Submission on the Draft Landholder Guides and Draft Orders to implement self-assessable codes under the *Native Vegetation Regulation 2013*

prepared by

EDO NSW
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Successful environmental outcomes using the law. With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

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EDO NSW is part of a national network of centres that help to protect the environment through law in their states.

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Introduction

EDO NSW has engaged in development and analysis of the regulatory regime for native vegetation in NSW since 2002. We have made extensive comment on the NSW *Native Vegetation Act 2003*, *Native Vegetation Regulation* 2005 and 2013, and the *Environmental Outcomes Assessment Methodology* (EOAM).[1]

Native vegetation provides a range of valuable ecosystem services relating to soil, water, salinity and biodiversity, and is an essential element of a healthy, productive landscape. EDO NSW supports an efficient system that encourages landholders to manage their native vegetation to improve and maintain environmental outcomes. We support efforts to work cooperatively with landholders to get Property Vegetation Plans (**PVPs**) in place in a more timely manner. We also support proposals to improve information delivery and education for landholders.

We strongly support the legislative ban on broadscale clearing unless it maintains or improves environmental outcomes.

This is the fundamental test in the *Native Vegetation Act 2003* (**the Act**), and we view recent proposed reforms as weakening this test. This submission identifies a range of problems with the proposed self-assessable codes that represent a significant departure from the Act. The proposed self-assessable codes are not capable of being effectively applied, monitored and enforced, and therefore are not capable of adequately implementing the "maintain or improve environmental outcomes" test as required by the Act.

The potential scale of clearing under the codes goes far beyond what was originally envisaged to be covered by routine agricultural management activities (**RAMAs**). The *Regulatory Impact Statement* (**RIS**) produced for the *Review of the Native Vegetation Regulation* in 2012 stated that "*it is very difficult to determine the number of times that clearing is undertaken under a RAMA. The Native Vegetation Report card does not report on activities exempted or excluded from the Act*".[2] Notwithstanding this fact, there is no limit to the number of notifications allowed under each clearing type under the proposed codes, and the proposed notification requirements lack critical details. The implication of this is that significant areas can be progressively cleared simply by submitting multiple notifications. Misuse of the codes would potentially be a reintroduction of broadscale clearing in NSW.

The potential for misapplication of the codes is high in the absence of technical input. The effective implementation of the codes requires a high degree of technical knowledge that many landholders may not possess. This applies to the level of species and vegetation community identification required, the best practice management approaches for invasive native species and the identification of habitat features in paddock trees, to use some examples. We understand that a number of issues arose during the recent field trials of the proposed codes, for example, in relation to accurately identifying tree species on site. We

[1] For EDO NSW on the NSW *Native Vegetation Act 2003*, *Native Vegetation Regulation* 2005 and 2013, and the *Environmental Outcomes Assessment Methodology* (EOAM), see: http://www.edonsw.org.au/forestry_clearing_vegetation_trees_policy.
[2] Regulatory Impact Statement, 2012, p11.

understand a report of the trials has been drafted and we recommend that this report be made public.

The proposed codes will be difficult, if not impossible, to enforce due to the inadequate requirements for expert input, record keeping and notification, combined with the vague nature of many provisions.

In order to ensure that the Act continues to effectively prevent broadscale clearing unless it maintains or improves environmental outcomes, EDO NSW submits that instead of experimenting with self-assessable codes, the NSW Government should improve the current PVP process, applying the EOAM. This involves providing better resources and staff for Local Land Services (**LLS**) so that PVPs can be drawn up with expert advice in a timely manner. It was never intended that PVPs would take weeks or months to negotiate. Increasing resources to better administer the Act would mean that thinning and Invasive Native Species (**INS**) PVPs could be put in place much faster, whilst not compromising the environmental objectives of the regulatory regime.

We also note there is a broader review of biodiversity legislation proposed in NSW. EDO NSW submits that any review must not erode the fundamental protections that have been put in place to ensure healthy, productive landscapes across NSW. A fundamental part of this is the ban on broadscale land clearing.

This submission identifies our key concerns with proposed Draft Orders and Draft Guidelines for:

- Invasive Native Species;
- Clearing Isolated Paddock Trees; and
- Thinning Native Vegetation.

Clearing of Invasive Native Species

This part notes key concerns with the *Landholder Guide: Guidelines for Managing Invasive Native Species according to self-assessable codes under the NSW Native Vegetation Regulation (2013) Draft for Discussion* (**draft INS Guidelines**) and the *Clearing of Invasive Native Species* (**draft INS Order**).

