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ACT URBAN SERVICES

Review of the *Environment Protection Act 1997* and the Role of the Environment Protection Authority

Final Report

June 2004

building our city
building our community
ACT Government

ACT Government

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Chief Minister's Foreword

The Review of the Environment Protection Act and the Role of the Environment Protection Authority has provided an opportunity for the people of the ACT to have a say about how the Act is working, and how things can be improved.

The Review shows that the Environment Protection Act has been operating well and the Authority has successfully implemented the aims of the Act. Those aims are set out in the opening of the Executive Summary of the report (see page vii). There are high levels of compliance with the Act in the Territory.

This success does not mean that we can rest on our laurels, however. A detailed consideration of the operations of the Authority and the mechanics of the Act has shown that improvements can be made. Those improvements are detailed in the Executive Summary.

It was gratifying to see the extent of community interest in the Review as shown by the number of people who attended public workshops and provided written submissions.

The people of the Territory have always taken a great deal of interest in our environment and are justifiably proud of it. It is therefore not surprising to see a strong level of interest in ensuring its protection.

My Government remains committed to protecting and enhancing our natural environment. We will continue to work to raise the profile of environment protection issues and the role of the Environment Protection Authority in our community.

We have a responsibility as the National Capital to demonstrate leadership in environmental policy. We are privileged to live in an urban environment surrounded by high quality bushland and we must continue to strive to ensure this legacy remains for future generations.

I commend this report to you.

Jon Stanhope MLA
Chief Minister and
Minister for the Environment

Background

The *Environment Protection Act 1997* commenced operation on 1 June 1998. It provided for a review of the operation of the Act after two years of operation. This was carried out in 2000. That review found that there has been insufficient experience in administering the Act to reach firm conclusions on many of the issues, so it recommended that there should be a further review of the Act in 2003. The Act was duly amended to provide that there should be a review of the operation of the Act commencing as soon as possible after 1 June 2003. The Act requires that a report must be provided to the Assembly by 1 June 2004.

As part of its election platform, the Government committed to reviewing the Environment Protection Authority (the Authority) to consider the level of resources required by the Authority to carry out its functions and to consider the options for increasing the independence of that office.

These two aspects of the review have been combined into one process carried out by Environment ACT. Advice and assistance on the direction and content of the review has been provided by the Environment Protection Technical Advisory Committee (EPTAC), a group of experts in environment protection matters.

The Terms of Reference of the review are included in this report as Appendix 1.

Executive Summary

The *Environment Protection Act 1997* and the *Environment Protection Regulations 1997* have been in force for nearly six years. At the time the legislation was passed, the key features of the legislation were:

- establishing a mechanism for implementation of National Environment Protection Measures (NEPMs) made by the National Environment Protection Council;
- establishment of a mechanism to implement a polluter pays charging system;
- establishing a co-regulatory approach tailored to specific activities, through negotiated environmental authorisations and industry codes of practice;
- establishment of a general environmental duty;
- certainty—most authorisations would be indefinite in duration, but would be subject to review;
- transparency in decision making—documents relating to decisions under the Act are publicly available; and
- integration with planning, by requiring referral of development applications to the Authority for comment.

Overall, these key features have been successfully implemented. The legislation has been a successful integration of the previous arrangements to regulate air, water, noise, pesticides, ozone depleting substances and contaminated sites. This Review has found that overall, there is broad support in the community for the objectives of the Act and the mechanisms in place to bring them into effect.

Role of the Environment Protection Authority

The Review has given detailed consideration to the question of the independence of the Authority. The finding is that the questions surrounding the independence of the Authority are a perception issue, and that the case for increasing the independence of the Authority has not been made. Similarly, there is no need to change the arrangements for the Authority to receive advice, and there will be no changes to the Environment Protection Technical Advisory Committee.

Overview of Proposed Changes

Education

It is clear that there is a significant need for greater effort to be put into education to raise awareness of general environment protection issues and about the role and function of the Authority in Government. This will help significantly to address perception issues concerning the independence of the Authority

Compliance and Enforcement

There is a need to make a series of adjustments to the machinery of the Act related to the compliance and enforcement functions of the Authority, to reflect a more coherent and comprehensive strategy for protecting the environment from pollution, while seeking to maintain an appropriate balance of environmental, economic and social considerations. This strategy will continue to build on existing partnerships with the community and industry.

General Machinery Issues

In addition to matters related to compliance and enforcement, there were issues raised as to the way in which some matters are regulated by the Act, including noise and hazardous waste.

Time Frame for Action

The education initiatives and proposals to raise the profile of the Authority will be actioned immediately. The balance of the reforms requiring amendment to the Act will be developed and progressed in consultation with relevant stakeholders and the general community. A Bill proposing relevant changes to the Act will be prepared in due course.

Integrated Environment Protection and Natural Resource Management

The review considered the question of whether it would be appropriate to recommend a fully integrated approach to pollution, biodiversity and natural resource management issues, as was suggested in one submission and put forward in the public workshops. It is considered that this issue is beyond the scope of this review, and that there are significant issues to be resolved relating to the operation and scope of the *Nature Conservation Act 1980* before this proposal could be fully considered. It may be appropriate to give further consideration to this issue at a later time.

Summary of Proposals

The following is a list of the proposals made in this report, grouped under headings in the report.

1. Introduction

Proposal 1:

Continue to work to improve environmental data collection, and data management and information systems to get better measures of environmental performance.

2. The Environment Protection Authority and the Advisory Committee

Proposal 2:

Raise the profile of the Authority and increase the awareness in the community of the degree of independence exercised by the Authority in its regulatory decision making.

Proposal 3:

Defer consideration of statutory integration of pollution, biodiversity and natural resource management regulation until this can be considered in the context of review of the Nature Conservation Act 1980.

Proposal 4:

Restructure the staff assisting the Authority to provide a clear focus on environment protection and water resource responsibilities.

Proposal 5:

Leave in place the existing arrangements for the Environment Protection Technical Advisory Committee to provide advice to the Authority on an administrative basis.

Proposal 6:

Develop a Strategic Environmental Management Framework for the ACT.

3. Working with Community and Industry

Proposal 7:

Devise and implement further education initiatives to improve understanding of the Act and its mechanics, and to improve the understanding of the general community about the impacts of various activities on the environment, and ways that individuals can act to reduce their impact. Where appropriate, efforts will be made to deliver these initiatives in cooperation with other parts of Government.

Proposal 8:

Continue to work with industry, trade and professional organisations to discuss cooperation on education and awareness, and to discuss the issue of financial incentives.

4. Working with Government

Proposal 9:

Liaise with WorkCover to consider the benefits of a protocol or memorandum of understanding to cover consultation between the two agencies over environmental authorisations, improvement plans, emergency plans and dealing with contaminated sites, to ensure that worker safety issues are adequately addressed in the regulatory activities of the Authority.

Proposal 10:

Liaise with ACTPLA and the Chief Health Officer to better define boundaries of operations and which agency should have the lead role in investigating and dealing with issues where there is crossover between matters regulated by the Authority and these agencies.

Proposal 11:

Liaise with ACT Health to consider the value of a memorandum of understanding to establish a partnership and joint strategy on human and environmental health.

Proposal 12:

Continue to work with the Office of Sustainability and the Commissioner for the Environment to promote sustainability and good environmental outcomes.

Proposal 13:

Continue to share information relating to contaminated sites and hazardous materials (and any other relevant information) with ACTPLA, the Emergency Services Bureau and the new Emergency Services Authority.

Proposal 14:

Continue to maintain links with NSW and other State Environment Protection Authorities for the purpose of sharing information and experience about regulating and addressing environmental issues.

5. The Act

Compliance and Enforcement Issues

Proposal 15:

Develop and make more explicit the Authority's compliance and enforcement strategy, in balance with education and awareness programs.

Proposal 16:

Continue to work closely with the Director of Public Prosecution to foster understanding of environmental issues.

Proposal 17:

Include powers to respond to breaches of authorisations in the reconsideration of the regulatory strategy.

Proposal 18:

Liaise with ACT Health over mechanisms for including health impact assessment in consideration of applications for authorisations.

Proposal 19:

Consider whether any additional activities could be exempted from the requirement to advertise applications for authorisations, while retaining appropriate public scrutiny of potentially polluting activities.

Proposal 20:

Consider mechanisms for reporting and review of authorisations to provide for appropriate powers for the Authority, while making adequate provision for certainty in business.

Proposal 21:

Develop guidelines to decision making under the Act that makes the balancing of social, economic and environmental issues more explicit and rigorous, including consideration of appropriate values to place on the environment and 'triple bottom line' valuation.

Proposal 22:

Take steps to ensure that decisions are better documented to record the consideration of all environmental impacts of activities, the precautionary principle and the principles of ecologically sustainable development.

Proposal 23:

Consider conducting further environmental monitoring, subject to a cost benefit analysis.

Proposal 24:

Consider and implement administrative arrangements to consult with and provide appropriate information about administration of authorisations to groups affected by pollution from authorised activities.

Proposal 25:

Amend section 52 so that authorisations commence when they are issued. Empower the Authority to suspend or cancel an authorisation for non-payment of fees when they are due (on a discretionary basis). Ensure that the fee determination for authorisation fees is appropriately drafted to take account of these changes.

Proposal 26:

Reconsider the system of infringement notices for the Act to establish power to issue infringement notices for all appropriate offences under the Act, using the provisions of the Magistrates Court Act 1930. Consideration should be had of the system of infringement notices in NSW. The final result should allow issue of infringement notices for breach of National Environment Protection Measures.

Proposal 27:

Consider appropriate expansion of deeming provisions to give greater certainty to what counts as environmental harm.

Proposal 28:

Reconsider the deeming provisions for causing environmental harm by causing pollutants to enter waterways. It will be necessary to consult with relevant experts, stakeholders and the community over these.

Proposal 29:

Re-examine the way in which outdoor concert and motor sport events are authorised and consider whether any changes should be made to address concerns about air and noise pollution arising from events.

Proposal 30:

Consider means of implementing a requirement for progressive environmental improvement, and a fair means of specifying the level of improvement required in given situations.

<u>General Issues with the Operation of the Act</u>

Proposal 31:

Consider the need to expand regulation of air pollution issues, modelled on the approach taken in other jurisdictions, in consultation with relevant stakeholders.

Proposal 32:

Consider amending the Act so that processing and disposal of Group B wastes requires an authorisation. Consider whether there are gaps in relation to other hazardous waste types.

Proposal 33:

Consider amending the definition of regulated waste in Schedule 1 of the Act to include Group B waste.

Proposal 34:

Develop a proposal to regulate clinical waste under the Environment Protection Act and consult further with stakeholders over the details of how it will work.

Proposal 35:

Develop a proposal to amend the way noise is regulated (including the Noise Environment Protection Policy), giving consideration to noise measurement methodology, the overall noise standards, the zoning system, the system of exceptions to those standards and the basis on which Government should intervene, and conduct further consultation on that proposal prior to bringing forward appropriate amendments to the Act and Regulations.

