



## australian network of environmental defender's offices

### Submission on Australia's Native Vegetation Framework – Consultation Draft

March 31 2010

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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## Introduction

The Australian Network of Environmental Defender's Offices (ANEDO) welcomes the opportunity to provide comment on *Australia's Native Vegetation Framework – Consultation Draft* ("Draft Framework"). ANEDO is a network of 9 community legal centres with over 20 years experience specialising in public interest environmental law. Each Environmental Defender's Office in each state and territory has experience of native vegetation legislation and its application. EDO offices in NSW, Western Australia, Queensland and the Northern Territory have also been involved in legislative reform processes to improve the regulatory regimes. We therefore focus on the legal aspects of native vegetation management which must underpin implementation of the Framework. Our comments relate to: alignment with the National Biodiversity Strategy, each of the proposed goals of the Draft Framework, and legislative implementation of the Framework.

## Alignment with the National Biodiversity Strategy

We note that the Draft Framework is intended to align with the *National Strategy for the Conservation of Australia's Biological Diversity* (National Biodiversity Strategy). If the latter is to be the overarching strategy that determines the direction of conservation policy it would be preferable that it is finalised prior to review of subsidiary strategies such as this Draft Framework. It is essential that Australia's international obligations under the Convention for Biological Diversity are clearly articulated in the National Biodiversity Strategy and any related policy document such as the Native Vegetation Framework. In the absence of a finalised National Biodiversity Strategy, the Draft Framework should more clearly include reference to Australia's international obligations so that it will be consistent. We note the reference to the Convention on Biological Diversity requirement for the development of a system of protected areas under Goal 1 (page 24), but submit that there needs to be further articulation of how the Framework is implementing international obligations. This is discussed further below.

### **Goal 1: Increase the national extent of native vegetation to build ecosystem resilience and improve the productive capacity of the landscape**

ANEDO strongly supports this goal. While elements of the goal may be achieved by establishing various incentive schemes for private land management, it is likely that regulatory reform will be needed in most jurisdictions to implement this goal. We support the increased use of a decision-making hierarchy as outlined (page 23):

*An increase in use by jurisdiction of a system to apply a decision-making hierarchy to managing native vegetation where the first aim is to avoid loss; and, if that is not possible, then to minimise loss; and if vegetation loss is unavoidable, impacts should be managed to maintain ecosystem functions including, where feasible, the use of offsets.*

However, we make 3 important qualifications. First, the use of the decision-making hierarchy must be mandated by explicitly including it in relevant native vegetation and land use planning legislation (both site-based and strategic) in each jurisdiction.

Second, the category of “unavoidable impact” should not apply to the highly threatened vegetation types where such a minimal percentage of the vegetation type is left, that *any* impact is unacceptable. In addition, clear guidelines should be developed to better define what “unavoidable” means, so that this step of the hierarchy is meaningful. Any claims that clearing is unavoidable must involve clear evidence of all alternatives considered.

Third, the use of “offsets” must be the last option (after avoid and minimise). Offsetting impacts of clearing native vegetation is problematic as no two patches of vegetation are identical in terms of ecosystem functions and values. There is always therefore a loss of the unique functions and values being cleared. Any limited use of compensatory vegetation or habitat must be regulated by clearly articulated principles in the legislation of each state. These are referred to below.

We strongly support the recognition that each jurisdiction must ensure compliance with their regulatory regimes, and that sufficient resourcing is required for monitoring and enforcement (page 24).

## **Goal 2: Maintain and improve the condition of native vegetation**

EDONSW was extensively involved in the development of new native vegetation laws in NSW between 2003 and 2005. This involved developing new legislation to implement the test of “maintaining and improving” native vegetation. It also involved development of regulations and a sophisticated methodology for assessing type, condition and extent of native vegetation at an individual property, catchment and state-wide scale. Based on this experience we make 3 recommendations.

First, it is important to have the goal of maintaining or improving the condition of native vegetation in legislation in each jurisdiction, and not as a policy aspiration. By including a clear test in legislation, there is a clear starting point for decision-makers. We note the wording of the “maintain and improve test” has now been incorporated into other land use planning legislation in NSW and there is potential for it to be incorporated further into the federal *Environment Protection and Biodiversity Conservation Act* (EPBC Act).<sup>1</sup>

Second, in order to implement the test it is essential to have accurate and comprehensive baseline data about native vegetation in every catchment in order to assess whether an activity will actually improve or maintain the condition of the existing vegetation. In this context, we support the proposed outcome for Goal 2 of establishing an agreed set of national standards for classifying the condition of native vegetation, but submit that there must also be a comprehensive and updated database of native vegetation type and extent to underpin any actions undertaken to achieve this goal.<sup>2</sup>

Third, classifying native vegetation condition for the purpose of assessing a development proposal (in terms of whether it will maintain or improve the condition of native vegetation) can be a complex scientific process. It is critical that this is an objective process based on the best available information. Subjective assessments by consultants employed by developers can have variable results. We therefore support the development

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<sup>1</sup> See The Australian Environment Act. Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*. Final Report. Commonwealth of Australia, October 2009; see Recommendation 6(2)(b)(ii).

