



environmental defender's office new south wales

Submission on the review of the *Noxious Weeds Act 1993*

28 January 2010

The EDO Mission Statement:

To empower the community to protect the environment through law, recognising:

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *the fundamental role of early engagement in achieving good environmental outcomes*
- ◆ *the importance of indigenous involvement in protection of the environment*
- ◆ *the importance of providing equitable access to EDO services around NSW*

Contact Us

*Environmental Defender's Office
Ltd
Level 1, 89 York St
SYDNEY NSW 2000*

freecall 1800 626 239

tel (02) 9262 6989
fax (02) 9262 6998
email: edonsw@edo.org.au
website: www.edo.org.au

For further inquiries on this matter contact Rachel Walmsley at: rachel.walmsley@edo.org.au

Submitted to: Ms Marion Bennett
Branch Support Officer
Industry & Investment NSW
Locked Bag 21
Orange NSW 2800

Via email to: admin.weeds@industry.nsw.gov.au

Executive Summary

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to comment on the review of the NSW *Noxious Weeds Act 1993*. The EDO is a community legal centre with over 20 years experience specialising in public interest environmental and planning law. The EDO has been involved in law reform in relation to native vegetation and weed control both on a state and federal level.

Prior to addressing each of the 22 issues raised in the *Noxious Weeds Act 1993: Statutory Review Issues Paper* (Issues Paper) we make some general comments regarding the current operation of the Act and some aspects of it that need to be improved.

The Act needs to be transformed to have an increased emphasis on the development of mechanisms that prevent the spread of weeds, as opposed to looking at solutions once a weed spreads to an area: i.e. the Act should be changed to focus more on the development of proactive as opposed to reactive mechanisms.¹ The EDO therefore supports the development of a 'white list'² approach to weed management. Furthermore, we submit that both public and private entities³ need to be charged with a clear duty of care to take all reasonable and practical steps to prevent weed invasions and impacts from occurring.⁴

The introduction of these measures should be coupled with an increase in public awareness⁵ of the existence of such a duty,⁶ as well as this duty being coupled with the development of a more effective enforcement and compliance regime for weed control.⁷ This includes providing authorised officers with the appropriate tools to investigate⁸ and extending the current powers to allow for the awarding of remediation orders and criminal prosecutions where necessary.

The EDO submits that the Act should be amended to reduce the opportunity for the spread of weeds across borders through the introduction of clauses requiring mutual recognition of declared weeds in other jurisdictions. This action should be further supplemented by the use of federal laws to address nationally significant weed threats. Such national and interstate cooperation would help increase uniformity between the states, make compliance easier for the community and minimise the gaps across borders.⁹

Furthermore, the EDO submits that there needs to be a greater emphasis for the regulatory regime to implement the principles of Ecologically Sustainable Development (ESD). This includes adhering to well recognised concepts such as the precautionary principle,¹⁰ the polluter pays principle¹¹ and the conservation of biodiversity and ecological integrity. The EDO submits the inclusion of ESD should not only appear in

¹ Discussed further at Issue 2 and Issue 7.

² Discussed further at Issue 2.

³ Discussed further at Issue 10.

⁴ Discussed further at Issue 4, Issue 10.

⁵ Discussed further at Issue 4.

⁶ Discussed further at Issue 11.

⁷ Discussed further at Issue 21.

⁸ Discussed further at Issue 12, Issue 20 and 21.

⁹ Discussed further at Issue 6.

¹⁰ Discussed further at Issue 2.

¹¹ Discussed further at Issue 21.

the objects of the Act, but given greater strength through the operationalisation of its principles throughout the legislation.

The formation of a Weed Assessment Committee¹² (or committees) should be on the same basis as the NSW Scientific Committee under the *Threatened Species Conservation Act 1995*, to assist in the development of weed management plans based on independent scientific assessment only.