Proposal 36:

Work with ACTPLA to consider means of resolving the apparent conflict between the noise standards and the Australian Standards that cover manufacturer and installation of air conditioning units.

Proposal 37:

Consider whether the '10 metre rule' in schedule 5 of the Regulations could be amended or expanded to catch similar kinds of activities that create unacceptable risk of pollutants entering waterways. In doing so, consider the approach taken in NSW.

Proposal 38:

Consider appropriate ways to include a definition of ground water to allow for appropriate regulation of activities that have potential to pollute ground water.

Proposal 39:

Bring forward a proposal to require builders to prevent sedimentation and runoff from building sites.

Proposal 40:

Consider and consult on a means of regulating odour pollution. Look at the schemes in other jurisdictions for a model.

Proposal 41:

Liaise with the Commissioner for Occupational Health and Safety to explore the means by which Environment ACT and WorkCover can work together to ensure that nothing agreed under an environment protection agreement or contemplated in an environmental authorisation would be in beach of occupational health and safety laws and standards.

Proposal 42:

In considering reforms to be brought forward, consider whether harmonisation with other jurisdictions, particularly NSW, would be beneficial. Consider and bring forward reforms to harmonise with NSW where appropriate.

Proposal 43:

Bring forward an amendment to the Act to insert a note in the objects clause referring to other legislation that contains provisions relevant to protection of the Environment such as the Nature Conservation Act 1980 and the Land (Planning and Environment) Act 1991.

Proposal 44:

Amend the objects of the Act and the definition of ecologically sustainable development to be consistent with the Government's policy on sustainability.

6. General

Proposal 45:

Consider whether standing for AAT appeals and injunctive orders under the Act should be expanded to be similar to arrangements in NSW, in consultation with relevant Government and community stakeholders. Further, consider whether the security for costs and compensation provisions should be adjusted to remove inappropriate barriers to citizens taking action to protect the environment.

Proposal 46:

Liaise with the ACT Planning and Land Authority to consider mechanisms that will reduce the risk that planning decisions can lead to ongoing environmental concerns.

Proposal 47:

Liaise with the ACT Planning and Land Authority to consider whether the Authority could have a greater role in the assessment of developments for the purpose of conducting authorised activities in such a way that the benefits outweigh the costs.

Proposal 48:

Liaise with ACTPLA and industry to consider whether development approval conditions are a suitable mechanism to secure better environmental performance in the course of development.

Proposal 49:

Arrange for necessary amendments to the Land (Planning and Environment) Act 1991 *to ensure that the Authority is consulted over variations to the Territory Plan.*

Proposal 50:

Consider whether any of the prescribed activities in Schedule 1 of the Act could be regulated by accredited authorisations and develop criteria for when an authorisation holder might qualify for one.

7. The Way Forward

Proposal 51:

Amend the Act to require a further review at the end of 5 more years.

1. Introduction

The Consultation Process

The consultation process for this review involved publication of a discussion paper in November 2003 and a call for submissions. To assist the community to participate in the process, public workshops were held in December 2003. Internal government workshops were held in December 2003 and January 2004.

Submissions closed on 30 January 2004. Nine submissions were received from individuals and community groups and six were received from within government. The matters raised in the workshops have been taken into account in developing the proposals in this report.

In general terms, the matters raised in the workshops and in submissions were as follows:

- role and independence of the Authority;
- resourcing of the Authority;
- objects of the Act;
- ways to improve administration and operation of the Act;
- education function of the Authority; and
- the planning and development process.

The matters raised and the Government's response to them are canvassed in some detail in the following chapters.

Benefits of Implementation of the Act

Item 11 of the terms of reference for this review is:

> Consider whether the implementation of the Act has improved environmental outcomes in the Territory, and whether there have been any other benefits from implementation of the Act.

There have been significant benefits in passage of the Act. It established a single system of authorisations, and has resulted in more activities being covered than previously. The system of annual reviews has also meant that the operation of authorisations has been monitored in a systematic way, which is also an improvement. The Authority is working better with industry and the community to achieve good outcomes, but as will be discussed in Chapter 3, there is more to do in this area.

It is hard to measure the actual environmental improvement, as there is little useful baseline data, nor any way of attributing changes in environmental measures to the Act or to other factors. It is proposed to continue to work to improve data collection, data management and information systems to get better measures of environmental performance.

Proposal 1:

> *Continue to work to improve environmental data collection, and data management and information systems to get better measures of environmental performance.*

2. The Environment Protection Authority

Independence and Structure of the Authority

The Government made a commitment to consider options for increasing the independence of the Authority. Item 7 of the terms of reference of this review specifically covers this issue, and includes the relationship of the Authority with other areas of Government. Accordingly, the discussion paper canvassed some options for independence, and reported on the position taken in other Australian jurisdictions.

There was a significant response from the community on this issue. There were calls for greater independence of the Authority. Some of these calls included expanding the responsibility of the Authority to include a broader range of functions, particularly in relation to protection of biodiversity, management of nature reserves and environmental impact assessment. None of the submissions showed that the functions of the Authority had been compromised by its level of independence, although a number made observations about the perception of lack of independence arising from the way the Authority is constituted and positioned in the ACT public service.

This section of the report is a consideration of the principles for good governance of the Authority and the implications of that for the structure of the Authority. A number of models are considered against the principles, and consideration is given to how to address the perception issue identified.

Principles for Independence

The question of independence of the Authority is a question of what the appropriate governance structure is. Robust and effective governance arrangements are the key to achieving the desired results in the right way. While the characteristics of governance are embedded in the broader political framework, there are a number of principles that are common to good governance. They relate to the status of stakeholders, decision-making structures and processes of decision-making. The following principles are widely recognised as fundamental to good governance:

- ***Accountability***: Decision-makers are accountable to stakeholders and the broader community.
- ***Transparency***: Decision-making processes and information upon which decisions are made are accessible to those concerned with them.
- ***Responsiveness***: Stakeholder needs are recognised and accommodated; new information promotes appropriate change.
- ***Cost effectiveness***: Processes and practices produce results that meet needs while making the best use of resources.
- ***Participation***: Public and private sectors, and the general community and individuals can become involved in the planning and management processes.
- ***Integrity***: Legal frameworks and institutional policies are applied equitably and impartially.

These principles must be applied to the relationships between the Authority, the Minister and the Legislative Assembly. When this is done, the following emerges.

1. The Government (the elected members of the Assembly forming the Government) are accountable to the community for its policy on protection of the environment. It is therefore the role of the Government to set overall environment protection policy. This policy includes what regulatory measures should be in place to prevent and minimise harm to the environment. It is the role of Government to guide and direct the making of the rules by which regulatory decisions are made (that is, to set the policy).
2. The Authority is accountable to the Government for implementation of policy. It is therefore appropriate that the Authority be subject to the directions of the Minister. To ensure this is done in a transparent way, such directions should be subject to public scrutiny.
3. To maintain the integrity (actual and perceived) of the enforcement and compliance process, the Authority should be able to carry out regulatory functions (licensing, compliance and enforcement) free from political influence. The Authority's freedom from influence should extend to the Authority's regulation of the activities of Government agencies and Departments.
4. To maintain the integrity of the advice provided by the Authority on environmental (mainly pollution) matters in the environmental impact assessment process, the development assessment process and more generally in 'incident management', the Authority should be able to give that advice without political influence, especially where the Government has an interest in the outcome of the process.
5. To maintain cost effectiveness, the measures taken to secure independence of the Authority must be proportional to the threat to the Authority's independence. That is, the structure and arrangements proposed to reduce inappropriate influence in regulatory decisions and advice provided must be compared to present arrangements and the additional cost must be compared to the benefit said to be gained.

The existing arrangements meet these principles. The Authority is subject to direction by the Minister, but not in relation to enforcement matters, and the Minister is accountable to the Assembly for any directions given. The Authority is able to carry out its regulatory role without undue influence. However, it is clear that there is a perception in the community that the Authority is hampered in its role by existing arrangements. It is therefore appropriate to consider how that perception should be addressed.

The question about the role and status of the Environment Protection Technical Advisory Committee is separate (although related) to the issue of the structure of the Authority, and is considered in a later section.

Options for Independence

The options for the independence of the Authority are as follows:

1. Status quo
2. Changing the reporting structure of the Authority
3. Make the Authority independent similar to ACT WorkCover
4. Make the Authority independent similar to the ACT Planning and Land Authority

These options are explained and compared below.

1. Status Quo

One option is to do nothing to change the way the authority is constituted and reports. The basis for doing so would be that there is no evidence that the Authority's functions have been significantly compromised (or indeed compromised at all) by its position in the public service.

The perception issues raised in consultation could be addressed by raising the profile of the Authority and increasing awareness in the Community of the way the Authority operates within its current context. These awareness measures would emphasise that the present arrangements do not compromise the effectiveness of the Authority's role.

2. Changing Reporting Structures for the Authority

One of the main features of establishing the Authority as a body outside the existing departmental structure is that the Authority would report directly to the Minister on all issues. If this were so, there could be no suggestion that the information and advice provided by the Authority to the Government could be inappropriately influenced by consideration of other matters.

Another option for increasing independence of the Authority would be to give the Authority a direct line of communication to the Minister on operational matters. That is, where the Authority considers it necessary to advise the Minister or seek direction from the Minister on a proposed course of action, then the Authority would report to the Minister directly, and not through an administrative department.

The operational matters to which this direct reporting would apply would be situations relating to exercise of the Authority's powers under the Act, and where the Authority is being asked to provide advice as the Authority. This might include any of the matters under which the Minister can give directions to the Authority under section 93 of the Act , which includes:

- Codes of Practice under Part 5 of the Act;
- Environment Protection Agreements;
- Environmental Authorisations;
- Environment improvement plans;
- Environmental audits;
- Contaminated sites issues; and
- Advice on development applications.

The Authority might also provide information to the Minister on enforcement matters, but would not seek direction from the Minister on such matters as the Minister has no formal power of direction in relation to them.

Since it is the role of Government to set policy, it would be appropriate for the Government to receive advice on policy issues through the normal channels. Policy issues relating to environment protection should continue to be integrated with other policy issues dealt with by Environment ACT and Urban Services generally. As a result, it would not be proposed to have the Authority report directly to the Minister on policy matters. As such, the formal *Administrative Arrangements 2004 (No 1)* would not be changed, and the Minister would continue to have recourse to the Department for advice on both policy and operation issues should the need arise.

These administrative arrangements would be similar to arrangements for the Office of the Community Advocate and the Discrimination Commissioner, though the formal legal arrangements for those statutory office holders are a little different. The staff of these officers are provided by the Department of Justice and Community Safety, and they are supported in an administrative sense from that Department. Each office holder reports to the Minister without going through the Chief Executive. Also, the relevant Minister is able to seek advice on issues related to the office holder from the Department.

3. Independence similar to ACT WorkCover

The Commissioner for Occupational Health and Safety (the Commissioner) is established by the *Occupational Health and Safety Act 1989*. Administratively, the Commissioner is set up as the head of ACT WorkCover, which is not formally part of any ACT Government Department, and the Commissioner reports directly to the Minister responsible for occupational health and safety. The Commissioner is subject to direction by the Minister.

