



# **Submission on the Remake of the Coastal Integrated Forestry Operations Approvals (IFOAs)**

prepared by

**EDO NSW**

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### **Submitted to:**

Remake of the Coastal IFOAs  
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## Introduction

As a community legal centre specialising in public interest environmental and planning law, EDO NSW welcomes the opportunity to comment on the *Remake of the Coastal Integrated Forestry Operations Approvals Discussion Paper* (February 2014) (the **Discussion Paper**).<sup>1</sup> EDO NSW also appreciates the briefing provided by EPA and Forestry Corporation staff on the Discussion Paper proposals, and we welcome further engagement in future.

We note that Integrated Forestry Operations Approvals (**IFOAs**) authorise and regulate forestry operations in State forests or other Crown timber lands, and incorporate a range of licence requirements,<sup>2</sup> including licences to pollute;<sup>3</sup> harm or kill threatened species (or their habitat);<sup>4</sup> and harm or kill a threatened species of fish (or their habitat).<sup>5</sup> IFOAs also include a number of conditions that are not connected to these licences.

The Discussion Paper proposes that a single IFOA will replace the current four coastal IFOAs for the Eden, Southern, Upper North East and Lower North East coastal regions of NSW.<sup>6</sup>

### Objectives of the Coastal IFOA remake

The changes to the IFOAs are focussed on 'reducing the costs of implementation and compliance and improving the clarity and enforceability of IFOA conditions'.<sup>7</sup> In addition, we note that 'the NSW Government has committed to delivering these objectives with no net change to wood supply and maintenance of environmental values'.<sup>8</sup> EDO NSW welcomes the upfront requirement to ensure 'no erosion of environmental values' in these reforms.<sup>9</sup> We make a number of comments on these proposed objectives and parameters below.

First, EDO NSW submits that the new IFOA should include ecologically sustainable forest management (**ESFM**) as its principal underlying objective. ESFM is defined as 'managing forests so that they are sustained in perpetuity for the benefit of society by ensuring that the values of forests are not lost or degraded for current and future generations'.<sup>10</sup> This has been promoted as an underlying principle for forest management by both national and State governments. Australia's *National Forest Policy Statement*<sup>11</sup> has ESFM as its underlying theme; and the *Forestry Act 2012* (NSW) (**Forestry Act**) requires Forest Agreements to promote ESFM and reports on ESFM to be tabled in Parliament annually.<sup>12</sup>

Second, rather than simply maintaining environmental values, the aim should be to *improve or maintain* environmental values. This is the standard required to be met by activities impacting the environment such as the assessment of developments involving broadscale

<sup>1</sup> Available at <http://www.epa.nsw.gov.au/forestagreements/coastlIFOAs.htm>, accessed March 2014.

<sup>2</sup> *Forestry Act 2012* (NSW), s. 69T(1).

<sup>3</sup> issued under the *Protection of the Environment Operations Act 1997* (NSW).

<sup>4</sup> Issued under the *Threatened Species Conservation Act 1995* (NSW).

<sup>5</sup> Issued under the *Fisheries Management Act 1994* (NSW).

<sup>6</sup> NSW Government and Environment Protection Authority (EPA), *Remake of the Coastal Integrated Forestry Operations Approvals* (February 2014), p 4.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, p 5.

<sup>10</sup> <http://www.epa.nsw.gov.au/forestagreements/questions.htm>

<sup>11</sup> <http://www.daff.gov.au/forestry/policies/statement>

<sup>12</sup> *Forestry Act 2012* (NSW), s 69C, 69H.

clearing,<sup>13</sup> the conferral of biodiversity certification,<sup>14</sup> and the establishment of BioBanking agreements.<sup>15</sup> It is arguable that environmental values are not even being maintained under the current system, with 70% of native forests in Australian having been degraded by unsustainable logging.<sup>16</sup>

Third, more information is needed about how the balance between ‘no net change to wood supply’ and ‘maintenance of environmental values’ will be achieved.<sup>17</sup> Issues of balancing wood supply with the need to improve or maintain environmental values should be the subject of a broader, independent expert review involving the NSW Natural Resources Commission (**NRC**). This review should be conducted and published in the near-term, to inform a two-year review of the IFOA remake (recommended further below).

Fourth, we recommend that the NRC should be engaged to provide advice and input on the IFOA remake, both *before and after* the draft IFOA is exhibited. The *Forestry Act* (Parts 5A and 5B) demonstrates a close nexus between NSW Forest Agreements and IFOAs. Before a Forest Agreement is signed, the Act specifically requires an NRC assessment of environmental values, indigenous and other heritage values, economic and social values, ESFM and timber resources.<sup>18</sup> IFOAs provide a framework to implement those Agreements following the NRC’s assessment.<sup>19</sup>

While further NRC input is not legally required at the IFOA stage, we believe the marked shift in approach proposed for the new IFOA warrants this further input. NRC engagement would demonstrate the Government’s good faith to the community, and would strongly contribute to the second plank of the Government’s policy objectives – namely, ‘ensuring no erosion of environmental values.’ Specific input from the NRC could include an appraisal of environmental effectiveness of the new IFOA proposals, and assistance on any associated protocols, guidelines and monitoring frameworks as these are developed.