Finally, in 2002 the Australian Weeds Committee developed nine key principles for weed legislation in Australia¹³ which largely summarise the comments above:

1. A duty of care binding all parties;
2. Integrated action against the economic, environmental and social impacts of weeds;
3. Actions to support preventive weed management;
4. Actions against human activity as a major vector of the spread of weeds and plants with weed potential;
5. A precautionary approach to weed management;
6. Weed management planning;
7. Community awareness and consultation;
8. Precedence over other legislation where essential for minimising weed impact and spread;
9. Maximum uniformity of provisions with other States and Territories.

The EDO submits that any proposed changes to the Act should implement these key principles.

¹² Discussed further at Issue 5.

¹³ Australian Weeds Committee (AWC) 2002 “Principles of Weeds legislation Discussion Paper”, available at www.weeds.org.au/docs/weeds_leg_dd.pdf.

Issue 1: Objects of the Act

The Issues Paper states that the current objects of the Act are “mostly deemed to be appropriate as the broad policy direction for weed management in NSW.” The EDO submits that this is not the case and we recommend amending the objects in three ways.

- As noted, the EDO submits it necessary that Ecologically Sustainable Development (ESD) not only appear in the objects of the Act, but be also be given greater strength through the operationalisation of its principles throughout the legislation.
- The EDO recommends the goal at section 3(a)(iii) of the Act to reduce the ‘area’ of existing weeds, changed to reducing the ‘adverse impacts.’ This proposition is largely in line with the proposition raised by the Issues Paper.
- The focus of the objects should be on reducing the impact of those weeds that are harmful or potentially harmful. There are large numbers of weeds that are benign and as such resources should not unnecessarily be allocated to their eradication, when those resources could be much more usefully applied to higher priority environmental threats.

Issue 2: Transition to a permitted list approach

The Issues Paper proposes to establish a separate review process to examine the feasibility of applying a permitted list approach in NSW. Over the recent years there have been a number of calls from various conservation groups for the development of a white list approach to dealing with invasive species, as opposed to a black list approach:

“The black-list-only approach allows the sale and movement of all introduced plant species apart from those on a prohibited (or noxious weeds) list. The white list system takes the opposite approach of banning all species unless they are on a permitted list... the difference between the approach is often summed up as treating species as harmless unless proven otherwise (black list) versus treating species as harmful unless proven otherwise (white list).”¹⁴

Such a strategy is line with “changing the objectives of the Act from reactive and punitive to proactive objectives that guide weed management priorities and direction.”¹⁵

The EDO supports the proposition that each new species be scientifically assessed for invasiveness before being permitted to be introduced to, or traded within, NSW. In addition to this, the EDO supports the proposal that following the assessment, appropriate restrictions on the sale and movement of the species be applied. Such an approach is consistent with the Precautionary Principle and places the emphasis on the scheme taking a proactive approach to weed management strategies as opposed to reactive. We also recognise there are resource implications of a white list approach, however given the costs of weeds to the economy, we submit investment in a white list approach is appropriate. We therefore recommend appropriate resources are allocated to ensure the new approach is efficient and effective.

¹⁴ Invasive Species Council, *Stopping weed invasions: a ‘white list’ approach*, December 2009. Available at: http://www.invasives.org.au/documents/file/bgrounder_weedwhitelist.pdf.

¹⁵ *Noxious Weeds Act 1993: Statutory Review Issue Paper*, page 9.

Issue 3: Responsibilities for Class 4 declarations

This proposal is to allow Local Control Authorities (LCA), usually the council of the local government area, to make declarations of Class 4 or locally controlled weeds. The Issues Paper suggests that there would still be a requirement for public consultation of draft declarations and that the LCA would have to report any proposed and actual declarations to the Minister or Director General.

Class 4 weeds are “plants that pose a threat to primary production, the environment or human health, are widely distributed in an area to which the order applies and are likely to spread in the area or to another area”¹⁶ and as such require accurate and appropriate identification. There has been some suggestion that there is a need to improve governance arrangements and mechanisms that allow identification of priority weed threats for both the environment and agriculture on a regional level. While some LCAs do this already, it has been suggested that the Act specifically provide for regional authorities to identify such threats. The EDO supports these initiatives, and submits that there needs to be improved coordination between LCA and Catchment Management Authorities. While LCAs have the historical role and relevant expertise at weed management, and CMAs do not currently employ weeds officers; CMAs have a strategic role in taking a regional or catchment based approach. The Act should be amended to clarify roles and improve coordination.