INS PVPs

In our submission to the review of the *Native Vegetation Regulation* (in 2012), EDO NSW noted:

> *The management of INS under the current scheme has permitted the clearing of a significant amount of woody vegetation in NSW. This is supported by the map of PVPs provided by OEH, which shows 3.3m ha of INS clearing out of a total of 4.2m ha under PVP (including 714,000ha under incentive PVPs). The mean annual loss of woody native vegetation in NSW from 2006-2010 was 87,740ha. Comparison of the five years before the implementation of the NV Act (2000-2004) with the five years post the implementation of the NV Act (2006-2010) shows there has been a 20% increase in the total loss of total native woody vegetation in NSW AND a 5% drop in the total amount of native vegetation cleared for the first time.* [3]

The current system has therefore permitted extensive clearing of INS. The need for an INS self-assessable code is therefore unclear.

Clearing of INS should only be allowed in the context of a long-term management plan that seeks to improve environmental outcomes and clearly describes what clearing will be undertaken, when it will be undertaken, and how it will contribution to the long-term management goals. This should be done through the current PVP process, rather than under a self-assessable code.

Identifying vegetation types and threatened species

EDO NSW believes that it is unrealistic to expect that providing one or two photographs of species is sufficient information to ensure landholders accurately identify INS species. The draft INS Guidelines currently provide small, sometimes blurred photographs (Appendix 2, p20).

Allowing self-regulated clearing of threatened ecological communities (TECs) is unacceptable. If clearing of TECs is to be allowed in exceptional circumstances for ecological reasons, it should only be done under a formal PVP. The list of INS species in the draft INS Guidelines (Appendix 1) and draft INS Order (Appendix 1) do not indicate which species are threatened. We submit that TECs should not be on the INS list at all.

[3] Analysis of the Land clearing rates from the Commonwealth Department of Climate Change and Energy Efficiency by Dr Phil Gibbons. See: National Greenhouse Gas Inventory - Kyoto Protocol Accounting Framework: http://ageis.climatechange.gov.au/QueryAppendixTable.aspx. The full EDO NSW submission is available at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/349/attachments/original/1380680437/120824native_vegetation_regulation.pdf?1380680437 (24th August 2012).

Incidental clearing

The draft INS Order allows for the incidental clearing of non-invasive native vegetation less than 20 DBHOB with some limitations (Schedule A, 1.2). Incidental clearing of native vegetation should not be acceptable at any level. It is likely that incidental clearing levels will be high if landholders are not able to accurately identify different species. Attempting to limit such clearing to the 'minimum extent necessary' is inadequate in this context as this is impossible to define, quantify or assess technically, and would therefore be based on the un-auditable subjective opinion of the landholder. If landholders are unable to appropriately target their management activities then clearly the current system of involving LLS in developing clearing arrangements is required to maintain an appropriate environmental outcome.

INS clearing methods

The draft INS Order and draft INS Guidelines set out 4 permitted clearing methods. Methods (a) (c) and (d) can be done at paddock scale, and involve chaining, slashing, roping, blade ploughing etc. These methods amount to broadscale clearing at a paddock scale, which is contrary to the fundamental purpose of the *Native Vegetation Act*.

Further, the "*Conditions related to clearing types*" in Schedule A of the draft INS Order undermine environmental protection by reducing the ability to assess compliance with the INS Guidelines and ignoring cumulative impact:

- Clearing by management burning attempts to limit clearing of non-INS to "the minimum extent necessary" which is impossible to define in any quantitative way;
- Clearing individual plants with minimal disturbance reduces the number of plants that must be retained from the already low 20 stems per hectare (which itself only applies to some species) to a cumulative 20 stems per hectare. This approach fails to recognise the different ecological benefits provided by different species; and
- The calculations for the area that must be retained when clearing more than 500ha potentially allow the double counting of the area to be retained. This is particularly problematic when considered in conjunction with the definition of INS Extent which defines INS Extent as areas in which INS "may not presently occur but where INS management is required to prevent their spread of recurrence". This is unclear and should be clarified.