<sup>2</sup> See *Accounting for Nature. A Model for Building the National Environmental Accounts of Australia*. Wentworth Group of Concerned Scientists, 2009.

of national best practice objective standards for native vegetation assessment, and that these standards may be augmented by the development of transparent methodologies to objectively assess a range of variables relating to native vegetation condition.<sup>3</sup>

### **Goal 3: Maximise the native vegetation benefits of carbon markets**

ANEDO strongly supports initiatives that recognise the co-benefits of conserving and managing native vegetation for both biodiversity benefits and carbon sequestration. There is great potential in Australia (and in the region) for native vegetation conservation to continue to play a role in mitigating the effects of climate change.

ANEDO in previous submissions has supported the development of stewardship incentives for private landholders in recognition of the ecosystem services provided, and the broader environmental benefits of good land management.<sup>4</sup> Carbon sequestration is such a benefit and it is appropriate that the Draft Framework recognise the potential role for native vegetation to play.

The Draft Framework (page 27) refers to the development of national standards to accredit and report on schemes – this is essential. As new carbon markets emerge, and in the absence of a clear legislated CPRS scheme in Australia, there is a degree of risk and uncertainty as to how any carbon credits from sequestration may be generated, measured, managed, valued and accounted for. It is therefore essential that in implementing this goal, a legislative scheme is developed (preferably nationally so that there is consistency across jurisdictions and internationally) that inject the necessary rigour, transparency and scientific accountability in to the carbon sequestration market. The legislative architecture for the accreditation of schemes must be drafted carefully to ensure there are no perverse incentives – such as incentives to plant monocultures for carbon sequestration purposes – as these would not have the same biodiversity co-benefits.

### **Goal 4: Build capacity to understand, value and effectively manage native vegetation by all relevant stakeholders**

As noted, ANEDO supports incentives to promote native vegetation conservation on private land. Where public funds are used, it is essential that such schemes be transparent, accountable and ensure long-term conservation.

Also as noted in relation Goal 2, it is essential that a national system of native vegetation accounts be developed. We therefore support the outcome referring to consistent and comparable vegetation mapping across Australia.

### **Goal 5: Progress the engagement and inclusion of Indigenous peoples in management of native vegetation**

ANEDO submits that it is essential to involve Indigenous peoples in native vegetation management, and we strongly support Goal 5.

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<sup>3</sup> See for example, the *Environmental Outcomes Assessment Methodology* and *BioMetric* tool developed to support the NSW *Native Vegetation Act 2003* and *Native Vegetation Regulation 2005*. Available at: <http://www.environment.nsw.gov.au/vegetation/eoam.htm>.

<sup>4</sup> For previous submissions see: <http://www.edo.org.au/edonsw/site/policy.php#3>.

We note that any access and benefit sharing arrangements regarding indigenous knowledge and use of native vegetation products must be consistent with Australia's international obligations under the Convention for Biological Diversity. This should be referred to in the Draft Framework, and be consistent with the National Biodiversity Strategy (when finalised).

We note Action 21 (page 36) states:

*“Develop a nationally consistent approach to management of sustainable harvesting of native flora and native vegetation products through the state and regional management plans and policies.”*

This should be expanded to explicitly recognise indigenous involvement, for example, to clarify what is contemplated by the proposed standards and how that relates to a nationally consistent approach to access and benefit sharing. If the scope of Action 21 includes indigenous harvesting of products, then a nationally consistent approach must include appropriate consultation and provisions relating to access with prior informed consent and aboriginal ownership. As drafted, neither Action 21 nor 23 adequately cover this issue.

## **Implementation**

As noted, each state and territory currently has native vegetation legislation - the Appendix identifies 88 pieces of legislation related to native vegetation. In addition, there are a plethora of regional natural resource management bodies with differing mandates. Notwithstanding these existing regimes, the EDO network constantly deals with community concerns about over-clearing of native vegetation.