To establish the Authority on the same footing, the Authority (and the staff assisting it) would need to be taken out of the Department of Urban Services, and report directly to the Minister. Many of the staff of Environment ACT would move with the Authority. Inevitably, there would need to be more staff in the two organisations combined than exist presently (particularly to provide policy and resource management services to the Authority), and ongoing costs would increase.

4. Independence Similar to the ACT Planning and Land Authority

Another option would be for the Government to establish the Environment Protection Authority on a similar footing to the ACT Planning and Land Authority (ACTPLA).

ACTPLA is a separate administrative unit with its own Chief Executive, called the Chief Planning Executive (the CPE). The CPE is appointed by the ACT Executive, and has security of tenure to the extent that he or she can only be suspended for misbehaviour or incapacity, and then removed only if the Legislative Assembly votes to ratify the suspension by dismissing the CPE. The Minister can set the general policy direction of the Planning Authority through the statement of planning intent and can direct the Planning Authority on general policy or require the Authority to review the Territory Plan, but only after seeking its comment on the issue. The Minister is accountable to the Legislative Assembly for his or her directions to the Planning Authority.

As can be seen from the above, the arrangements to establish the independence of the Planning Authority go significantly further than those set up for the Commissioner for Occupational Health and Safety. But like the WorkCover model, establishing the Authority on this sort of basis would incur considerable ongoing costs.

Comparing the Options

The issue to be addressed here is the perception that the regulatory activities of the Authority are inappropriately influenced as a result of the way that it is established in the ACT public service. There would be a significant cost associated with adopting either the WorkCover or the ACTPLA model. There is some question whether all the

features of the ACTPLA model (such as security of tenure) would be needed for the Authority in any event. Either of these models would address the perception issues, however.

The case for incurring the costs of making the Authority more independent has not been sufficiently made out. Even if the cost were relatively small, this cost is not justified to deal with what is only a matter of perception. It is therefore not proposed to take any steps to increase the formal independence of the Authority.

While the reporting structure of the Authority could be changed to have the Authority report directly to the Minister, this would result in the Executive Director of Environment Act and the Chief Executive or Urban Services being formally out of communication with the Minister and the Authority on operational matters. While this could be addressed by having the Authority inform these executives about its communication with the Minister, it is not considered appropriate for this change to be made. This is because the change would disturb administrative arrangements that are working, for no significant gain.

It is recognised that steps could be taken to address the perception issue, however.

Proposal 2:

> *Raise the profile of the Authority and increase the awareness in the community of the degree of independence exercised by the Authority in its regulatory decision making*.

Integration of all Environment and Natural Resource Functions

It was suggested that the Government should establish an integrated environment agency dealing with pollution issues, conservation issues and impact assessment. A significant number of other submissions expressed the view that the Authority should be involved in protection of biodiversity and management of nature reserves. This was also the effect of a number of comments made at the public workshops. Stakeholders internal to Government have submitted that this change is not necessary, as the existing arrangements were delivering good outcomes.

Establishing a single environmental department would be in line with the approach taken in NSW with the Department of Environment and Conservation, which incorporates the NSW EPA, the National Parks and Wildlife Service, the Royal Botanic Gardens and Resource NSW. The NSW Government gave reasons for this consolidation as follows:

> The new structure will assist us in tackling some of our most pressing challenges and problems—the loss of biodiversity, protection of our cultural heritage, restoration of our rivers and sensible use of water, reducing pollution and promoting waste avoidance, championing business and community sustainability and the development of long term, innovative solutions that also create jobs in rural and urban New South Wales.

The current structure of Environment ACT goes some way toward this model with integration of nature conservation, environment protection and heritage functions all

dealt with in this one business group. It would seem, however, that the submissions and comments were directed towards making statutory changes and rebalancing the responsibilities of office holders who currently carry out these functions.

Such a change, involving the powers of the Conservator of Flora and Fauna and the role of that officer in the planning process is beyond the scope of this review. While nothing found in this review militates against rebalancing or integrating nature conservation, reserve management and environment protection functions, it would be premature to consider any such proposal without considering the way in which these functions would fit together and the appropriate mechanisms for governance, compliance and enforcement. As a further issue, the *Nature Conservation Act 1980* is somewhat out of date, and the regulatory mechanisms in that Act should be reconsidered prior to or as part of consideration of any integration of functions.

Proposal 3:

> *Defer consideration of statutory integration of pollution, biodiversity and natural resource management regulation until this can be considered in the context of review of the* Nature Conservation Act 1980.

Resourcing the Environment Protection Function

The conduct of this review has been an opportunity to reconsider the way in which the staff of the Authority are organised to deliver environment protection functions.

The issue of the resourcing level of the Authority was raised at the public workshops and in some submissions. The point made was that there should be sufficient resourcing for effective enforcement. It was put that the level of resourcing in NSW (on a per capita basis) might be of assistance in analysing what the appropriate level should be. Direct comparison with resourcing of the NSW Environment Protection Authority is flawed because many environment protection functions in NSW are undertaken by local government.

There is no doubt that the Act will be ineffective without adequate resourcing, but it is doubtful that a per capita comparison with NSW would be of much assistance since the regulatory framework and the kinds of matters that must be regulated are significantly different in each jurisdiction.

Some submissions suggested that the Authority should be sufficiently resourced to call in independent expert advice to assist in decision making. The Authority already has in place arrangements to obtain advice on a range of issues and funding to meet the cost of that. The role of the Commissioner for the Environment in giving advice to the Authority could be further developed, however.

It is proposed to refocus the tasks of the environment protection unit by making a clear distinction between the administration of the *Environment Protection Act 1997*, the suite of tasks associated with administering the *Water Resources Act 1998* and delivering the water resources strategy (on the one hand), and the regulatory functions relating to the Conservator of Flora and Fauna: tree protection, licensing under the *Nature Conservation Act 1980*, and the animal disease and veterinary services (on the other hand). The education function and industry liaison officer roles will be developed and given greater focus.

Proposal 4:

> *Restructure the staff assisting the Authority to provide a clear focus on environment protection and water resource responsibilities.*

Expert Advice to the Authority

Several submissions suggested that Environment Protection Technical Advisory Committee (EPTAC) be turned into statutory committee or council along similar lines to the structure of the Planning and Land Council. That is, it should have a statutory basis, and an advisory capacity. Like the Planning and Land Council, there would be a number of matters on which the Authority must seek the Committee's advice, which could include authorisations of various kinds (potential for major pollution effects) and the making of environment protection policies. One submission suggested that there should be industry representation.

Establishing such a body in statutory form would place environment protection issues on a similar footing to conservation issues and heritage issues.

The Flora and Fauna Committee is a statutory committee established under the *Nature Conservation Act 1980* with the statutory function of advising the Minister on declaring threatened species. In practice this committee provides advice to the Minister and the Conservator on a wide range of ecological issues. The Heritage Council is established under the *Land (Planning and Environment) Act 1991* and has the function of preparing interim heritage places registers, and providing advice to the Planning Authority on development applications concerning heritage places.

However, EPTAC has no formal statutory function, and there is no need for it to perform one. Its role is to provide advice to the Authority on issues as they arise. There is no need to make the Committee statutory to ensure that the Authority has access to advice on environment protection issues. Submissions did not suggest that the Committee would function better if made statutory, only that it would operate better with clearer terms of reference and functions. This can be achieved without making the Committee statutory.

Proposal 5:

> *Leave in place the existing arrangements for the Environment Protection Technical Advisory Committee to provide advice to the Authority on an administrative basis.*

Strategic Vision of the Authority

In 2003-04, the Authority adopted 'Air and Water' as significant themes, and has taken significant action in relation to each. These themes reflect national concerns as well as local concerns. However, there is greater scope to take a more strategic approach to the business of the Authority and the carrying out of its functions. It is proposed to continue to consider ways to adopt a more strategic approach, and act in a more strategic fashion.

It was suggested at the workshops that the Authority is generally more reactive than proactive, and that strategic planning was required to identify threats and adopt

proactive strategies. At the same time, it was suggested that proactive investigations were also required to avoid undesirable outcomes.

The Authority could build on the approach taken so far and develop a strategic environmental framework which, in turn, could provide a comprehensive approach to environmental management in the ACT. Such a framework would integrate national, regional and local commitments for air, water, energy, noise, and waste and be based in scientifically rigorous data and reporting.

Proposal 6:

Develop a Strategic Environmental Management Framework for the ACT.

3. Working with Community and Industry

One of the key aims of the Act when it was introduced was to establish a co-regulatory approach with industry and the community, as it was recognised that much can be achieved to improve environmental outcomes if the Authority works with the community and with industry.

The terms of reference of this review include (at item 6) the education function of the Authority and the level of contact with business and industry.

A significant issue raised at the public workshops was the education function of the Authority. There was a call for more information and greater promotion of a range of issues, and at a number of different levels.

It was suggested that the Authority itself and the processes it follows under the Act should be promoted more. This included general education on the way decisions under the Act are made and communicated and how they can be challenged, as well as a call for more general promotion of the Act and its place in the way the affairs of the community are regulated by Government. For example, it was put that there should be more information made available and promoted on how the actions of individuals can have a negative impact on the environment.

On a different level, there was a call for more in school education on environment protection issues, and a call for more education of authorisation holders on administration of authorisations and on compliance.

One submission raised the issue of education about compliance with the National Environment Protection Measure in relation to controlled waste, hazardous material transport and management of major spillages. The submission called for greater information to be made available to stakeholders, and for greater liaison with stakeholders on these issues.

One mechanism suggested for some of these initiatives was for the Authority to improve cooperation with industry groups. Another mechanism suggested was provision of incentives for improved environmental performance, such as a grants program.

The need for education and awareness on environment protection matters is clear. A significant challenge for the Authority is communicating to individuals how their day to day actions can impact on the environment and to persuade them to change their behaviour. For many issues, education is going to be more cost effective and produce better results than attempting to regulate them.

The Authority already makes some effort to promote its role and educate industry and the general community about the Act, means of compliance and general environment protection issues. One significant initiative in recent times has been the establishment of an industry liaison officer, who works to improve contact with industry groups and assist in understanding the requirements of the Act as they apply to particular industries. One significant goal of this is to improve compliance with the Act, and to reduce incidents of harm to the environment.

This officer has been meeting with peak industry bodies to achieve these goals. Some of the initiatives the industry liaison officer is working on at this time are:

- development of fact sheets relating to environment protection issues at building sites;
- reviewing the motor trades industry code of practice;
- assisting the Motor Trades Association in the development of guidance notes for the motor trade industry; and
- assisting in review of the Commercial Waste Industry code of practice.

The industry liaison officer is continuing to develop proposals to assist industry in compliance with the Act.

Nevertheless, it is clear from the matters raised that significantly more could be done to raise the profile of environment protection issues. As a lot of activities of the community are regulated by more than one government agency, there would be value in coordinating education efforts with other Government regulators.