Management of class 4 weeds could also be improved by clarifying the guidelines. The Act should make clear what can be included in management plans.

Issue 4: Notification of noxious weed matters on sale of land

The EDO supports the proposal to amend Schedule 4 of the *Environmental Planning and Assessment Regulation 2000* to include on any section 149 certificate:

- Details of any weed control notices currently affecting the land;
- Details of any outstanding expenses payable to the LCA or any resulting charge on the land; and
- Notice that absence of a weed control notice does not mean the absence of noxious weeds on the property, and that the purchaser may need to seek independent expert advice on the matter.

These amendments would assist in promoting awareness of the duty of care of landholders regarding weed management, and in doing so would hopefully lead to better on the ground environmental outcomes. The EDO also agrees that although there exists a well established principle of *caveat emptor* in the purchase of property, the ramifications for failing to maintain appropriate weed management practices will not only impact the landowner, but also those individuals in close proximity to the unmanaged property. The potential to cause significant damage beyond the perimeter of a landowner’s property is another reason to support statutory measures to increase awareness such as the introduction of such information onto section 149 certificates.

¹⁶ Section 8(2)(d) of the *Noxious Weeds Act 1993*.

The EDO strongly supports measures to increase land manager awareness of responsibilities towards weed management. In addition to this, the EDO submits that awareness of weed management should not only take place at the point of sale, but on a more regular basis. The development of educational programs to provide land managers with the information required to make informed decisions is essential to the success of weed management in NSW. We understand that this is currently occurring under various policy instruments and initiatives, such as the Invasive Species Plan (for example, Goal 4, objective 4),¹⁷ and support adequate resources being made available to LCAs to carry out the necessary actions.

Issue 5: Management of the weed risk posed by commercial species

The EDO supports, in principle, the insertion of provisions into the Act that specifically address the management of conflict species. The EDO is wary however of the creation of a one size fits all approach through the declaration of a “managed species.” Instead what should be created is a transparent and scientifically robust process through which a species is assessed. Following assessment, the criteria that apply to enable the species to be managed appropriately would be defined and applied, with accompanying penalty provisions to ensure compliance. Furthermore, the assessment to determine the appropriate management of such a species must be conducted by an independent scientific body, such as a Weed Assessment Committee (or committees) to be set up on the same basis as the NSW Scientific Committee (TSC Act). This would help in ensuring that appropriate management practices and listing of weeds are based only on independent scientific assessment. Such a committee could also be responsible for focusing weed control activities on the highest priority biodiversity and economic outcomes, determined according to a transparent methodology.

Issue 6: Prevention of spread of high priority weeds from Queensland

The EDO supports the introduction of a set of broader mechanisms to monitor the transfer of weed species between the NSW and other States and Territories. The Issues Paper proposes the expansion of the quarantine measures set out in sections 31 and 32 of the Act to apply to a broader range of machinery (as opposed to the current legislation which restricts it to “agricultural machinery”) and to machinery brought in NSW from any State and Territory. Increased monitoring of machinery that could be a potential vector to spread weeds and weed propagules will help reduce unwanted dispersion. The EDO submits whilst the Minister should be able to make declarations about the type of machinery requiring inspection, this should not be the only process used. The regulations should provide a set of criteria which identify the categories of machinery and areas which require testing based on factors such as location utilised, clearance from vegetation and seasonal factors.

Another way in which the spread of weeds across borders can be minimised is through the introduction of clauses into the legislation that require mutual recognition of declared weeds in other jurisdictions. Such a measure would help increase uniformity between the states, make compliance easier for the community and minimise the gaps across borders.

¹⁷ *NSW Invasive Species Plan 2008-2015*, available at: <http://www.dpi.nsw.gov.au/agriculture/pests-weeds/nsw-invasive-species-plan>

Issues 7: Prohibition on import of noxious weeds into NSW

In line with need for the management of weeds to be more proactive in NSW, the EDO supports the proposition to introduce stronger quarantine powers. Introducing similar provisions as those that exist in the *Plant Diseases Act 1924* would allow the Minister to make an order prohibiting the importation of certain species. Such a proposal is in line with the precautionary principle and promotes a proactive as opposed to reactive approach to weed management.