It is difficult to see how paddock-scale treatment of INS is consistent with the requirement to avoid a change of land use and restore native ecosystems. Such uncontrolled activities are far more likely to cause damage than prevent it, if technical advice is not sought. It is also unclear why a landholder would go to the considerable expense of some of the clearing methods if there wasn't to be some change in land use. Indeed, under clearing type (d) the draft INS Order allows 3 crop cycles over the following 15 years (Schedule A, 5.7).

EDO NSW does not support the use of chaining or blade ploughing to clear INS. If it is to be used, it should be done under a PVP and only be allowed on low land degradation risk

categories (as opposed to low and medium as currently proposed). The PVP should provide a management plan stipulating staging of the clearing. However, allowing stage 2 clearing when the stage 1 area only has 50% groundcover creates a significant erosion risk. The area of groundcover required must be higher. No non-INS clearing should be allowed and 20% of native vegetation in each 100ha should be required to be maintained if the vegetation maintained is going to be useful for habitat protection.

Notification

The notification requirements are not included in the draft INS Order as a relevant condition, but are set out in the draft INS Guidelines (p17-18) and in the *Native Vegetation Regulation* (cl 43). The draft INS Guidelines currently refer to information that **may** be required by the LLS. EDO NSW submits that notification requirements must be mandatory for all RAMAs and include the species being cleared for all applications (not just those involving threatened species, as currently stipulated in cl 43). The draft INS Guidelines and draft INS Order and Regulation are unclear about whether the 14 notification day notification period is re-triggered for a modification. Also, there is no detail on record keeping requirements to assist landholders in showing they followed the code with due diligence.

Land degradation risk

The draft INS Guidelines and draft INS Order provide two methods for determining Land Degradation Risk. Given that mapping of this risk has already been undertaken in many areas, EDO NSW recommends that a system that allows farmers to simply access these maps should be developed and this should preferentially be the tool by which the decision is made. A single implementation system will improve clarity around the issues and support compliance. The proposed method for determining Land Degradation Risk in the absence of mapping is overly simplistic and may not result in adequate protection for high risk areas. Further it will be difficult to apply for landholders to apply without specialised training in this area.

Management burning should not be allowed in areas that are at high risk of land degradation or within 30m of a watercourse. To further prevent land degradation, EDO NSW submits that exclusions zones of at least 30m should be required around riparian zones.

Summary

Given these significant concerns with the proposed self-assessable code for INS, EDO NSW submits that the NSW Government should focus on improving the PVP approval process. LLS should be provided with increased resources and staff to assist landholders with expert advice to apply the EOAM and make PVPs in a timely manner that ensures that environmental values are maintained and improved as required by the Act.

Clearing of Paddock Trees in a Cultivation Area

This part notes our key concerns with the *Landholder Guide: Guidelines for Clearing of Paddock Trees in Cultivation Areas according to self-assessable codes under the NSW Native Vegetation Regulation (2013) Draft for Discussion* (**draft Paddock Tree Guidelines**) and the *Clearing of Paddock trees in a Cultivated Area* (**draft PT Order**).

Role of paddock trees

EDO NSW has previously highlighted research that describes the importance of maintaining paddock trees for both farming and environmental outcomes. EDO NSW notes that the description of paddock trees in the draft Paddock Tree Guidelines recognises this role to some extent. Despite this recognition, the draft Paddock Tree Guidelines fail to provide adequate protection for paddock trees, particularly for those trees that have the potential to provide connectivity between vegetation patches and act as mature paddock trees in the future. The draft Paddock Tree Guidelines also fail to recognise that clearing hollow bearing trees, particularly paddock trees, has been identified as a threatening process for some endangered ecological communities (EECs).

Unlimited clearing

The draft Paddock Tree Guidelines suggest that paddock trees can be removed in "relatively small numbers to improve production efficiencies". However there is nothing in the draft PT Order that ensures that only a small number of paddock trees will be cleared. On the contrary, the draft PT Order and draft Paddock Tree Guidelines propose to allow the clearing of 200 paddock trees per 1000 hectares *per notification*, with no limit on the number of notifications that can be submitted (Draft Order, Schedule A, 3.1). This clearing may occur in any cultivated area which, based on the definition of cultivated area in draft PT Order and draft Paddock Tree Guidelines, means any paddock. We note that the definition (which is based on the Regulation, cl 41) is unclear regarding included pastures.[4]

DBHOB threshold

The draft PT Order and the draft Paddock Tree Guidelines propose to allow the clearing of trees that are less than 80cm diameter at breast height over bark (**DBHOB**). EDO NSW submits that the use of a blanket DBHOB fails to recognise that different tree species will form hollows and provide ecosystem services at different ages and therefore different DBHOBs. Further paddock trees will provide different benefits at different DBHOBs in different locations throughout the state. If a blanket DBHOB is to be used, a precautionary approach and a lower threshold (smaller DBHOB) should be applied.