As Government at all levels is seeking to impart a wide range of messages to the community, care should be taken to guard against information overload. Education initiatives must be relevant, and targeted them at groups in situations where the information is useful and appropriate at the time. Monitoring and enforcement situations are key opportunities to present some messages.

The Authority will consider a range of methods of communication with the community, and will avoid non-targeted, over generalised information strategies.

Proposal 7:

Devise and implement further education initiatives to improve understanding of the Act and its mechanics, and to improve the understanding of the general community about the impacts of various activities on the environment, and ways that individuals can act to reduce their impact. Where appropriate, efforts will be made to deliver these initiatives in cooperation with other parts of Government.

Proposal 8:

Continue to work with industry, trade and professional organisations to discuss cooperation on education and awareness, and to discuss the issue of financial incentives.

4. Working with Government

The Authority is just one of a number of ACT Government agencies that regulate activities in the Territory. A number of submissions have addressed the issue of how the Authority should work with those other regulators. In addition, the Authority is in the position of regulating the activities of other ACT Government agencies.

The terms of reference of the review include consideration of the Authority's relationship with some other areas of Government (see items 7 (c), (d) and (e)) as well as communication with the Planing Authority (see item 5(b)).

Co-Regulators within Government

The Authority is one office holder in Government, with a particular brief to deal with environment protection and pollution issues. There are other environmental regulators (such as the Conservator of Flora and Fauna) and others who also regulate the same or similar activities as those regulated by the Authority, such as the ACT Planning and Land Authority, ACT Health and ACT Workcover. In addition, the Authority provides advice and assistance on environment protection issues for matters, such as development assessment.

Some submissions highlighted the need for ACT Government regulators to work together to ensure that issues are appropriately covered.

ACT WorkCover

One such regulator is ACT WorkCover. The Commissioner for Occupational Health and Safety conducted its own review of the *Environment Protection Act 1997* to consider the extent to which there is a need to amend that Act to be consistent with the *Occupational Health and Safety Act 1989*. The report of that review was provided to the Authority for consideration in this review. The suggestions in that review that called for amendment of the Act are dealt with in Chapter 5 below. Some of the suggestions dealt with improving the way the Authority and WorkCover work together.

Proposal 9:

> *Liaise with WorkCover to consider the benefits of a protocol or memorandum of understanding to cover consultation between the two agencies over environmental authorisations, improvement plans, emergency plans and dealing with contaminated sites, to ensure that worker safety issues are adequately addressed in the regulatory activities of the Authority.*

WorkCover also suggested that the codes of practice made by the Minister under the Act should be amended to require compliance with the *Occupational Health and Safety Act 1989*. Since codes of practice are 'deemed to comply' standards, it is neither appropriate nor helpful to include such a requirement: the codes do not require any particular action at all. It might be helpful, however, to include reference to obligations under the *Occupational Health and Safety Act 1989* to serve as an additional reminder of them to those reading the code.

The Chief Health Officer and the ACT Planning and Land Authority
The Chief Health Officer and the ACT Planning and Land Authority (ACTPLA) regulate issues that often 'cross over' with issues regulated by the Authority. It has been suggested that the dividing line between what is regulated by each agency is sometimes blurred, which leads to difficulties in regulating particular issues and in liaison with the public.

These issues would be addressed significantly by better communication between the Authority and these agencies on these issues.

Proposal 10:

> *Liaise with ACTPLA and the Chief Health Officer to better define boundaries of operations and which agency should have the lead role in investigating and dealing with issues where there is crossover between matters regulated by the Authority and these agencies.*

ACT Health submitted that there is significant potential for overlap between the Act and health issues, especially as the objects of the Act include human and environmental health. Accordingly, ACT Health suggested a comprehensive memorandum of understanding between ACT Health and the Authority to detail the partnership between the agencies, establish a risk management strategy and a strategic plan covering prevention, promotion and regulation. There is clearly potential for benefit to both agencies in such an approach.

Proposal 11:

> *Liaise with ACT Health to consider the value of a memorandum of understanding to establish a partnership and joint strategy on human and environmental health.*

Relationship with Other Areas of Government

In addition to the relationship with other regulators, the issue of how the Authority works with other areas or government was also raised in the course of the review.

In particular, the relationship with the Office of Sustainability and the Commissioner for the Environment was raised. It was suggested that there is some duplication of functions between the Authority (or rather Environment ACT) and the Office of Sustainability and in collection of information between the Authority and the Commissioner for the Environment.

The Office of Sustainability has a significant common interest with the Authority, particularly as the principles of ecologically sustainable development are part of the objects of the Act. The Authority will naturally continue to work with the Office of Sustainability to promote sustainability.

Similarly, the Authority and the Commissioner for the Environment have a significant common interest in environmental outcomes. The Authority will continue to work with the Commissioner for the Environment to achieve good environmental outcomes.

The Commissioner for the Environment has a role to investigate matters of environmental concern. In the past, this has led the Commissioner to investigate the

activities of the Authority and make recommendations about how the Authority carries out its functions. This is entirely appropriate and the Authority will continue to cooperate with the Commissioner in this aspect of her role.

Proposal 12:

Continue to work with the Office of Sustainability and the Commissioner for the Environment to promote sustainability and good environmental outcomes.

The Authority maintains records relating to contaminated sites and hazardous materials that are important to the operations of ACTPLA and the Emergency Services Bureau and that will be important to the proposed Emergency Services Authority. In particular, the ACT Fire Brigade plays an important role in handling hazardous waste in the ACT.

Proposal 13:

Continue to share information relating to contaminated sites and hazardous materials (and any other relevant information) with ACTPLA, the Emergency Services Bureau and the new Emergency Services Authority.

Working with other Governments

It was submitted that cross border collaboration with similar authorities are of value. The Authority maintains contact with other Environment Protection Authorities through the Environment Protection and Heritage Ministerial Council and Standing Committee and through working groups and officer contact networks established under the auspices of the Standing Committee. These groups are used to exchange information and strategies for dealing with environment protection issues.

Proposal 14:

Continue to maintain links with NSW and other State Environment Protection Authorities for the purpose of sharing information and experience about regulating and addressing environmental issues.

5. The Act

Items 1, 2, 3 and 4 of the terms of reference require that the review consider the overall operation of the Act, whether the machinery of the Act adequately reflects the objects, harmonisation with other jurisdictions and whether the Authority has necessary powers to carry out its functions.

A large number of matters were raised in discussions and in submissions relating to these topics. The Authority's experience in administering and enforcing the Act has also informed the proposals for reform in this chapter.

Compliance and Enforcement Issues

A significant number of matters raised in the review touch on the issue of the regulatory approach taken in the Act, and the regulatory strategy adopted by the Authority in administering the Act. The review has been an opportunity to consider and articulate what those strategies should be, and consider reforms to the Act that would allow for better administration, better compliance and better environmental outcomes.

Compliance and Enforcement Strategy

As noted in chapter 3 above, the education function of the Authority is very important in achieving compliance with the Act, and the Authority will be refocussing efforts on more effective means of communicating with the community on environment protection issues. The education function is an essential component of the strategy to achieving compliance with the Act.

In order to talk about compliance and enforcement, it is necessary to consider the overall approach to environment protection taken by the Act.

The Act adopts a mixed approach of co-regulation (through codes of practice and environment protection agreements) and direct regulation (through establishing offences and a scheme for licensing (authorising) activities that are known risks of causing pollution). Underlying all of this are provisions that impose an environmental duty on all people, and a set of offences that make pollution causing environmental harm an offence.

The authorisation system is a recognition that lots of useful activities either cause or have potential to cause pollution. These activities are regulated by imposition of conditions on the licence to minimise the amount of pollution and environmental harm caused by the activity. Often these are expressed as limits on the amount of emissions, but they also include particular means of controlling emissions or reducing the risk of environmental harm. Many of these conditions are a key part of the strategy for reducing the risk of environmental harm. For example, some authorisation holders are required to keep relevant records and provide them to the Authority on a regular basis. Without this record keeping and reporting, the Authority has limited means of determining whether the authorisation holder is complying with the terms of the authorisation that are designed to protect the environment.

A number of submissions made suggestions about how some kinds of breaches of the Act should be dealt with. Proposals to deal with various kinds of breaches of the Act

should be considered as part of an overall approach to enforcement, dealing with what circumstances call for education, which for imposition of fines through infringement, which for prosecution and which for other action such as suspension or cancellation of authorisations. It is arguable that the Authority should have a varied 'toolbox' of responses so that the approach taken can be tailored to the circumstances of the person in breach, to maximise opportunities for changing the behaviour of those in breach. The point of enforcement activity is to achieve long term compliance with the Act.

The point was made in workshops and in some submissions that the Authority should be retaining its consultative approach and not be moving towards a more adversarial approach. Articulation of an approach to compliance and enforcement is not about becoming adversarial. It is about having a consistent and coherent approach to compliance. The education, policy and policing roles will stay in balance.

Proposal 15:

Develop and make more explicit the Authority's compliance and enforcement strategy, in balance with education and awareness programs.

The issue of the Authority's relationship with the Director of Public Prosecution was raised in submissions, the point being made that the Authority should work closely with the DPP and act to foster understanding of environmental issues in that office. The Authority already does so.

Proposal 16:

Continue to work closely with the Director of Public Prosecution to foster understanding of environmental issues.

Authorisations – Administration and Enforcement

Variation and Cancellation of Authorisations

An issue was raised that the Authority should have more power to vary or cancel authorisations or give directions on compliance. On a related point, one submission suggested that the Authority should consider education first before taking any other steps (such as prosecution) in relation to breach of authorisation.

In keeping with the regulatory approach of the Act, it is important that the Authority have a means of encouraging authorisation holders to comply with the record keeping and other conditions, and further it is important that there be a range of responses to meet the seriousness of the breach. For example, it would not be appropriate to cancel an authorisation in response to the first time a required report is not submitted. But such a response might be warranted if the pattern of breaches of conditions meant that it was not possible to tell whether the authorisation conditions were achieving their purpose of minimising the environmental impact of the activity.

Proposal 17:

Include powers to respond to breaches of authorisations in the reconsideration of the regulatory strategy.

Health Impact Assessment for Authorisations

ACT Health suggested that the Authority should arrange for health impact assessment of activities regulated under the Environment Protection Act before issuing an

environmental authorisation. There may be benefits to this approach, particularly where there is a risk that the activity proposed might be environmentally sound but have potential health impacts that might not be apparent to those assessing environmental issues.

It was suggested that the Act should formally provide for consultation within Government on the issue of authorisations just as it formally provides for consultation with the community generally. The need for such a formal mechanism should be considered in light of whether an informal mechanism will serve the need just as well.

Proposal 18:

> *Liaise with ACT Health over mechanisms for including health impact assessment in consideration of applications for authorisations.*

Public Notification Processes for Authorisations

When a person applies for an authorisation, the Act requires that the fact of the application be advertised, and later place a further advertisement if the authorisation has been granted.