**Recommendations:**

- *The new IFOA should include ecologically sustainable forest management (ESFM) as its principal underlying objective. A further objective should be to maintain or improve environmental values and outcomes in State forests and other Crown timber lands.*
- *Issues of balancing wood supply with the need to maintain or improve environmental values should be the subject of a broader, independent expert review involving the NSW Natural Resources Commission (NRC), to report publicly in the near-term.*
- *The NRC should advise on the IFOA remake, before and after a draft IFOA is exhibited, to provide an arms-length appraisal of environmental effectiveness of any new IFOA, and input on associated protocols, guidelines and monitoring framework.*

Other key changes proposed in the Discussion Paper are addressed below.

<sup>13</sup> *Native Vegetation Act 2003* (NSW), s 14.

<sup>14</sup> *Threatened Species Conservation Act 1995* (NSW), s 126O.

<sup>15</sup> *Threatened Species Conservation Act 1995* (NSW), Part 7A.

<sup>16</sup> Kingsford et al “Major Conservation Policy Issues for Biodiversity in Oceania” (2009) 23; 4 Conservation Biology 834; Hammond-Deakin, N. and Higginson, S. (2011) *If a tree falls: Compliance failures in the public forests of New South Wales*, EDO NSW, Sydney, Australia, p 8: [http://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/284/attachments/original/1380667654/110728w\\_hen\\_a\\_tree\\_falls.pdf?1380667654](http://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/284/attachments/original/1380667654/110728w_hen_a_tree_falls.pdf?1380667654).

<sup>17</sup> NSW Government and EPA, *Remake of the Coastal Integrated Forestry Operations Approvals* (February 2014), p 4.

<sup>18</sup> *Forestry Act 2012*, s 69B.

<sup>19</sup> *Forestry Act 2012*, s 69L.

## The proposed coastal IFOA structure and framework

### Replacing the four current coastal IFOAs with a single IFOA

More information is needed about how the four current coastal IFOAs will be replaced with one single IFOA. Standardising the IFOAs into a single document is likely to have implications for sensitive environmental and heritage assets, particularly when there is so much variation between the forests covered, from northern to southern NSW. The Discussion Paper acknowledges that regional variation, including 'different species needs and harvesting practices', 'will continue to be recognised' (p 11). It is unclear what form this will take. We submit that the new IFOA provisions will need to ensure that important environmental and heritage features are protected, and that local communities are given the opportunity to contribute knowledge about the existence of places that need to be protected.

### Outcomes-based principles to replace prescriptive licence rules

The Discussion Paper proposed a shift from prescriptive IFOA rules towards outcomes-based principles, enforceable protocols and best practice guidelines (pp 12-13). The proposed outcomes-based approach will result in the removal of many prescriptive conditions. This is a very significant shift that entails a number of risks and gives rise to significant community concerns about the loss of environmental protections.

Any transition from prescriptive licence conditions to outcomes-based regulation must be able to *demonstrate*: first, that there will be no erosion of environmental values; and second, *how* environmental outcomes will be improved or maintained for the future. Further clarity on the practical implications will be essential, including sufficient opportunities for community engagement to voice concerns. This should include the release of a comparison report at the next consultation stage, to show how existing licence conditions and environmental protections have been translated to the new system.<sup>20</sup>

The term 'outcome-based' needs to be clarified to avoid lax interpretation. IFOA conditions must be measurable and enforceable, supported by appropriate resourcing and agency culture. The wording of outcomes will need to be such that the failure to meet outcomes will amount to an enforceable breach.

If outcomes-based regulation entails the use of robust, science-based tools and standards (such as ANZECC Guidelines and National Environmental Protection Measures), EDO NSW supports these. Nevertheless, there is also a need to retain prescriptive conditions in relevant circumstances, to ensure environmental outcomes are achieved. This includes where data on outcomes is difficult to gather or interpret, or where detection of results or errors can only be done over the long-term. In other words, long-term outcomes must have specific (possibly prescriptive) 'waypoints' that allow meaningful monitoring, auditing and adaptive management to continually improve environmental outcomes.

Reliance on 'outcomes' must not imply a shift towards *reactive* measures when harm occurs, rather than *proactive* conditions which prevent harm and protect environmental values. In addition, if 'outcomes' remain high-level, are not measurable, or not attributable to a particular operation, planning area or operator, then proof and enforceability will be difficult. This highlights the need for further detail and clarity, as well as assurance that the proposed strategic environmental monitoring framework is effective (discussed further below).

As part of the outcomes-based approach, the Discussion Paper proposes to give the Forestry Corporation of NSW (**FCNSW**) the flexibility to determine how outcomes specified in the IFOA and licence conditions will be met (p 13). We submit that FCNSW be required to:

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<sup>20</sup> The Discussion Paper's discussion of this process is low on detail (pp 12-13).

- document its intended approach to outcomes-based compliance;
- publish clear and transparent compliance policies (including, for example, a 'compliance charter' that FCNSW and its contractors must adhere to); and
- maintain a public register that records all identified non-compliances.

### Protocols and guidance materials

The Discussion Paper proposes to introduce enforceable protocols to streamline licences and support licence conditions, supplemented by best practice (but not enforceable) guidance materials (p 13). The Discussion Paper also proposes to streamline licence conditions, and grouping them by environmental outcome rather than licence type (p 14).