Allowing the removal of a paddock tree that is larger than 80cm DBHOB because it is more than 50m from another tree that is 15-25cm DBHOB (depending on the zone) in no way ensures that ecological function will be maintained. This is particularly true when "clumps"

[4] The definition states "an area that is cropped, ploughed or fallow or covered in perennial or annual non-indigenous pasture". It is unclear whether non-indigenous applies to both perennial and annual pasture.

defined as trees within 50m of each other, may also be cleared. In fact, these clumps are likely to be highly valuable as habitat as they provide a range of environmental niches within a small area.

Identify threatened tree species and habitat

The self-assessable code relies on landholders being able to successfully identify threatened species. As discussed earlier, EDO NSW considers that there are many landholders who will be unable to meet this requirement.

The list in the Appendix of the draft PT Order and draft Paddock Tree Guidelines, identifies 'species that cannot withstand loss of native vegetation'. It is unclear to landholders if this is a comprehensive list or a subset of all species that are listed for protection under the *Threatened Species Conservation Act 1995*. It is also unclear how changes to threatened species listings will be integrated.

Appendix 1 puts arbitrary limits on the definition of different threatened species habitat without the need to consider whether paddock trees are actually being used by those threatened species. Further, the likelihood that landholders will be able to successfully identify 2cm hollows, or that there is an ability to enforce such a requirement, is small. These requirements are clearly unenforceable and risk negative environmental outcomes. Appendix 1 also makes no reference to migratory species (such as regent honeyeaters that are dependent on flowering eucalypts) or species that move throughout the landscape but are reliant on large, old trees during different seasons or at different times of their lifecycle.

'Set aside' areas

The regime for 'set aside' areas described in the draft Paddock Tree Guidelines is a significant reduction of the standard required from the current offset process. It is also confusing to change the terminology from 'offset' to 'set aside.' This implies the areas do not have the same assessment, formality, management requirements and legal security as is currently understood for offsets. EDO NSW does not support the creation of another, weaker, version of offsets.

As a minimum, 'set aside' areas must be established *before* trees are cleared (not 'within 12 months as proposed) and the areas must be protected and managed in perpetuity, with a legally enforceable mechanism. As such, we submit offsets should be assessed using the EOAM and secured through a PVP.

While the requirement that mature trees in a 'set aside' area need to be of the same species (Schedule A, 4.3 of the draft order), EDO NSW does not support the arbitrary ratios for mature trees to be set aside (in Schedule A, 4.4 of the draft PT Order) without expert assessment. The LLS must be involved in any decision making process for clearing paddock trees where the property has less than 30% intact native vegetation. *No* paddock trees should be able to be cleared where a property has less than 10% intact native vegetation.

RAMAs should not be permitted in 'set aside' areas (Draft PT Order, Appendix 2).

Notification

Again, the notification provisions are inadequate. The notification requirements are not included in the draft PT Order as a relevant condition, but are set out in the draft Paddock Tree Guidelines (p11-12) and in the *Native Vegetation Regulation* (cl 43). EDO NSW submits that notification requirements must be mandatory and include the species being cleared for all RAMAs (not just those involving threatened species, as currently stipulated in the cl 43) and information on the set aside areas must include the vegetation composition and how the area meets the set aside requirements. We reiterate that these arrangements should be done through a PVP.

Furthermore the draft Paddock Tree Guidelines indicated that applications may be modified, but it is not clear whether a modification triggers the 14 day notification period again. The Regulation does not address notification requirements where an application may be modified in the current clause 43.

Summary

Given these significant concerns with the proposed self-assessable code for paddock trees, EDO NSW submits that the NSW Government should focus on improving the PVP approval process. LLS should be provided with increased resources and staff to assist landholders with expert advice to apply the EOAM and make PVPs in a timely manner that ensures that environmental values are maintained and improved as required by the Act.

Thinning Native Vegetation

This part notes key concerns with the *Landholder Guide: Guidelines for Thinning Native Vegetation under the NSW Native Vegetation Regulation (2013) Draft for Discussion* (**draft Thinning Guidelines**) and Thinning of Native Vegetation (**draft Thinning Order**).