There is a mechanism for the Minister to exempt an authorisation or a group of authorisations from these processes. This has been done in relation to authorisations for handling ozone depleting substances, burning off for fuel reduction or nature conservation purposes and for commercial use of agricultural and veterinary chemicals (weed spraying).

In the history of the operation of these provisions, the only request for information about a proposed authorisation related to the V8 super cars race in 2001. This has led to a suggestion that the process for keeping the public informed of environmental authorisations and allowing public comment should be reconsidered to reduce resource expenditure on it.

The existing system reflects a clear principle that there should be an opportunity for those affected, or even those merely interested, to access information about the prospect of potentially polluting activities being authorised. The Minister's power to exempt some activities from the advertising requirements reflects the recognition that this may not be appropriate in all cases. In the past, this has been exercised in relation to activities that do not have a single location, and where the controls on the activity are designed to minimise the risks of adverse polluting events.

It is difficult to conceive of an alternative to the existing system that adequately allows for the community to have an opportunity to hear about and respond to proposed authorisations. This represents a significant transparency and public accountability provision. It is therefore not proposed to alter the existing system. However, consideration could be given to whether any other activities could be exempted.

Proposal 19:

> *Consider whether any additional activities could be exempted from the requirement to advertise applications for authorisations, while retaining appropriate public scrutiny of potentially polluting activities.*

Review Process for Authorisations

The Act requires annual review of authorisations that are issued for unlimited time. This has been perceived as inadequate from two different perspectives. Some have seen the review power as removing certainty from business activities, and restricting the ability of business to plan for the future. On the other hand, others have said that the powers of the Authority to act on matters raised in review of authorisations is too limited.

What is required is a process that allows the Authority to review the operation of authorisations, and where appropriate, make changes to conditions of authorisations that improve environmental outcomes and improve the administration of them. Any such process must protect the legitimate interests of authorisation holders, particularly to maintain adequate certainty.

Related to the review process is the reporting mechanisms used in some authorisations as a means of monitoring the environmental outcomes of the authorisation. It has been put forward that a more comprehensive reporting mechanism may lessen the process required for annual review of authorisations, particularly for the information based aspects of a review such as updating contact details. If an authorisation holder is required to fill in a form with relevant details at each anniversary, this would save the Authority arranging for someone to ask them, and the unscheduled interruption to their business by the reviewer.

Proposal 20:

> *Consider mechanisms for reporting and review of authorisations to provide for appropriate powers for the Authority, while making adequate provision for certainty in business.*

Grant of Authorisations – Relevant Factors

One submission argued that the process by which authorisations were considered and granted was flawed because the framework in which those decisions are made tends to favour outcomes that are justified more on economic and social considerations than they are on environmental. It was put that in some cases there is detailed data on the environmental impact of proposed activities, and only vague information about the social and economic benefits of the activity, but the activity is approved without requiring any rigorous analysis of the data to determine the basis on which the social and economic benefits outweigh the environmental impact.

It was suggested that the Authority could be more explicit in explaining how the objects of the Act, particularly the principles of ecologically sustainable development and the precautionary principle, have been considered in making decisions.

It is recognised that the decision making of the Authority could be made more transparent. The way decisions are documented could be more explicit in showing how the principles of ecologically sustainable development and the precautionary principle have been considered.

One submission suggested that the Authority should be given a Ministerial direction to focus on environment protection as its paramount responsibility. This submission

arises from the concern that non-environmental factors inappropriately affect the Authority's decision making, and from the concern that the Authority does not consider all environmental impacts of proposed activities in all cases.

It would not be appropriate for the Minister to give a direction in the form proposed. Rather, it is proposed that the Authority address these concerns and make it abundantly clear that its decision making is appropriate, based on rigorous data, and takes into account all environmental impacts.

It was suggested that the Authority should have access to increased expertise in valuing the environment, triple bottom line valuations and market values. These should be taken up in addressing concerns about the range of matters considered in making decisions.

Proposal 21:

> *Develop guidelines to decision making under the Act that makes the balancing of social, economic and environmental issues more explicit and rigorous, including consideration of appropriate values to place on the environment and 'triple bottom line' valuation.*

Proposal 22:

> *Take steps to ensure that decisions are better documented to record the consideration of all environmental impacts of activities, the precautionary principle and the principles of ecologically sustainable development.*

Data Used for Decision Making

The concern was raised at one of the workshops about the quality of data used by the Authority for making decisions. The suggestion was made that independent experts should be used for such data.

There is no question that the Authority should have good quality data on environmental issues to make decisions. The need for an independent expert will vary from case to case, depending on whether the data required for the decision is outside the range of data collected by the Authority, and whether there is a need for verification in a given casse.

It was also put in workshops and echoed by EPTAC that the Authority should be getting more monitoring data on environmental indicators. Such data would obviously come at a cost, so any proposal to obtain more equipment to conduct better environmental monitoring would need to be examined on a cost benefit basis.

Proposal 23:

> *Consider conducting further environmental monitoring, subject to a cost benefit analysis.*

Consultation with Affected Parties

One submission suggested that there should be regular and systematic consultation with parties affected by pollution from a particular activity. This was put on the basis that it would make the decisions made at officer level more transparent.

Where there is an identifiable group of people affected by the conduct of a particular activity regulated under the Act, there can be benefits for all concerned if all are kept informed about how the activity is being managed, if only to be transparent about how the conditions put on the authorisation are being enforced. There are a fairly limited range of circumstances where this is appropriate or helpful. For example, it would not make any difference in a situation where the emissions from the activity did not directly affect any particular person but 'only' had effects on general air quality.

It would not be appropriate, therefore, to make formal provision for any such consultation arrangements. Formal steps can be taken by interested people to obtain information about administration of authorisations through freedom of information, for example.

Proposal 24:

> *Consider and implement administrative arrangements to consult with and provide appropriate information about administration of authorisations to groups affected by pollution from authorised activities.*

Length of Authorisations

One submission suggested that authorisation of polluting activities should be for a maximum of three years. It is not clear from the submission what the purpose of such a change would be. If it is intended that the Authority have more scope to reconsider the terms of authorisations, then the proposal to ensure that the annual review power is strong enough to address environmental issues will deal with the concern.

Authorisations are granted for unlimited time in many cases because it is appropriate that the authorisation holder have sufficient certainty for their ongoing (usually) commercial enterprise. Issues that arise from time to time will be able to be dealt with through the review power.

Pollution Reduction Targets

One submission stated that pollution reduction targets and mechanisms for reduction of pollution should be mandatory in all authorisations.

The Authority already includes reduction targets in authorisations, particularly in those that relate to activities that result in discharge of pollutants into waterways. Such targets do not make sense in all cases. For example, it makes no sense to have a pollution reduction target in an authorisation for a weed sprayer, where the conditions on the authorisation relate to taking adequate care to avoid harm to health and chemical spills. Another example where targets would be inappropriate is the firewood sale authorisations.

It is therefore proposed that the Authority will continue to impose pollutant targets in authorisations where it is appropriate to do so. A blanket approach is neither appropriate nor workable.

Commencement of Authorisations

Section 52 of the Act sets out when authorisations commence. This is expressed to be the date that the annual fee is paid. This causes some problems where the annual fee is 'load based,' (that is, based on the amount of emissions the activity causes) which

means that the annual fee cannot be determined with certainty until the end of the first year.

It is therefore proposed to amend section 52 so that authorisations begin on the date they are issued. The policy of the existing provision is to ensure that annual fees are paid and that until they are, the authorisation holder cannot carry out the activity being authorised. With load based licensing, this is inappropriate. However, this policy of having a mechanism to enforce fee payment can be achieved by empowering the Authority to suspend or cancel an authorisation for non payment of fees when they fall due. (The current provision for suspension or cancellation, section 63, does not allow this, though there is an existing power to cancel an authorisation, which *must* be used). This will effectively allow the Authority to tell an authorisation holder to stop carrying out the activity until fees are brought up to date. It is appropriate that the Authority have some flexibility in use of this power so that it is not required to take harsh action in the event of an oversight or misunderstanding by an authorisation holder.

Proposal 25:

> *Amend section 52 so that authorisations commence when they are issued. Empower the Authority to suspend or cancel an authorisation for non-payment of fees when they are due (on a discretionary basis). Ensure that the fee determination for authorisation fees is appropriately drafted to take account of these changes.*

Infringement Notices

The Act and the Regulations establish a system of infringement notices that may be given for 'minor environmental offences.' At present, these are a series of minor offences that are specified in the regulations, and do not extend to the main offences in the Act of causing environmental harm or breach of an authorisation.

The range of enforcement options was raised during the review. The point made was that it would be appropriate to have a regulatory response to use after education and exhortation had failed but falls short of prosecution. This would be particularly useful in areas like administration of authorisations where the effectiveness of the regulatory strategy depends reporting and review mechanisms that require authorisation holders to cooperate. In such cases, imposition of a fine would be more appropriate than cancellation or suspension of the authorisation in many instances.

The point was also made that the range of matters that could be dealt with by infringement notices should be similar to that in NSW.

An audit of the ACT's performance against implementation of National Environment Protection Measures (NEPMs) has recommended that there should be a power to issue on the spot fines in circumstances where the terms of NEPMs are not met.

In reconsidering the system of infringement notices, the opportunity should be taken to bring them in line with the system set out in the *Magistrates Court Act 1930.*

Proposal 26:

> *Reconsider the system of infringement notices for the Act to establish power to issue infringement notices for all appropriate offences under the Act, using the provisions of the Magistrates Court Act 1930. Consideration should be had of the system of infringement notices in NSW. The final result should allow issue of infringement notices for breach of National Environment Protection Measures.*

Definitions and Deeming Provisions for Offences

A number of submissions suggested that the definitions in the Act are unclear. This could be addressed by including more provisions that clarify the scope of the definitions of environmental harm, which is indeed what one submission proposed.

The definitions of environment and environmental harm are deliberately wide as it is intended that anything that degrades the quality of the environment will be regulated. It would run contrary to the intention of the Act to retreat from this position. The Act and Regulations include provisions that deem various events to be environmental harm. An example is the noise standards. Another is the list of pollutants taken to cause environmental harm. However, there is scope to include more such deeming provisions to define more activities as causing environmental harm.

Proposal 27:

> *Consider appropriate expansion of deeming provisions to give greater certainty to what counts as environmental harm.*

A close reading of the deeming provisions for waterways shows that whether a pollutant spill into a lake or a waterway is deemed as environmental harm can depend on the point at which the pollutant enters the water. Successful enforcement can therefore depend on showing that this particular spill actually caused a variation to overall levels of the pollutant within a whole catchment, or affected an environmental indicator. This is true even when it is known that entry of a given kind of pollutant into the system has negative effects, or that repeated entry of such pollutants would have that effect. One submission made the same point by suggesting that it was necessary to deal with some pollutants on a point source basis rather than on a whole of catchment basis.