At this stage it is unclear how obligations in *protocols* will be able to be enforced, or who could enforce them. For example, would compliance with the protocols be a general licence condition? Does the proposal that protocol documents 'sit outside, but are linked to the IFOA' have implications for enforcement or investigation procedures? Elsewhere in this submission we recommend 'open standing' for members of the public to pursue civil enforcement of forestry breaches, in addition to EPA and ministerial enforcement powers.

The Discussion Paper suggests that new protocols will be finalised by the implementation date for the new IFOA (p 14). However, it is important that the community is engaged in the development of these protocols, and understands in advance how they will translate (and improve on) existing ecological protections under the IFOA. Proper engagement procedures and transparency safeguards will also be vital to any future amendments to protocols.

The best practice *guidance material*, proposed to be developed by FCNSW in consultation with EPA and DPI, would sit under the protocols to enable more flexible, tailored operations. It is important that any prescriptive detail required to make enforcement possible is included in the binding protocols, not in these guidelines. The objective of the IFOA remake to reduce the costs associated with implementation and compliance should not compromise effective implementation and enforcement. Self-regulation is not an adequate replacement for regulation by the Government.

### **Recommendations:**

- *The new IFOA must continue to protect regional environmental and heritage variations.*
- *EDO NSW supports clear and enforceable conditions, based on a mix of prescriptive and outcomes-based requirements.*
- *Outcomes-based conditions must be measurable and enforceable, with appropriate resources and agency culture; and must emphasise proactive prevention of damage.*
- *At the next consultation stage, the Government should release a comparison or translation of old and new IFOA licence requirements and environmental safeguards.*
- *FCNSW should be required to document its outcomes-based approach, publish its compliance policies (e.g. a compliance charter), and maintain a non-compliance register.*
- *The EPA should clarify the enforcement mechanisms and operation of forestry protocols, and ensure transparent procedures for any iterative amendments.*

### **Landscape-based measures and reduced surveys for threatened species**

Part 7 of the Discussion Paper proposes a significant shift in approach for the new IFOA, reducing surveys to locate threatened species and emphasising landscape-based measures – based on biophysical features at the 'site, local and broad landscape scale' (p 22). The Discussion Paper notes that some landscape-based protections already apply under the Threatened Species Licence (TSL); and that some site- or species-specific provisions will be retained (pp 20-26).

EDO NSW generally supports landscape-based approaches to biodiversity protection.<sup>21</sup> Nevertheless, as a landscape-based approach to forestry surveys will focus on protection of forest features for habitat (such as trees with hollows), there is a risk that this approach overlooks whether actual threatened species are observed in those forest features. Regulators and FCNSW will need to address challenges of identification, monitoring and reporting.

More information is needed on the extent to which the landscape-scale approach will replace targeted surveys, and how the species and sites requiring targeted surveys will be selected. It is critical that this process is robust, science-based and transparent. Although we have reservations about reduced surveying, we welcome the commitment to *improving* species outcomes via 'greater' landscape protections. It is important that genuine improvement is evident at the next consultation stage. We support the inclusion of protections for Threatened Ecological Communities, for example; but we are concerned about proposed exemptions from these measures (p 20). Among other things, a landscape-based approach should specifically address climate change risks and cumulative impacts of forestry and surrounding land uses on biodiversity outcomes; including when providing for connectivity.

The IFOA consultation documents highlight various concerns with existing forestry survey methods; while acknowledging the importance of site-based surveys in other respects.<sup>22</sup> We submit that the IFOA revision presents an opportunity to implement a *broader range of improvements* to survey methods and protection zones based on experience (successful and unsuccessful) over the past decade.<sup>23</sup> This broader range of improvements should involve Office of Environment & Heritage (OEH), NRC and independent ecologists' input.

#### Data gaps, precautionary measures and knowledge-sharing

Any shift to landscape-based surveys must account for the challenge of whether current datasets (on the association between species and landscape features) are sufficiently accurate, comprehensive and fit for purpose; and how data shortfalls will be addressed. Consecutive NSW *State of the Environment* reports emphasise the limited knowledge of threatened species and biodiversity in NSW.<sup>24</sup>

In this regard, the objectives of FCNSW require it to apply a precautionary approach (and other principles of ecologically sustainable development) where its activities affect the environment.<sup>25</sup> We submit that a precautionary approach must inform measures to protect threatened species from significant or irreversible harm as a result of changed IFOA policies, notwithstanding that there may be scientific uncertainty or a lack of data on likely impacts.

Regulators and FCNSW will also need to provide measures to encourage local communities (including indigenous groups) to share their knowledge – to ensure that known populations, species and landscapes are identified and protected. Local communities have expressed concern to EDO NSW that a landscape-scale approach may reduce the protection of locally important species, populations and communities. Although the Discussion Paper notes the multi-scale nature of a landscape approach (including at the local level, pp 22-25), this community concern must be fully addressed in more specific and transparent terms.

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<sup>21</sup> See EDO NSW *Submission on review of the threatened species Priorities Action Statement* (2014).