Issue 8: Unworkable notifiable weed requirements

As there is no control requirement for Class 5 species growing on land, the EDO agrees that it would be onerous and of minimal consequence if landowners had to notify their local control authority of the presence of a Class 5 notifiable weed on their land.

Issue 9: Lord Howe Island special circumstances

Lord Howe Island is classified as a part of NSW for the purposes of the Act. Due to the fact that large areas are listed as World Heritage, and that many of the species of weed present on the mainland are not present on the island, the Issues Paper has suggested that a mechanism be introduced into the Act for the Minister to exempt or limit the operation of certain provisions of the Act in certain circumstances. The EDO submits that the wording of this proposition is extremely loose and could lead to subjective decision making based on political and economic criteria, rather than scientific criteria. The Act should make clear what mandatory scientific criteria apply to this process.

Issue 10: Public and private land owners or occupiers

Under the Act, obligations to maintain appropriate weed management practices vary between private landowners and public authorities. This has undoubtedly been a point of frustration for many environmental and landowner groups. One of the major recommendations in this submission is to promote a universal standard duty of care requiring that all persons take all reasonable and practical steps to prevent weed invasions and impacts. It has already been highlighted in this submission that if there is a failure by a person to correctly manage an area of land, the ramifications have the potential to be felt far beyond the perimeters of that land regardless of whether the land is privately or publically owned.

The disparity in the duty of care that currently exists in sections 12, 13 and 14 of the Act is apparent, with occupiers (other than a public authority or a local control authority) of land to which a weed control order applies, required to control noxious weeds on the land as per the order. However the lesser duty of care that a public authority must display is to control noxious weeds on the land as required under the order, to the extent necessary to prevent the weeds from spreading to adjoining land. Furthermore, while LCAs can order a landholder to control weeds, only the Minister can serve notice on a public land manager.

During the review of the Act in 1998, there was a significant amount of pressure from environmental groups for public authorities to have the same obligations as those imposed on private landholders. Whilst there was, and still is, a recognition that weed

control may require the use of limited public funds, it is a necessary up front and relatively minor expenditure in comparison to the environmental and economic costs that can arise from inadequate weed management. The EDO therefore fully supports the proposal to promote a universal standard duty of care requiring that all persons take all reasonable and practical steps to prevent weed invasions and impacts. We note that this will have resource implications for public land managers – for example, where there are no staff available to control weeds in a state forest then the authority would remain in breach of their duty of care unless sufficient resources are provided.

Issue 11: Land owner notification when not the occupier

In line with establishing a strengthened general duty of care, the EDO supports the proposed requirement that the landowner provide the LCA (or appropriate authority) details of the land occupier. For the duty of care to function effectively, both the community and authorities need to know who is responsible for weed management in an area, and what activities they are required to undertake. With such information readily available, what is required should be clear to the individual with whom the duty of care rests and hopefully lead to a stricter adherence to weed management practices. Such information would also assist in carrying out appropriate enforcement and compliance activities.

Issue 12: Identification and trace-back of noxious weed material

The Issues Paper proposes an amendment to the legislation to allow an inspector or authorised officer to go beyond their current permission to commence questioning about the source of destination of ‘noxious weed material.’ The extension would allow an inspector or authorised officer to require a person to answer questions when they believe a person has information that may enable the source to destination of not only noxious weed material but also material that the inspector or authorised officer *reasonably suspects* to be noxious weed material to be traced.

The EDO submits that the extension of inspectors’ or authorised officers’ powers is appropriate and will hopefully lead to increased compliance and enforcement of the Act. Such a step is consistent with the EDO’s proposition to strengthen the compliance and enforcement regime associated with noxious weed management in NSW.