Proposal 28:

> *Reconsider the deeming provisions for causing environmental harm by causing pollutants to enter waterways. It will be necessary to consult with relevant experts, stakeholders and the community over these.*

Air and Noise Pollution from Events

Concerns have been raised about the effectiveness of the Authority's regulation of events. This concern arises from the fact that some events are not directly authorised under the Act but the event is held under the auspices of an authorisation for a particular location. This has been said to lead to ineffective compliance and enforcement.

Proposal 29:

> *Re-examine the way in which outdoor concert and motor sport events are authorised and consider whether any changes should be made to address concerns about air and noise pollution arising from events.*

Progressive Environmental Improvement

One submission stated that the machinery of the Act should be amended to reflect paragraph 3(1)(c) of the objects of the Act, which is 'to require persons engaging in polluting activities to make progressive environmental improvements, including reductions of pollution at the source as such improvements become practical through technological and economic development.' In this submission, this object of the Act was stated to be one of the fundamental objects of the Act.

This submission was made in the context of a particular polluting activity and it was put that the Authority should be imposing requirements on the polluters to reduce their emissions as a result of this clause in the objects. This report is not the place to consider the details of that concern.

While the Authority has a power to require a polluter to submit and comply with an environmental improvement plan, it is acknowledged that the Authority could do more to promote progressive improvements and to consider whether such improvements should be implemented.

Proposal 30:

> *Consider means of implementing a requirement for progressive environmental improvement, and a fair means of specifying the level of improvement required in given situations.*

General Issues with the Operation of the Act

Air Pollution Regulation

The Act regulates air pollution issues mainly by regulating smoke emissions from houses and industry. There are growing concerns nationally about other air pollution issues, particularly relation to small particle air pollution sources.

Proposal 31:

> *Consider the need to expand regulation of air pollution issues, modelled on the approach taken in other jurisdictions, in consultation with relevant stakeholders.*

Hazardous Wastes

The Act does not presently make provision for the regulation of processing and disposal of hazardous, industrial, Group A and Group B wastes. There has been interest in establishing a treatment facility for such wastes in the past. Such an activity should be the subject of an environmental authorisation, but a more detailed analysis of the costs and benefits of regulating this activity will be required.

Proposal 32:

> *Consider amending the Act so that processing and disposal of Group B wastes requires an authorisation. Consider whether there are gaps in relation to other hazardous waste types.*

In addition, Group B wastes should be added to the definition of regulated waste in schedule 1 of the Act. This would expand the operation of items 10 and 11 in that schedule, which require that provision of and transport of regulated waste within the Territory be authorised. A detailed analysis of the costs and benefits of this proposal is required for this proposal also.

Proposal 33:

Consider amending the definition of regulated waste in Schedule 1 of the Act to include Group B waste.

Protection of NSW from ACT Pollution

One submission suggested that the Act should be amended to include a specific provision to ensure that nearby NSW is protected from pollution emanating from the ACT. It was put that this necessary to honour the ACT's commitments under the Intergovernmental Agreement on the Environment.

It is not proposed to add any such provisions. Under the terms of the Act, NSW gets the same protection as the ACT. There are some issues that affect some NSW areas more than the ACT because of the location of the source of the issue. These issues must be addressed on their merits, and not on the basis that the activity concerned is said to have more effect on NSW residents than ACT residents. The ACT is not in breach of its obligations under the Intergovernmental Agreement on the Environment.

Clinical Waste

It was submitted that storage and handling of clinical waste at facilities that generate such waste should be regulated under the Act. In particular, it was put that storage and handling of such waste should be made an activity that requires authorisation, and that an environment protection policy and a code of practice should be developed under the Act. This would replace the *Clinical Waste Act 1991* and the Clinical Waste manual.

The need for reform of the existing arrangements for clinical waste is well established. This proposal should be developed further and stakeholders consulted over the details of how it will work.

Proposal 34:

Develop a proposal to regulate clinical waste under the Environment Protection Act and consult further with stakeholders over the details of how it will work.

Noise Regulation

Submissions on the system of noise regulation raised a number of important points. In summary, these were:

- noise measurement methodology differs from current practice in NSW and consideration should be given to adopting the NSW methodology;
- the current system of giving exceptions to some kinds of noisy activities is inconsistent, and consideration should be given to a system that does not discriminate between noise sources;

- consideration should be given to requiring complainants to attempt to resolve noise issues themselves prior to the Government becoming involved; and
- supply and installation of air conditioners manufactured within the Australian Standards can still lead to noise issues. This submission called for relaxation for the noise standards for air conditioners that comply with the Australian Standards or amendment of the relevant Australian Standard.

It is recognised that there are some significant issues with how the existing arrangements are working, and it would be appropriate to consider means of improving the system to be fairer to all parties and more consistent with NSW. In doing so, care must be taken to ensure that noise pollution does not exceed reasonable levels.

Proposal 35:

Develop a proposal to amend the way noise is regulated (including the Noise Environment Protection Policy), giving consideration to noise measurement methodology, the overall noise standards, the zoning system, the system of exceptions to those standards and the basis on which Government should intervene, and conduct further consultation on that proposal prior to bringing forward appropriate amendments to the Act and Regulations.

Proposal 36:

Work with ACTPLA to consider means of resolving the apparent conflict between the noise standards and the Australian Standards that cover manufacturer and installation of air conditioning units.

Protection of Water from Pollutants

It was suggested that the 10 metre rule for protection of waterways should be reviewed in light of the NSW provisions dealing with the issue. This provision is one of the provisions in the Regulations that identifies a behaviour that is an offence because of the high risk to the environment associated with it. It is understood that this issue arises more from the fact that a much greater range of risky behaviours should be included, and be capable of being dealt with by way of infringement notice. This provision will be considered with the other deeming provisions for appropriate expansion or revision.

Proposal 37:

Consider whether the '10 metre rule' in schedule 5 of the Regulations could be amended or expanded to catch similar kinds of activities that create unacceptable risk of pollutants entering waterways. In doing so, consider the approach taken in NSW.

It was also suggested that the lack of a definition of ground water compromises the way in which some pollution issues can be dealt with. This includes circumstances where an activity causes pollutants to enter ground water, but not a waterway.

Proposal 38:

Consider appropriate ways to include a definition of ground water to allow for appropriate regulation of activities that have potential to pollute ground water.

Sediment and Erosion Controls
One submission stated that mechanisms for sediment and erosion controls for construction activity should be brought up to date, and that the Authority should take a more active role in enforcing them.

The Authority is already considering mechanisms to impose appropriate sediment and erosion control measures in the building industry in a more effective way.

Proposal 39:

> *Bring forward a proposal to require builders to prevent sedimentation and runoff from building sites.*

Regulation of Odour
The ACT is the only jurisdiction that does not treat odour as an environmental protection issue.

Proposal 40:

> *Consider and consult on a means of regulating odour pollution. Look at the schemes in other jurisdictions for a model.*

Occupational Health and Safety Issues
ACT Workcover suggested three changes to the Act:

1. that definitions of workplace, employee and employer be included in the Act;
2. that amendments be made to ensure that environment protection agreements do not contravene other legislation including the *Occupational Health and Safety Act 1989*; and
3. that amendments be made to ensure protection against harm to humans working at or near a workplace from pollutants that are being disposed of under the Environment Protection Act.

It is not proposed to amend the Act to deal with any of these matters.

The definitions should not be added because there are no provisions (existing or proposed) that refer to these terms.

There is no need to ensure that environment protection agreements do not contravene the Occupational Health and Safety Act or any other laws because the Environment Protection Act specifically provides that such agreements do not relieve the parties from any obligation under any law. Notwithstanding that, it is likely that there would be some value in ensuring that nothing agreed under an environment protection agreement or contemplated in an environmental authorisation would be in breach of occupational health and safety laws and standards.

Proposal 41:

> *Liaise with the Commissioner for Occupational Health and Safety to explore the means by which Environment ACT and WorkCover can work together to ensure that nothing agreed under an environment protection agreement or contemplated in an environmental authorisation would be in beach of occupational health and safety laws and standards.*

There is no need amend the Act to ensure protection against harm to humans working at or near a workplace from pollutants which are being disposed of under the Environment Protection Act. If any pollutants being dealt with under the Act were causing harm to humans then they would also be causing material or serious environmental harm, which would not be sanctioned under the Act. As noted above, there is scope for the Authority to work more closely with ACT Workcover to ensure that OH&S issues are addressed by those who are authorised under the Act.

Review of Codes of Practice

The Act provides for the Minister to make codes of practice for sectors of industry. Once made, a code of practice provides a standard that, if complied with, counts as compliance with the general environmental duty. Compliance with the general environmental duty provides a defence to prosecution for most offences under the Act.

A code of practice can only be made if the Minister is satisfied that it has been made in consultation with those carrying on the industry to which it relates. One issue raised in consultation was that the Act provided for no firm review mechanism codes of practice. Such a mechanism would ensure that codes of practice were kept up to date.

It is not proposed to put forward an amendment to the Act to insert a review mechanism. Codes of practice are deemed to comply standards. They do not require any particular approach to environmental issues, but are a way for industry to have greater certainty as to what approach to relevant environmental issues is deemed acceptable. If a given code is out of date because a previously accepted practice is no longer acceptable (because, say, emergence of new technology) then the Authority will be seeking to make changes. But emergence of new techniques when old one is still acceptable does not *require* a change to a code, since those adopting the new technique will still be complying with their environmental duty.

The emergence of new ways to deal with environmental issues does not occur on a regular basis. Rather than force a particular schedule of review of codes of practice in the Act, it would be better to allow the Authority to handle the need to update them on a discretionary basis.

Harmonisation with NSW

The terms of reference required that the review consider opportunities to harmonise the approach taken in the Act with that taken in other jurisdictions. One particular issue raised in the course of the review was the possibility that there are matters lawful in the ACT that are not lawful in NSW. Noise regulation was identified as an area where a consistent approach would be beneficial.

As the review has identified a significant number of matters to be considered further, it would be more appropriate to consider the issue of harmonisation in more detail and bring forward appropriate reform proposals in a package with the other reforms.

Proposal 42:

> *In considering reforms to be brought forward, consider whether harmonisation with other jurisdictions, particularly NSW, would be beneficial. Consider and bring forward reforms to harmonise with NSW where appropriate.*

Stormwater Runoff Management

One submission suggested that the Authority should be the person to take control of stormwater runoff management in the Territory's water supply catchments, particularly in light of the issues arising from the damage caused in the Cotter/Bendora catchment following the bushfire in January 2003.

This issue had already been identified following the fires and the Authority, in her capacity as the person responsible for administration of the *Water Resources Act 1998*, is developing a proposal to improve governance and management of these catchments.

Greywater Reuse

It was suggested that the Authority should develop and environment protection policy to cover greywater reuse. This is being progressed. One of the initiatives of the Water Resources Strategy is that Environment ACT and ACT Health collaborate to develop guidelines for greywater reuse in the second half of 2004.

One submission suggested that the Authority should allow greater use of grey water in construction works, and waive water extraction charges associated with such use, particularly in times of water restrictions. This is an issue of regulation under the *Water Resources Act 1998* and is therefore beyond the scope of this review. The suggestion to consider this issue has been passed on to relevant officers in Environment ACT.