<sup>22</sup> Discussion Paper, pp 21-22; NSW Government, *Coastal IFOA remake - Cost of Regulation* (Feb. 2014), p 4, at [www.epa.nsw.gov.au](http://www.epa.nsw.gov.au).

<sup>23</sup> This issue also arose in the 10-year IFOA review. See NSW Government, *Outcomes from the Review of the NSW Forest Agreements and the Integrated Forestry Operations Approvals* (2010) p16.

<sup>24</sup> See EPA, *State of the Environment NSW 2012*, Chapter 5. See also 2009 report.

<sup>25</sup> *Forestry Act 2012*, s 10(1)(c); *Protection of the Environment Administration Act 1991* (NSW), s 6.

The IFOA consultation documents suggest that the data currently collected in threatened species surveying may be of limited use for long-term planning or other re-use purposes.<sup>26</sup> The IFOA remake should therefore consider how species-specific and multi-scale landscape data collected for forestry and environmental purposes can be enhanced, shared and re-purposed. Secondary uses could include contributing to the NSW *Saving our Species* program and Priorities Action Statement, inter-governmental and public databases.<sup>27</sup>

#### Review of threatened species licence framework – Forest Practices Association of Tasmania

The Discussion Paper sets out a four-step process to develop the threatened species licence (TSL) framework for the new IFOA (pp 26-27). This would begin with a review of the proposed framework by the Forest Practices Authority of Tasmania (FPAT). There has been some community concern to ensure that any FPAT review incorporates sufficient ecological and conservation expertise, as well as local NSW knowledge.<sup>28</sup>

EDO NSW submits that this concern could be addressed through joint involvement in the review from OEH, or independent ecologists, depending on the expertise required.<sup>29</sup> EDO NSW welcomes the expert panel review proposed at Step 3 of revising the TSL framework, provided the make-up and findings of this panel are transparent and appropriately consultative. Nevertheless, upfront involvement by OEH or independent ecologists in framing TSL requirements is recommended.

#### **Recommendations:**

- *Further information is needed on the extent to which a landscape-scale approach will replace targeted surveys for threatened species, and the processes involved.*
- *Landscape-based approaches should specifically address climate change risks, and cumulative impacts of forestry and surrounding land uses on biodiversity outcomes.*
- *The Government should examine a broader range of measures to improve survey methods based on experience, assisted by OEH, the NRC or independent ecologists.*
- *A precautionary approach must inform IFOA measures to protect threatened species.*
- *New processes should be developed to encourage communities to share their local ecological knowledge with regulators in order to enhance protection and outcomes.*
- *The Government should investigate how ecological survey data can be captured for publication, research and re-use within and outside government.*
- *The review of the Threatened Species Licence framework by the Forest Practices Authority of Tasmania should be conducted jointly with OEH or independent ecologists.*

#### **Offences, penalties and enforcement reforms**

Several of the Discussion Paper's proposals in relation to offences, penalties and enforcement are significant strengths within the overall IFOA reforms. EDO NSW maintains a strong interest in the forestry compliance and enforcement regime. For detailed information

<sup>26</sup> NSW Government, *Coastal IFOA remake - Cost of Regulation* (Feb. 2014), 'Ecological surveys'.

<sup>27</sup> See further: [www.environment.nsw.gov.au/savingourspecies/about.htm](http://www.environment.nsw.gov.au/savingourspecies/about.htm); the Priorities Action Statement is a requirement under the *Threatened Species Conservation Act 1995 (TSC Act)*. See also the Australian Government *National Plan for Environmental Information*, at <http://www.environment.gov.au/topics/science-and-research/national-plan-environmental-information>.

<sup>28</sup> The FPAT website indicates that its director position for 'a person with expertise in biological science or nature conservation' is currently vacant. See [www.fpa.tas.gov.au/the\\_fpa/?a=55442](http://www.fpa.tas.gov.au/the_fpa/?a=55442).

<sup>29</sup> For example, the FPAT itself convened a panel of seven ecologists and other scientists to advise FPAT on the *Review of the biodiversity provisions of the Tasmanian Forest Practices Code* (2009).

on recent compliance failures, please refer to our 2011 paper, *If a Tree Falls*.<sup>30</sup> We make the following comments on the IFOA Discussion Paper's proposals.

### Stronger penalties and enforcement tools

EDO NSW supports the strengthening of penalties for forestry offences in State forests and other Crown-timber lands, and additional enforcement tools to reflect regulatory best practice (p 16). This should include stop work and interim protection orders (historically unavailable). Strengthened forestry enforcement is clearly necessary in light of repeated and at times flagrant breaches. This has prompted the NSW judiciary to comment that: 'the number of convictions suggests either a pattern of continuing disobedience in respect of environmental laws generally or, at the very least, a cavalier attitude to compliance with such laws.'<sup>31</sup>

Penalties must be brought up to parity with equivalent offences, with tiers based on severity where appropriate. EDO NSW research in 2011 concluded that 'The penalty for breaching a threatened species condition in the IFOA licence is between one-fifth and one-tenth of the level of penalties for offences of other environmental laws.'<sup>32</sup>