Issue 13: Control of noxious weeds on waterways and riparian land

The management of aquatic weeds can be labour intensive and costly, and under the current Act, responsibility is not clear. The current situation whereby responsibility for the bed and banks of waterways is with the Land and Property Management Authority and adjoining property owners, whilst the water itself is the responsibility of both the NSW Office of Water and the State Water Corporation leads to confusion of roles, and ultimately allows responsibility to be passed and accountability of actions to diminish. Therefore the opportunity to place this responsibility within a single entity (such as a local or state government agency or contractor) would be appropriate and is consistent with increasing the overall duty of care arguments raised above. As the Issues Paper notes, there is often a great deal of equipment and expertise required to effectively manage aquatic weeds. Therefore an appropriate assessment of the capacity of the potential entity to be tasked with such responsibility would need to take place. The current wording of the proposal needs clarification.

Issue 14: Confusion as to where a noxious weed is declared

The EDO supports the clarification of any ambiguous sections within the legislation. We therefore support the proposal to amend the Act to provide that a plant is considered to be a noxious weed only in the area of land to which the relevant control order applies. Without clarity of the intention of the legislation, adherence to weed control orders and subsequent compliance and enforcement efforts are greatly hampered.

Issue 15: Conflict between the *Noxious Weed Act 1993* and other NSW and Commonwealth Government legislation

The EDO agrees that current duplication and conflict that occurs between legislative instruments should be addressed. Care needs to be taken in such a process to ensure that any sort of legislative cropping or streamlining does not diminish the environmental integrity, accountability or transparency in the system, or achieve a 'lowest common denominator' result. The Act should therefore be the primary legislation to implement the principles of best practice weed management. The EDO would be happy to provide input on proposed legislative amendments for better coordination of instruments.

Issue 16: Appointment/authorisation of inspectors and delegation of Local Control Authority functions.

The EDO supports the proposal to allow the appointment of inspectors, as well as delegation of this function, to be executed under the *Noxious Weed Act 1993*. We understand that there are review powers for delegations under the *Local Government Act 1993*¹⁸ and by General-Managers, and EDO submits that if all delegations are brought under the *Noxious Weeds Act*, then appropriate provisions should be included requiring regular monitoring and evaluation of delegated duties.

Issue 17: Definition of residence

The EDO supports the clarification of the meaning of dwelling.

Issue 18: Refine the definition of occupier.

The EDO supports this amendment, as this again adds clarity to identifying the entities responsible for carrying out appropriate weed management practices.

Issue 19: Proof of knowledge of notifiable weeds

The Act currently provides for offences for knowingly dealing with noxious weeds or materials, however the proof of this knowledge is extremely difficult to demonstrate. The Issues Paper suggests that the Act be amended to include a section similar 26(3) of the *Plant Diseases Act 1924*, which provides:

¹⁸ Section 380, Review of delegations.

Where in any proceeding against any person for an offence arising under subsection (1) (a), (f) or (g) knowledge of the accused must be shown, such knowledge shall be presumed unless and until the contrary is proved, and the accused satisfies the court that the want of knowledge was reasonable, and was in no way imputable to negligence on the part of the accused personally, the accused's servant or agent.

The EDO supports a clear statement that dealing with noxious weeds or materials is a 'strict liability' offence analogous to the ACT legislation¹⁹ to facilitate improved enforcement action and ensure the Act provides an appropriate deterrent. This should be made very clear to land managers.

Issues 20: Offence for abuse of an inspector or authorised officer

In accordance with the EDO's call for a more robust enforcement and compliance regime, we would support amendments to protect inspectors and officers attempting to enforce such provisions. The introduction of offences for abusing and/or threatening inspectors is therefore supported.

Issue 21: Review of penalties under the Act

The Issues Paper proposes a review of the offence and penalty provisions. The EDO supports this proposal as it will assist in creating a more robust enforcement and compliance regime. The EDO would also like to see the introduction of criminal convictions for serious breaches, in a similar way to land clearing legislation, as well as remediation orders. Such measures are in line with the polluter pays principle, a fundamental element of ESD.

Issues 22: Definition of classes of road

The EDO supports this amendment.

¹⁹ See section 9(c) of the *Pest Plant and Animal Act 2005*.