Noise of Motor Vehicles

One submission suggested that the noise generated by motor vehicles should be regulated under the Environment Protection Act. Noise of motor vehicles is regulated under the *Road Transport (Safety and traffic Management) Regulations 2000*. In addition, the noise emitted by vehicles is governed by the Australian Design Rules, which are part of the system of registration of vehicles.

While it is understood that there are genuine concerns about vehicle noise caused by use of vehicles on major roads in the ACT, it is not appropriate to seek to regulate these issues under the Environment Protection Act. Instead of establishing direct rules about the level of noise that might be emitted by vehicles, it would be more appropriate to seek to address the issue by erecting sound barriers or by erecting signs to ask drivers to alter their driving behaviour to reduce the noise in sensitive area. These are only two possible ways to address vehicle noise issues. The concerns raised have been passed on to the relevant parts of Government, Roads ACT and the Motor Registry.

The Objects of the Act

Item 2 of the terms of reference requires the review to consider the objects of the Act and whether the machinery adequately reflects the objects. The objects of the Act are reproduced at Appendix 2 of this report.

Submissions and comments on the objects of the Act presented two contrasting positions. Some submissions called for the machinery of the Act to be expanded to match the broad language of the objects (especially 3(1)(a) and (b)), and others called for writing back the objects to clarify that the Act was not about protecting the environment from all threats, but rather really about regulating release of pollutants and dealing with contaminated land.

It is not proposed to modify the objects of the Act in response to either of these positions. The machinery of the Act and the powers of the Authority are well suited to dealing with pollution issues (although, as will be clear from earlier in this report, they could be improved in some respects) and the objects clarify what that machinery and objects are to be used for: protection and enhancement of the environment.

Conversely, the mechanisms in the Act are designed to deal with pollution and contaminated land issues. There are other legislative and administrative structures that deal with other environmental issues such as conservation of native flora and fauna and nature reserves, and the assessment of environmental impacts of development. Regardless of the merits of replacing the other relevant legislation with provisions in the Environment Protection Act, is not appropriate as part of this review to put forward any suggestion that this be done. If there are concerns with the operation of other legislation or the administration of it, then these need to be considered, but not in the relatively narrow confines of this review.

Another view was that the objects were too broadly stated, and that they should be more clearly defined to set some boundaries so that there is a clear definition of what is acceptable environmental performance. This view ignores the fact that the boundaries are not set by the objects, but by the terms of the Act itself. While the Act requires some study to understand, and some matters could be more clearly defined, it is possible to determine with some certainty what is acceptable.

A further view put was that the objects should include referring appropriate matters to the Health Protection Service, which is part of the ACT Department of Health. The objects of the Act are probably not the best place to deal with making such referrals. In any event, the need to refer matters to the Health Protection Service can likely be dealt with administratively (which is to say, without amendment of the Act). As discussed in Chapter 4 above, it is proposed to liaise with Health to establish a closer working relationship, which will include discussion of what sort of matters should be referred to health, and in what circumstances.

The range of views expressed about the objects of the Act and what the role of the authority should be highlights the fact that there are some misconceptions in the community about the place of the Act in the scheme of regulation in the Territory for protection of the environment to address both pollution issues, as well as biodiversity and natural resource issues. One way to address this would be to include information

in the Act in the form of a note of some kind, directing the reader to other relevant legislation that deals with other environmental issues.

Proposal 43:

> *Bring forward an amendment to the Act to insert a note in the objects clause referring to other legislation that contains provisions relevant to protection of the Environment such as the* Nature Conservation Act 1980 *and the* Land (Planning and Environment) Act 1991.

Sustainable Development in the Objects

The objects of the Act include the following two paragraphs:

(d) to achieve effective integration of environmental, economic and social considerations in decision-making processes; and

(g) to promote the principles of ecologically sustainable development.

The term 'ecologically sustainable development' is defined in section 3(2) of the Act as follows:

> ecologically sustainable development is to be taken to require the effective integration of economic and environmental considerations in decision-making processes and to be achievable through implementation of the following principles:
>
> (a) the precautionary principle, namely, that if there is a threat of serious or irreversible environmental damage, a lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
>
> (b) the inter-generational principle, namely, that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
>
> (c) conservation of biological diversity and ecological integrity;
>
> (d) improved valuation and pricing of environmental resources.

The Act was passed by the Assembly prior to the development of a sustainability policy for the ACT. The Government has developed *People Place Prosperity: a policy for sustainability in the ACT* after extensive consultation with the community. This policy specifically provides for the effective integration of environmental, economic and social considerations in decision making processes, incorporates the principles listed in section 3(2) of the Act and acknowledges the interdependence of our economy, environment and society.

Proposal 44:

> *Amend the objects of the Act and the definition of ecologically sustainable development to be consistent with the Government's policy on sustainability.*

6. General

This chapter deals with some of the more general issues raised in the review. A number of matters were raised that fall outside the scope of the review. These are listed in Appendix 3.

Courts

Court Structures

Item 9 of the terms of reference for this review is:

> Consider whether environmental offences are best dealt with by existing Court structures, and the appropriateness of adopting the NSW model of the Land and Environment Court (or some other model).

While there have been a significant number of infringement notices issues under the Act and Regulations (roughly 30 a year for the first 5 years of operation), there have only been 3 matters that have been dealt with in Court.

Given the relatively small number of matters going to Court, there is clearly no justification for a separate Court for environmental matters. Nor is there any justification for changing arrangements for how environment related prosecutions and administrative appeals are dealt with in the Courts.

Appeals and Injunctions

One submission suggested that an alternative to establishing an independent authority would be to improve mechanisms to promote transparency and good decision making under the Act. This submission suggested that one way to do this would be to allow third party appeals in relation to decisions made under the Act (that is, expand the range of people who could appeal against decisions in the AAT). Further, the test for who can make application under the injunction provisions in Division 13.4 of the Act could be expanded to allow any person to so apply. Presently a person seeking to make an application for an injunction must seek leave of the Court, which can only be granted if the person has asked the Authority to intervene and it has not, and if the proceedings are in the public interest.

The issue of access to Court for these purposes was raised in some other submissions and at the public workshops. The suggestion was made that the provisions relating to costs, security for costs and compensation should be revisited to ensure that they do not place inappropriate barriers to citizens taking action to protect the environment. For example, it was suggested that in such applications, each party would bear its own costs of the proceedings unless the application was vexatious (in which case the applicant would be ordered to pay the respondent's costs).

These proposed changes would make the arrangements in the ACT similar to those in NSW.

Proposal 45:

Consider whether standing for AAT appeals and injunctive orders under the Act should be expanded to be similar to arrangements in NSW, in consultation with relevant Government and community stakeholders. Further, consider whether the security for costs and compensation provisions should be adjusted to remove inappropriate barriers to citizens taking action to protect the environment.

The Authority and the Planning Process

A significant number of submissions and comments made related to the role (or potential role) of the Authority in the environmental impact assessment process, the development assessment process and the process for variation of the Territory Plan. Some submissions included general observations about these processes.

Environmental Impact Assessment

One submission stated that the Authority should be involved in the impact assessment process early enough to have input into the process. This already happens. In line with suggestions by another submission, there is no need to alter the role of the Authority in the impact assessment processes.

Some comments focussed on the potential conflict of interest between government as developer and impact assessor, and the need for cooperation between agencies to deal with this potential. This comment is beyond the scope of this review to address.

Another submission suggested that health impact assessment should be incorporated into the environmental impact assessment process. This also is beyond the scope of this review, but will be passed on to ACTPLA.

Development Assessment

A number of submissions supported the existing arrangements in relation to involvement of the Authority in the development assessment process, although some thought there was scope for improving liaison between Environment ACT and ACTPLA to improve efficiency. This improved liaison is supported, as referred to in Chapter 4 above. It is not proposed to put in place any reform that would work against the Government's policy of seeking ways to streamline the development assessment process.

It was suggested that the Authority should have a greater role in the planning process where measures suggested by the Authority at the impact assessment and development approval stage could reduce the need for regulatory intervention in the future. As an example, the Authority may suggest conditions on a development approval that would, if implemented, shield the future occupants of a building from nearby noise sources (such as already existing entertainment venues). If these are not imposed, the Authority will be faced with the ongoing need to respond to noise complaints (at significant resource cost), where this could be avoided if the Authority could require that the conditions be imposed.

The model of allowing Government agencies to impose conditions in the development assessment process has been tried in the past and has been abandoned as unworkable.

There is, however, a serious issue that planning decisions can lead to ongoing pollution problems if environmental issues are not adequately addressed. This is a bad result for the community, and a bad result for the Authority in having to administer and enforce environmental laws in circumstances where the built environment is acting against good outcomes. There may be some scope to develop a mechanism that is based on environmental standards and the need to avoid environmental harm.

Proposal 46:

> *Liaise with the ACT Planning and Land Authority to consider mechanisms that will reduce the risk that planning decisions can lead to ongoing environmental concerns.*

One submission stated that the development process should allow for the Authority to have more input and greater control over the specifications required in a development that will involve a polluting activity so that appropriate conditions are imposed to ensure that the final emission levels are minimal. Such a process would only apply where the development was for the purpose of conducting an activity that would require authorisation under the Act. A reform of this kind would need to be carefully examined to ensure that the improvement in outcomes are not outweighed by the costs to proponents and the Government.

Proposal 47:

> *Liaise with the ACT Planning and Land Authority to consider whether the Authority could have a greater role in the assessment of developments for the purpose of conducting authorised activities in such a way that the benefits outweigh the costs.*

It was suggested that there should be better conditions to protect the environment from threats arising from the building process included in development conditions. (It was not put that development conditions could or should do more to protect the environment from other threats, such as those arising from later use of the site).

On a similar topic, one submission stated that sustainability controls should be governed through the building code at the building approval stage and not through development conditions. It was put that use of development conditions could erode housing affordability and diminish community and industry confidence in the benefits of energy and resource sustainable systems.

Development conditions are a possible mechanism for managing threats to the environment from the actual building process, though there are clearly issues as to who should be seeking to enforce environmental related conditions, and whether this mechanism is best suited to the task of protecting the environment from these threats. It is agreed that development conditions seem less well suited to dealing with ongoing issues, particularly in developments that do not relate to a particular polluting activity, and where possible, it would be more appropriate to deal with issues through the building code.

Proposal 48:

Liaise with ACTPLA and industry to consider whether development approval conditions are a suitable mechanism to secure better environmental performance in the course of development.

Variation to the Territory Plan

It was suggested in the discussion paper that draft variations to the Territory Plan should be referred to the Authority for comment. This suggestion has the support of the ACT Planning and Land Authority.