However, to be an effective deterrent, it is important that increased penalties are *imposed* when breaches are identified – prosecutions for breaches of the existing IFOA licences are extremely rare.<sup>33</sup> To assist regulators, FCNSW, contractors and community expectations, the Government should consider a tiered enforcement framework similar to NSW pollution laws and draft planning legislation. Legislative changes should also include increased civil penalties, and recourse to other civil remedies, to support existing enforcement tools.<sup>34</sup>

### Forestry Act changes should include community civil enforcement provisions

It is unclear whether changes to offences and penalties will include expanded civil remedies. EDO NSW submits that any changes to the NSW forestry legislation should include provision for third-party enforcement action. The *Forestry Act 2012* currently prevents members of the public from bringing enforcement action for legal breaches, including by removing 'open standing' rights in other NSW laws.<sup>35</sup> Instead the Forestry Act relies on the Minister or EPA taking action. This has resulted in a very low prosecution rate despite regular and often serious breaches by FCNSW and its contractors.<sup>36</sup>

The absence of third-party enforcement action for forestry breaches is an anomaly within NSW planning and environmental laws. Reinstating third party rights to bring civil enforcement is appropriate and consistent with the intent to modernise IFOAs towards 'best practice' regulation. The history of the use of civil enforcement in NSW planning, pollution and threatened species laws shows that these provisions are rarely used, but are

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<sup>30</sup> Available at [www.edonsw.org.au/forestry\\_clearing\\_vegetation\\_trees\\_policy](http://www.edonsw.org.au/forestry_clearing_vegetation_trees_policy), 'Discussion Papers'.

<sup>31</sup> Justice R A Pepper, *Department of Environment, Climate Change and Water v Forestry Commission of NSW*, NSW Land and Environment Court, 8 June 2011.

<sup>32</sup> For example, the maximum penalty under ss 175, 175A and 175B of the *National Parks and Wildlife Act 1974* (NSW) is \$11000-\$22,000. By contrast, s 123 of the *Protection of the Environment Operations Act 1997* (NSW) provides water pollution penalties of up to \$1,000,000 for a corporation and \$250,000 for an individual, plus continuing offence penalties. Offences under the *Environmental Planning and Assessment Act 1979* (NSW), including unlawful development, attract a maximum penalty of \$1,100,000 and a further maximum daily penalty of \$110,000.

<sup>33</sup> Hammond-Deakin, N. and Higginson, S. (2011) *If a tree falls: Compliance failures in the public forests of New South Wales*, EDO NSW, p 28.

<sup>34</sup> See *Forestry Act*, s 85 (penalty notices); s 69S (civil enforcement of IFOA breaches by Minister).

<sup>35</sup> *Forestry Act 2012* (NSW), s. 69ZA.

<sup>36</sup> Hammond-Deakin, N. and Higginson, S. (2011) *If a tree falls: Compliance failures in the public forests of New South Wales*, EDO NSW, p 28.

nonetheless highly valued by the community as an accountability measure.<sup>37</sup> The prospect of civil enforcement is also a further incentive for FCNSW and contractors to ensure compliance. In the rare cases where civil enforcement proceedings *are* used, they often succeed in rectifying the breach and/or improving environmental outcomes.<sup>38</sup>

#### Clearer responsibilities and minimum competencies

EDO NSW supports the clarification of the responsibilities of FCNSW, its contractors, and regulators under the IFOA. Potential benefits include increased compliance and prevention of breaches. Removing ambiguous language and clarifying IFOA conditions also has the potential to result in increased and more effective enforcement action. This is not to say that FCNSW should be exempt from liability for contractors' actions.

EDO NSW also supports the introduction of minimum competencies for contractors (Discussion Paper, p 16). This should include specific training on biodiversity conservation, landscape feature and habitat identification, and environment and heritage obligations.<sup>39</sup> This would increase awareness of requirements and responsibilities under the IFOA, and improve compliance with IFOA conditions. There is anecdotal evidence that contractors are often unaware of their responsibilities under the current IFOAs, and FCNSW has not emphasised the importance of compliance. This places pressure on contractors who may not know the specific requirements of the IFOAs and licences, or agencies' expectations.<sup>40</sup>

It is unclear how the Government envisages the liability relationship between FCNSW and its contractors. While EDO NSW supports enforceability of contractors' obligations, including as a greater incentive to comply, FCNSW should be jointly liable for contractors' conduct. This is consistent with the Corporation's functions, including control and management of forestry areas and as grantor of forestry rights.<sup>41</sup>

#### Increased licence enforceability (including permanent 'switching on' of licences)

EDO NSW supports increased licence enforceability, and new EPA prosecution and investigation powers (Discussion Paper, p 15). Proposals include offence and penalty provisions for breaches of non-licence terms (currently unenforceable), delegating enforcement authority to the EPA, and the introduction of additional EPA investigation powers. These measures have the potential to increase enforcement of forestry breaches that are not covered by the pollution, threatened species, and fisheries licence conditions in IFOAs. Furthermore, we strongly agree that pollution licences should always be 'switched on', and FCNSW should not have the option of failing to do so lawfully.

#### **Recommendations:**

- *EDO NSW supports increased forestry penalties and enforcement tools. This must be accompanied by increased use of tools and prosecutions, and a 'culture of compliance'.*
- *The Government should consider a tiered enforcement system, as in NSW pollution law.*
- *The Forestry Act 2012 should be amended to include 'open standing' for third party enforcement of breaches.*
- *FCNSW and contractors should be jointly liable for breaches of forestry legislation, supported by minimum competency requirements for contractors.*

<sup>37</sup> See for example, Moore, T. and Dyer, R., *Independent review of the NSW Planning System* (2012).