EDO NSW remains concerned about the extent of clearing that would be permitted under the draft Thinning Guidelines, the ability of landholders to follow the guidelines and the ability of compliance officers to enforce them.

Change of land use

According to the introduction to the draft Thinning Guidelines, "*thinning must not result in a change of land use*". However the proposal to allow thinning to occur on up to 1,500 ha in Zone 1, up to 1,000 ha in Zone 2 or up to 300 ha in Zone 3 is incompatible with this requirement. The cost of undertaking thinning over such a large area means that such clearing is unlikely to occur unless a higher income land use is envisaged.

Categorisation by vegetation 'formation'

The use of vegetation formations to define areas where thinning is permitted is exceedingly broad and therefore ecologically inappropriate. The list of formations where thinning is allowed effectively includes all vegetation types that are likely to include forested species (except alpine areas and rainforest).

We also question whether an entire vegetation formation can be represented by one photo as proposed in Appendix 2 of the draft Thinning Guidelines.

The draft Thinning Guidelines also provide a list of genera of species that can be thinned in coastal areas. This list is incredibly broad.

Minimum patch size

In our submission to the review of the *Native Vegetation Act*, we expressed our concern that thinning was only prevented in vegetation patches smaller than 1 hectare in size. It is disappointing that this size limit is maintained in the draft Thinning Guidelines. This limited protection has been further weakened by stating that "*patches of vegetation of any size that are within 100m of each other that collectively add up to more than 1 ha can also be thinned*". "Patches of vegetation" is not defined and but the inclusion of the words "of any size" suggest that any individual tree could be considered a patch. This would mean in many cases the prohibition on thinning in areas smaller than 1 hectare is effectively meaningless. Given the lack of clear guidance, any illegal thinning undertaken will be difficult, if not impossible, to prove.

Threatened species

The draft Thinning Guidelines currently state that "*if threatened tree species or woody shrubs are present you **may** need to apply to the LLS*" (emphasis added) for a PVP. This is

inappropriate and landholders should not be permitted to thin threatened species without specialist advice. This approach also highlights EDO NSW's concern about the potential impacts on threatened species that would arise from landholders being unable to accurately identify these species. By removing the need for external assessment, the risk of threatened species being cleared is greatly increased. The suggestion that providing photographs of threatened species will address this problem is impractical and high risk. Without a genetic analysis, many species can only be identified at certain times of year, for example when they are in flower, and many species consist of individuals with differing morphology. Comparing a tree or shrub to a single image of species is an inadequate identification technique. The draft Thinning Guidelines must include a compulsory referral to the LLS where threatened species are involved.

Riparian areas

Thinning in riparian areas without LLS assessment should also be prohibited. Any thinning in a riparian area must require a PVP. The proposal to allowing thinning "*without disturbing the soil or groundcover*" fails to recognise that the death of tree or shrub species by whatever means will likely remove the structure provided by the presence of tree/shrub roots and risks increasing erosion. Use of broad spray herbicide should not be allowed in riparian zones.

Notification and record keeping

Our comments in relation to notification requirements also apply to thinning, for example, further detail on species is required, and clarification around the modification of applications. Furthermore, we note the draft Thinning Guideline indicates that keeping before and after photos is discretionary. We would suggest that this should be mandatory for all RAMAs.

For example, the draft Thinning Guidelines provide information on how to check patch density prior to clearing. The lack of reporting guidelines mean it is will impossible for compliance agencies to know whether this process has been followed. Landholders must be required to maintain written and photographic records of their checking procedure and these must be available for inspection LLS staff and compliance officers on request. It is in the interests of landholders to be able to show due diligence in applying the code to avoid legal liability. These recording requirements should be supported by more detailed LLS notification provisions (as discussed above). The draft Thinning Guidelines currently refer to information that **may** be required by the LLS. There must be minimum reporting requirements and these must include the species being cleared and the stem density that exists prior to clearing, with supporting information. This should done through a PVP.

Summary

Given these significant concerns with the proposed self-assessable code for thinning, EDO NSW submits that the NSW Government should focus on improving the PVP approval process. LLS should be provided with increased resources and staff to assist landholders with expert advice to apply the EOAM and make PVPs in a timely manner that ensures that environmental values are maintained and improved as required by the Act.