Proposal 49:

Arrange for necessary amendments to the Land (Planning and Environment) Act 1991 *to ensure that the Authority is consulted over variations to the Territory Plan.*

Review of Environment Protection Policies

It was submitted to the review that Environment Protection Policies (EPPs) should be subject to review in the AAT. It was put that since EPPs set the rules by which decisions on environmental authorisations are made, it was incongruous that an appeal could be lodged in relation to the decision to grant an authorisation, but the policy itself could not be challenged. The only way to get to the heart of the way the Authority is regulating an issue is to allow an appeal against EPPs. Such a provision would go some way to ensure that the Authority adequately focuses on protection of the environment.

EPPs are fundamentally policy documents. They are approved by the Minister and are publicly notified. The AAT is an inappropriate forum for review of such documents. There are informal means of challenging policies of these kinds, such as putting a submission to the Authority or the Government. The fundamental issue here would be addressed if the Authority took steps to ensure that there was more rigorous analysis of claimed social and economic benefits from a proposed activity, and that a holistic analysis of environmental effects of a proposed activity was more clearly apparent in decision making processes. These are dealt with at proposals 21 and 22.

It is therefore not proposed to make arrangements for review of EPPs in the AAT.

2000 Review

Item 10 of the terms of reference for this review require consideration of the recommendations of the two year review (2000), and whether any of the issues raised in that report require further consideration.

The 2000 Review, published in November 2000, made a series of recommendations in relation to provisions of the Act and the Regulations. Only some of these were accepted by the Government at that time. The review also raised a series of matters for further consideration, without making specific recommendations.

Amendments to the Act from the 2000 Review

In so far as legislation was required to deal with the issues raised, they were dealt with in the *Environment Protection Amendment Act 2001* (2001 No 91). Among other things, these amendments did the following matters as raised by the 2000 Review:

- expanded the range of the objects clause to include consideration of the environment outside the Territory;
- removed sections 92 and 136 which were provisions about the powers of the Minister to act on behalf of the Authority. It was considered more appropriate that the Minister should simply have power to direct the Authority in a transparent way as set out in section 93; and
- added powers for inspectors to collect photographic and video evidence as part of routine inspections.

A number of other amendments were made to the Act that were considered appropriate, such as including provisions allowing the Minister to remove the requirement for pubic notification of some steps in the authorisation process where material environmental harm would not be caused by the activity being regulated and it was otherwise considered appropriate.

All of the matters raised by the 2000 review 'for consideration' were considered, but other than those mentioned above, none were progressed as they were either unnecessary or not considered appropriate.

The proposal to amend provisions relating to noise to make them easier to understand will be picked up in the proposed reconsideration of the noise system.

Ongoing Issues from the 2000 Review
There were a number of recommendations of the 2000 Review that raised issues that have been ongoing.

As noted in Chapter 5, concerns have continued to be raised about whether the Authority requires progressive improvements in relation to environmental harm caused by authorisation holders. It is clear that this issue requires further attention (proposal 30 refers).

The 2000 Review suggested that there was a need for more promotion of the general environmental duty. As noted elsewhere in this report, there is a general ongoing need for greater awareness and education in relation to a range of issues relating to the Act.

The 2000 Review also raised the matter of integration of approvals by the ACT Government. As noted above, it has been recognised that more needs to be done to ensure that ACT Government agencies work together to reduce the regulatory burden on those regulated by more than one set of provisions, and to achieve better outcomes.

The 2000 review raised the question of the lack of arrangements for accredited environmental authorisations. It is clear from the explanatory materials for the original Act that these were meant to be issued where a person conducting a controlled activity was dealing with the environmental issues in an exemplary way. The consequence of being issued with one was a reduced level of regulation and less administrative burden on the holder. It would be worthwhile to develop some detailed criteria for issue of such authorisations so that some Canberra businesses could get the benefit of such an arrangement, if they qualify.

Proposal 50:

Consider whether any of the prescribed activities in Schedule 1 of the Act could be regulated by accredited authorisations and develop criteria for when an authorisation holder might qualify for one.

7. The Way Forward

This review has made 50 proposals to improve the administration, operation and enforcement of the Environment Protection Act, and proposed some refinements to the role of the Environment Protection Authority.

The proposals relating to the role of the Authority and the education function will be progressed immediately, as will the proposals relating to improving working relationships and procedures within Government.

The bulk of the proposals relate to amendments to the Act. A significant number of those are based on submissions from only one stakeholder or set of stakeholders. It would therefore be appropriate for many of these proposals to be developed further, and an appropriate level of further consultation take place. Following that consultation, the Government will make a decision on how to progress these proposals, and legislation to amend the Act will be brought forward.

A lot has been learnt during the first 5 years of the operation of the Act. It is clear that there will be an ongoing need to keep the Act under review in future.

Proposal 51:

Amend the Act to require a further review at the end of 5 more years.

Appendices

Appendix 1: Terms of Reference

(1) Review the operation of the Act. In particular, consider whether there are any changes that could be made to the Act, regulations or the administrative practices that would improve the extent to which the objects of the Act are being met or improve the efficiency with which it is administered.

(2) Review the objects of the Act and consider whether the machinery of the Act adequately reflects those objects.

(3) Consider the interaction of the Act with other ACT legislation and national agreements. Also consider the opportunities to harmonise the approach taken in the Act with that taken in other jurisdictions.

(4) Consider whether the EPA has all necessary powers to carry out its functions, and whether the existing powers are being utilised effectively

(5) Have regard to matters raised in Stage 1 (2002), and in particular:
   (a) development of a strategic vision for the EPA and identify the priority areas for new or updated regulations on policies for improved protection of the environment;
   (b) enhanced communication with other areas in Environment ACT, in particular with the policy arm of the organisation, and with other areas within the ACT Government such as Planning and Land Management; and
   (c) establishment of an industry liaison officer.

(6) Consider the education function of the EPA, and the level of contact with business and industry and availability of public information.

(7) Consider the role of the Environment Protection Authority (the EPA) within Government, in particular:
   (a) the appropriate level of independence of the EPA;
   (b) level of independence for the EPA that might improve the compliance function of the EPA, in relation to both Government and private sector entities;
   (c) relationship to the Commissioner for the Environment;
   (d) relationship to the Conservator of Flora and Fauna; and
   (e) relationship to the Office of Sustainability.

(8) In considering the independence of the EPA, consider the appropriate level of independence for the Conservator of Flora and Fauna in relation to compliance and enforcement functions.

(9) Consider whether environmental offences are best dealt with by existing Court structures, and the appropriateness of adopting the NSW model of the Land and Environment Court (or some other model).

(10) Have regard to the recommendations of the two year review (2000), and whether any of the issues raised in that report require further consideration.

(11) Consider whether the implementation of the Act has improved environmental outcomes in the Territory, and whether there have been any other benefits from implementation of the Act.

(12) Make recommendations in regard to each of the above.

The Review should maintain links with and share information with the Review of the Office of the Commissioner for the Environment.

Appendix 2: Objects of the *Environment Protection Act 1997*

3(1) The particular objects of this Act are—

(a) to protect and enhance the quality of the environment; and

(b) to prevent environmental degradation and adverse risks to human health and the health of ecosystems by promoting pollution prevention, clean production technology, reuse and recycling of materials and waste minimisation programs; and

(c) to require persons engaging in polluting activities to make progressive environmental improvements, including reductions of pollution at the source as such improvements become practical through technological and economic development; and

(d) to achieve effective integration of environmental, economic and social considerations in decision-making processes; and

(e) to promote the concept of a shared responsibility for the environment by acknowledging environmental needs in economic and social decision-making; and

(f) to promote the concept of a shared responsibility for the environment through public education about and public involvement in decisions about protection, restoration and enhancement of the environment; and

(g) to promote the principles of ecologically sustainable development; and

(h) to regulate, reduce or eliminate the discharge of pollutants and hazardous substances into the air, land or water consistent with maintaining environmental quality; and

(j) to allocate the costs of environmental protection and restoration equitably and in a manner that encourages responsible use of, and reduces harm to, the environment with polluters bearing the appropriate share of the costs that arise from their activities; and

(k) to facilitate the implementation of national environment protection measures under national scheme laws; and

(m) to provide for the monitoring and reporting of the environmental quality on a regular basis in conjunction with the commissioner for the environment; and

(n) to control the generation, storage, collection, transportation, treatment and disposal of waste with a view to reducing, minimising and where practical, eliminating harm to the environment; and

(p) to adopt a precautionary approach when assessing environmental risk to ensure that all aspects of environmental quality, including ecosystem sustainability and integrity and beneficial use of the environment, are considered in assessing, and making decisions in relation to, the environment; and

(pa) to ensure that contaminated land is managed having regard to human health and the environment; and

(q) to coordinate all activities as are necessary to protect, restore or improve the Territory environment; and

(qa) to establish a process for investigating and, where appropriate, remediating land areas where contamination is causing or is likely to cause—

(i) a significant risk of harm to human health; or

(ii) a significant risk of material environmental harm or serious environmental harm;

and this Act shall be construed and administered accordingly.

Appendix 3: Issues Outside the Scope of the Review

Quite a significant number of submissions raised issues outside the scope of this review. These issues related to planning issues, and issues related to other legislation administered by Environment ACT. For completeness, these issues are listed here. It is proposed to pass on the submissions to relevant parts of Environment ACT or other government agencies.

Road Verges
Comments by Environment ACT on development applications re flora and fauna issues for road verges have been found to be in conflict with applicable landscape design standards. There should be better liaison between EACT, Roads ACT and CUPP on these matters.

Flora and Fauna issues are dealt with by the Conservator and the Wildlife Research and Monitoring Unit. This comment will be passed on.

Planning Approval in the Parliamentary Triangle
It was stated at one of the workshops that there were differences between the ACT Government and the Australian Government when it came to use of the Parliamentary triangle. This comment is beyond the scope of the review to address.

Canberra Nature Park
One submission stated that protection of Canberra Nature Park was of paramount importance, and that a management plan for it should be developed that identifies flora and fauna in it, areas of special environmental sensitivity and takes into account the need to properly manage the park/urban interface.

The management of Canberra Nature Park is the responsibility of the Conservator of Flora and Fauna. These comments are beyond the scope of this review to address, and have been passed on to the Conservator.

Water Issues
One submission raised a number of water issues:

- the Government should be doing more to raise the debate on the future of water supplies and possible constraints on development;
- there is a conflict between Draft Variation to the Territory Plan 200 (which maintains large areas of open space on blocks) and the ongoing need for water restrictions. Higher density would allow for reduced water use and for open spaces to be better maintained;
- irrigation to well designed public parks in developments where block sizes are small is being disconnected, reportedly due to limited maintenance funds for dry land grassing.

The Government is committed to developing options for management of the water supply so that water supply issues will not constrain development.

The comment in relation to DV 200 will be passed on to ACTPLA.

The comment in relation to the irrigation of public parks will be passed on to Canberra Urban Parks and Places, the unit in Urban Services that manages such places.

Conservator, Commissioner for the Environment, Sustainability Issues
One submission provided detailed recommendations relating to the role of the Conservator of Flora and Fauna, the Commissioner for the Environment and general sustainability issues. The matters raised were all beyond the scope of this review. The material provided will be passed on to relevant areas of Government.