<sup>38</sup> See for example, *Blue Mountains Conservation Society v Delta Electricity*, at [http://www.edonsw.org.au/pollution\\_cases](http://www.edonsw.org.au/pollution_cases).

<sup>39</sup> For example, in relation to Aboriginal and non-Aboriginal heritage, grazing and pest/weed control.

<sup>40</sup> Hammond-Deakin, N. and Higginson, S. (2011) *If a tree falls: Compliance failures in the public forests of New South Wales*, EDONSW, p 27.

<sup>41</sup> See *Forestry Act 2012*, s 11.

## Streamlining licence contents

The Discussion Paper proposes a range of measures to 'streamline' IFOA licence provisions, including in relation to soil and water. We comment on these proposals below.

### Integrating and aligning licence conditions – a 'highest common denominator' approach

EDO NSW recommends a 'highest common denominator' approach to achieving more consistent and integrated conditions between pollution, threatened species and fisheries licences (Discussion Paper, pp 14, 23-26, 29-30). For example, if buffer zones for a certain type of sensitive area were variously prescribed as 30, 40 and 50 metres across different licences, the integration and alignment process should adopt a 50-metre buffer as the most protective, to ensure that environmental standards are not eroded. To give another example, in reviewing of existing owl landscape protection areas and site-based protected areas (Discussion Paper, p 24), ongoing protection should be the default position; with the onus to demonstrate clear reasons why it would be ecologically inappropriate to protect such areas.

### Removal of various regulatory controls from IFOA provisions

EDO NSW does not support the proposal to remove provisions relating to heritage (including Aboriginal culture and heritage), grazing permits, weed and pest control from the IFOA (Discussion Paper, p 19). While legislative requirements under other Acts would still apply, there are risks to decoupling these obligations from the IFOA – particularly for the protection of Aboriginal culture and heritage values under the *National Parks and Wildlife Act 1974* (NSW). Removing these IFOA obligations could reduce compliance, and may expose FCNSW and its contractors to increased risk of compliance action.

It is unclear whether input has been sought from Aboriginal groups on this issue, or on other solutions to better protect Aboriginal culture and heritage values under the new IFOA. This engagement should occur before the draft IFOA is prepared. Ongoing engagement with Aboriginal communities is also important, in accordance with NSW Forest Agreements.<sup>42</sup>

The Discussion Paper does not provide sufficient information on proposals to remove grazing, weed and pest control provisions from the IFOA, including permits and management plans (p 19). Further information is needed on how grazing activities would be dealt with via proposed amendments to the Forestry Act; how sensitive area safeguards will be maintained; and how regulation will be improved in the absence of recent EPA activity.

If any of these IFOA obligations are removed, first, a system must be in place to ensure FCNSW and its contractors are fully aware that legal requirements and responsibilities still exist. For example, 'minimum competencies' on related laws and obligations must be included in training on the new IFOAs, and become a prominent part of FCNSW notification of contractors' obligations.

Second, renewed emphasis will be needed on regulator cooperation, coordination and information-sharing, to notify and investigate potential forestry-related breaches under the IFOA and other laws. This cooperation could be enshrined in the *Forestry Act* if obligations under other laws are no longer incorporated into the IFOA.

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<sup>42</sup> Discussion Paper p 8: 'The [forest] agreements contain provisions for promoting ESFM, sustainable timber supply, community consultation and Aboriginal involvement in forest management...'

### Silvicultural practices

In relation to reducing specifications for silvicultural practices (Discussion Paper, p 18), the proposed inclusion of habitat tree retention requirements in the IFOA is vital; as are spatial and time limits on logging operations that demonstrably protect ecological values and outcomes. These requirements must be worded in a way that ensures they are enforceable, implemented in a scientifically rigorous way, and regularly monitored and audited.

The EPA is aware of community and EDO NSW concerns that past interpretation and implementation of tree retention requirements has been sub-optimal. The IFOA remake is an ideal opportunity to address this deficiency, and ensure that tree retention requirements reflect ecological needs. For example, the IFOA must ensure that tree retention not only meets required ratios per hectare, but that the most suitable trees are retained and appropriately dispersed across a given area.

### Other forest uses

The Discussion Paper proposes the removal of other forest product operations from the IFOA (such as collection of seed, bark and oil for commercial purposes) (p 18), except for areas that are actively being or have recently been logged. The lack of elaboration or reasoning has raised some community concern about this issue. The next consultation stage should clarify and demonstrate how other forest uses will be regulated (for example, under the *Environmental Planning and Assessment Act 1979*), and how the proposal will avoid creating legal loopholes or diminished oversight of non-logging activities.

