDO wishes to note an excellent summary of a sound environmental management regime found in an extract from a review conducted into the Victorian EPA by Mr Stan Krpan. It provides:

> Having regard to the principles of 'good regulation' and the feedback received in this review, I have included the following principles in the proposed policy to guide EPA and its officers in their compliance and enforcement activity.
> Targeted: Enforcement activities will be targeted at preventing the most serious harm.
> Proportionate: Regulatory measures will be proportional to the problem they seek to address.
> Transparent: Regulation will be developed and enforced transparently, to promote the sharing of information and learnings. Enforcement actions will be public, to build the credibility of EPA's regulatory approach and processes.
> Consistent: Enforcement should be consistent and predictable. EPA aims to ensure that similar circumstances, breaches and incidents lead to similar enforcement outcomes.
> Accountable: To ensure accountability, compliance and enforcement decisions will be explained and open to public scrutiny.
> Inclusive: EPA will engage with community, business and government to promote environmental laws, set standards and provide opportunities to participate in compliance and enforcement.
> Authoritative: EPA will be authoritative by setting clear standards, clarifying and interpreting the law and providing authoritative guidance and support on what is required to comply. EPA will be prepared to be judged on whether individuals and business understand the law and their obligations. EPA will also be an authoritative source of

[14] Ben German, 'Federal court upholds Obama EPA's climate change regulations' on The Hill, *E2 Wire*, (26th June 2012) <http://thehill.com/blogs/e2-wire/e2-wire/234779-federal-court-upholds-epas-c>
[15] www.environment.act.gov.au/__data/assets/pdf_file/0004/254947/AP2_Sept12_PRINT_NO_CROPS_SML.pdf

information on the state of the environment, key risks and new and emerging issues.
Effective: Enforcement will seek to prevent environmental harm and impacts to public health, and improve the environment. Enforcement action will be timely, to minimise environmental impacts and enhance the effectiveness of any deterrence.[16]

In conclusion:

68. The EDO has sought to address the many areas in which we believe that the Act can be amended and strengthened to better protect the environment. Integration or improving linkages between the EPA and other industry bodies and agencies is essential for the furtherance of the EPA's objectives and the implementation of the EPPs. Integration can be achieved through the incorporation of the EPPs obligations and requirements into the governing documents and regimes of other agencies. Any misinterpretation would be rectified by a precise drafting of the EPP as well as a clarification of what requirements are demanded from the community and other agencies. Integration of policies with the relevant industry approval/licensing bodies and an annual review will make it much more likely for both legitimate and deliberately offending individuals or businesses undertaking activities that are potentially harmful to the environment to be educated or caught by the obligations required of them.

69. The EDO supports an expanded and independent EPA exercising a fuller participation within the current planning and development regime and ensuring there is a proper implementation of the Act's objectives. We also wish to see an independent EPA preparing and administering legally enforceable EPPs and conducting investigations and prosecutions for non-compliance of the environmental legislation. We support the effective implementation of regulatory tools with clearly defined compulsory obligations and responsibilities coupled with strict compliance via civil or criminal sanctions.

70. The EDO supports the implementation of mandatory EPPs. The EPPs are important interpretative documents which are essential for an effective environmental management framework. They should have a clear standard setting function coupled with specific and enforceable obligations designed to help achieve these aims.

[16] Stan Krpan, *Compliance and Enforcement Review: A Review of EPA Victoria's approach* (Environment Protection Authority Victoria, 2011) 208.

71. Finally the EDO looks forward to an EPA which is proactive, contemporary and capable of adapting with the evolving area of climate change; an EPA that seeks to prevent environmental harm before it happens and to improve the current state of the environment.

I would be happy to discuss any the matter raised in this submission.

Yours sincerely
Environmental Defender's Office (ACT) Inc.

Camilla Taylor
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