We therefore support improved national collaboration and coordination to improve native vegetation regulation. As noted in the Draft Framework

*“the extent to which native vegetation receives legislative protection varies considerably across jurisdictions. Some jurisdictions do not provide legislative protection for certain types of native vegetation. As a result, continued clearing of, or damage to some high value native vegetation may still be occurring. Varying definitions across different states and territories of what constitutes native vegetation has led to difficulties in mapping and monitoring the condition and extent of native vegetation across Australia. As a result there is a strong need to improve national coordination and consistency in managing and protecting native vegetation.”*

As noted in our comments on each of the goals above, best practice native vegetation legislation is needed in each jurisdiction to ensure that the “maintain and improve native vegetation” test is consistently applied and enforced. The Framework will be aspirational only without implementation of the goals and principles by comprehensive legislation. We note that each jurisdiction will be required to develop ‘Implementation Plans’ by the end of 2010 (p32). These plans should include a detailed overview and timetable for legislative amendments required.

In this context we **strongly** support 3.2 Actions – Action 1 (page 34):

*Develop national guidelines for native vegetation legislation to provide a basis for consistency, where possible in definition and scope of coverage.*

The national guidelines should go beyond guiding definition, scope and coverage, and include key elements that we have identified as essential in effective native vegetation legislation. Similarly, we support integration of the important principles (such as the “maintain or improve” test) into other relevant land use planning legislation, instruments and policies (consistent with Actions 8 and 13).

ANEDO submits that legislation in each state be best practice and include essential elements such as:

- **Clear objectives** including a ban on broadscale clearing unless it maintains or improves environmental outcomes; a commitment that the legislation be implemented in accordance with the principles of ecologically sustainable development (including the precautionary principle); and a reference to the role of native vegetation conservation in mitigating climate change.
- **Coverage** - the legislation should cover all relevant land tenures, include a broad definition of ‘native vegetation’ (for example, including trees, understorey, groundcover, etc), and a broad definition of ‘clearing’ is required to cover the broad range of activities that may damage or kill native vegetation.<sup>5</sup>
- **Clearing that requires consent** provisions should be designed to protect vegetation of the highest conservation value whilst allowing minimal impact routine farming activities to continue where appropriate.
- **Clearing that does not require consent (exemptions)** should be appropriately circumscribed in the legislation.
- **Assessment process** provisions need to identify a consent authority and a clear process including a clearly expressed decision hierarchy (as discussed in relation to Goal 1).
- **Compensatory measures principles** – where it is impossible to avoid impacts according to the decision hierarchy, and “offsets” are proposed, there must be clear scientific and legal principles in legislation applying to any proposed measures, for example, any “offset” must be additional, verifiable, and like-for-like.<sup>6</sup>
- **Public consultation and transparency** – there should be appropriate provisions establishing consultation on clearing proposals and a public register of approvals.
- **Compliance and enforcement** provisions should include a wide range of enforcement options and open standing provisions. (This should be supported by comprehensive independent monitoring and auditing of approvals and any offsets).
- **Incentives** should be provided for in legislation to promote good land management (such as provision for the making of property management agreements that secure funding).
- **Consequential amendments** – each jurisdiction should consider other planning and land use legislation that may need to be amended to support the best practice native vegetation legislative regime.

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<sup>5</sup> For example, see *Native Vegetation Conservation Act 1997* (NSW), section 5.

<sup>6</sup> For detailed discussion of the principles that must be applied to an offset scheme, see: *Submission on the Use of Environmental Offsets under the EPBC Act 1999 - Discussion Paper*

3 December 2007, available at: [http://www.edo.org.au/edonsw/site/pdf/subs07/epbc\\_offsets071204.pdf](http://www.edo.org.au/edonsw/site/pdf/subs07/epbc_offsets071204.pdf)

Finally, we note that while the Australian Government and the Draft Framework has an important role in improving coordination; the federal government could also have an enhanced role in native vegetation management, particularly in relation to the most threatened vegetation types, by the inclusion of an appropriate native vegetation clearing trigger<sup>7</sup> or an 'ecosystems of national significance' trigger<sup>8</sup> in the *EPBC Act 1999*.

*For further information please contact Rachel Walmsley on 02 9262 6989.*

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<sup>7</sup> See: *Possible new matters of National Environmental Significance under the EPBC Act 1999*, May 2005; available at: [http://www.edo.org.au/edonsw/site/policy/mnes\\_review060502.php](http://www.edo.org.au/edonsw/site/policy/mnes_review060502.php)

<sup>8</sup> See The Australian Environment Act. Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*. Final Report. Commonwealth of Australia, October 2009; see Recommendation 8.