#### **Recommendations:**

- *Measures to better integrate and align licence conditions must adopt a 'highest common denominator' approach to protecting environmental values and outcomes.*
- *The NSW Government should consider alternatives to removing IFOA provisions on heritage protection (including Aboriginal heritage), grazing, weed and pest control.*
- *The Government should engage with Aboriginal groups on the proposal to remove Aboriginal heritage requirements from licenses and how to best ensure protection.*
- *Further information on proposals for grazing, weed and pest control is needed.*
- *If references to legal obligations under other Acts are removed from the new IFOA, FCNSW staff and contractors must be fully trained and educated on these requirements. The Forestry Act 2012 should also be amended to require greater regulator cooperation.*
- *Clarify and demonstrate how other forest uses will be regulated to avoid loopholes.*

### **Steep slope harvesting trial**

The Discussion Paper proposes to introduce a steep slope harvesting trial in NSW (p 31).<sup>43</sup> EDO NSW does not support this proposal. The steep slopes trial (and any subsequent expansion) has potential to cause environmental degradation, including soil erosion and water pollution (particularly following large rainfall events), and destruction of refuge habitat.

The protection of slopes with a gradient steeper than 30 degrees has been in place since the establishment of the existing IFOAs.<sup>44</sup> The introduction of steep slope harvesting is a radical change to current practices, and is contrary to the underpinning principle of ecologically sustainable forest management (**ESFM**). Before any trial is contemplated, a peer review should be undertaken, measures employed to mitigate environmental impacts, and independent assessments undertaken and made available to the public.

<sup>43</sup> Currently timber extraction is limited to slopes less than 30 degrees. See further: <http://www.epa.nsw.gov.au/forestagreements/coastlFOAsHarvestingTrial.htm>.

<sup>44</sup> <http://www.epa.nsw.gov.au/forestagreements/coastlFOAsHarvestingTrial.htm>

For example, as an alternative to proceeding with the trial now, the rationale for steep slope harvesting could be subject to a broader scientific review of forestry practices by the Natural Resources Commission. This should include a thorough valuation of the ecological and ecosystem services contribution of steep slopes, and the potential benefits of maintaining and improving these areas intact.

**Recommendations:**

- *EDO NSW opposes the introduction of a steep slope harvesting trial.*
- *Before any trial is contemplated, a peer review should be undertaken, measures employed to mitigate environmental impacts, and independent assessments undertaken and made available to the public.*
- *Steep slope harvesting could be subject to a broader forestry review by the NRC.*

### **Mapping technology, surveying and ground-truthing**

New technologies such as LiDAR and GeoNet and a new stream classification system have the potential to result in increased knowledge about forest features including waterways and slopes (Discussion Paper, pp 32-37). Further detail on the specific uses will be needed to assess whether existing levels of protection will be maintained.

Provisions will need to ensure that the replacement of physical marking of protected areas of environmental significance<sup>45</sup> with digital mapping does not result in confusion or uncertainty on the ground (for example, all contractors will need to have access to the technology at all times). Otherwise this has the potential to result in the loss of environmental and heritage values which are supposed to be protected, including in the event of technology failure.

In addition, the Discussion Paper suggests the new stream classification system ‘would result in no net change to protected areas or timber availability’ (p 36). We submit that where improved stream mapping identifies additional protected areas, this should be given effect on the ground.

### **Strategic environmental monitoring framework**

The proposal to introduce a strategic environmental monitoring framework has potential to be an important evolution beyond the current IFOAs. Realising this potential is integral to the success of the reforms. However, considering the significant regulatory shifts proposed, the Discussion Paper provides limited detail on the environmental monitoring framework.

EDO NSW strongly supports the development and integration of better tools for monitoring, audit, data-sharing and sustainability indicators, to improve understanding and evidence-based natural resource management. We also agree that the current framework does not allow for the proper evaluation of effectiveness of IFOAs and licence conditions (Discussion Paper, p 38), including in relation to biodiversity or forest health over time, or cumulative impacts of forestry and surrounding land uses.

The new IFOA monitoring framework must align with key principles of ESFM. It must also include measurable, strategic and detailed environmental objectives (water, soil, biodiversity, carbon etc); and measurable outcomes – including how various environmental values are being maintained or improved. Without meaningful measurement, monitoring and reporting, it is impossible to arrest problems and ensure that NSW forestry is ecologically sustainable.

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<sup>45</sup> For example, rainforest, old growth, threatened species habitat.

### Reporting on ecologically sustainable forest management and other measures

EDO NSW submits that forestry regulators and FCNSW should be required to report on whether strategic environmental outcomes and detailed targets are being achieved – including in relation to an overarching objective of achieving ESFM (discussed above).

In addition, regulators should assess and report on how forestry operations are applying *adaptive management to continually improve environmental outcomes* – in response to changing environmental conditions, scientific information and technology.

The 10-year IFOA review noted that ‘ESFM criteria and indicators form the basis of measuring progress towards ESFM.’<sup>46</sup> That review further noted:

*Several submissions requested work be undertaken to benchmark a range of ESFM values across forest tenures to understand conservation values in state forests and national parks, and on other lands.*

*Conservation stakeholders expressed concern that there was a lack of information available on native forest growth rates, regeneration and other criteria to determine whether ESFM was being achieved.*

In the 2014 Discussion Paper, the monitoring framework overview refers briefly to ESFM principles and reporting (p 38). However, there is no reference to a report entitled *ESFM Criteria and Indicators for the Upper North East, Lower North East, Southern and Eden regions of NSW*, which was to be published separately to the 2010 review.<sup>47</sup> This document should be made available immediately to inform the next stage of consultation.

Finally, NSW forestry monitoring and reporting should be progressively linked to State and national environmental accounting. Governments across Australia have invested significant resources in information gathering, mapping and target-setting for environmental and natural resource management outcomes<sup>48</sup> – including NSW-wide targets set by the Natural Resources Commission. However, legislative requirements and agency processes have so far failed to harness these investments by linking data and targets to triple-bottom-line reporting or environmental accounts.<sup>49</sup> The IFOA remake is an opportunity to rectify this.

### Increased access to IFOAs online

A corollary of improved monitoring is the need for leading practice transparency, via accurate, publicly accessible information. EDO NSW welcomes the proposal to increase online access to information about IFOAs (Discussion Paper, p 16). Effective delivery will increase community accessibility and understanding of forestry operations; promote transparency and accountability; and increase confidence in government processes. IFOA information should be presented in accessible and user-friendly forms, and should integrate into wider strategic planning databases and processes for natural resource management, threatened species and planning laws.

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<sup>46</sup> NSW Government, *Outcomes from the Review of the NSW Forest Agreements and the Integrated Forestry Operations Approvals* (2010) p 2. See further discussion at part 3.1.2 of that document.

<sup>47</sup> NSW Government, *Outcomes from the Review of the NSW Forest Agreements and the Integrated Forestry Operations Approvals* (2010), p 15.

<sup>48</sup> See Report to the Australian Government, *State of the Environment* (2011), ‘Future reporting’, <http://www.environment.gov.au/soe/2011/report/future-reporting.html>. These include more intelligent monitoring, increased standardisation and data-sharing, better data management and modelling, and national benchmarks for environmental and sustainability indicators.

<sup>49</sup> See for example, Australian Bureau of Statistics, ‘Completing the Picture - Environmental Accounting in Practice’ media release, 10 May 2012, at <http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbyReleaseDate/7F28835E079362EACA2579F900124A79?OpenDocument>.

**Recommendations:**

- *The expanded IFOA monitoring framework must align with key principles of ESFM; and include measurable strategic and detailed environmental aims and outcomes.*
- *Forestry regulators and FCNSW should be required to report on:*
  - *fulfilment of updated and rigorous ESFM criteria and indicators*
  - *whether strategic environmental outcomes are being maintained or improved*
  - *whether detailed targets are being achieved*
  - *how adaptive management is being used to improve environmental outcomes.*
- *The Government should immediately publish the report entitled 'ESFM Criteria and Indicators for the Upper North East, Lower North East, Southern and Eden regions of NSW', referred to in the 10-year IFOA review (2010), to inform public consultation.*
- *Online IFOA information should be presented in accessible and user-friendly forms.*
- *IFOA data should be linked into strategic planning and environmental accounts.*

**Delivering the new coastal IFOA**

The Discussion Paper states that there is a legislative requirement to review IFOAs 'on a five-yearly basis.' (p 39)<sup>50</sup> In our view, the significant structural and procedural changes proposed for the Coastal IFOAs present a strong case for an *interim review* of effectiveness within two years of their commencement (for example, early 2017). The Government should amend s 69G of the *Forestry Act 2012* to give effect to this requirement. (We note that the Act has been amended in the past to adjust review requirements for specific IFOAs.<sup>51</sup>)

A two-year review would be a useful source of information prior to the expiration of the Forest Agreements and IFOAs in 2018-2020.<sup>52</sup> Assuming that the next five-year review is due in 2015, the coverage of a 2015 statutory review is unclear. For example, reviewing a new IFOA within months of its creation (or reviewing expired IFOAs that no longer apply) would be of limited use. We would welcome the Government's views on this question, given the important accountability role of statutory reviews. Nevertheless, a two-year interim review would address this ambiguity and fulfil the practical purposes of the statutory review.

**Recommendations:**

- *Any new Coastal IFOAs should be reviewed within two years of commencement, to allow an interim assessment of the new outcomes-based approach (if adopted).*
- *The Government should amend s 69G of the Forestry Act 2012 to ensure this.*
- *The Government should clarify expectations regarding content and timing of future statutory reviews of the forest agreements and IFOAs under the Forestry Act 2012.*

**Conclusion and next steps**

We hope these comments assist the NSW Government in its Coastal IFOA remake. The Government has indicated that a draft IFOA will be released for public consultation for six weeks in mid-2014 (Stage 3). As noted, we recommend that the supplementary information for Stage 3 includes a 'translation' of environmental protections; and a report discussing concerns raised in submissions (including this one), and how these have been addressed. We look forward to further engagement with the NSW Government on these reforms.

<sup>50</sup> Section 69G of the *Forestry Act 2012* (NSW) deals with review of forestry agreements and IFOAs. Among other things, the *Forestry Act* requires 'A review is to be undertaken by those Ministers every 5 years after the [forest] agreement is made'.

<sup>51</sup> S. 69G(8) provides exemptions for the Brigalow and Nandewar Community Conservation Area.

<sup>52</sup> The Discussion Paper (p 9) notes the Eden, Lower and Upper North East IFOAs expire 31 Dec. 2018; and the Southern IFOA on 31 Dec. 2020. It does not indicate the new IFOA will change this.