# environmental defender's office new south wales

Review of the *Native Vegetation Act 2003*

October 2009

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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*


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## Executive Summary

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide comment on the review of the *Native Vegetation Act 2003* (*NV Act*). The EDO has been extensively involved in the formulation of the *NV Act* and its regulations from its inception and has keenly followed the implementation of the Act.

It is clear that the *NV Act* has been an improvement on previous regimes, especially in its overarching commitment to prohibit broad-scale clearing unless it improves or maintains environmental outcomes. Moreover, the introduction of a scientific methodology - the Environmental Outcomes Assessment Methodology - to assess applications was a quantum leap forward as it instituted a rigorous process predicated on science, not based on subjective opinion and ad hoc decision-making.[1] The EDO submits that these foundational tenets of the Act must be retained, especially in the context of burgeoning climate change and increased biodiversity loss and decline in NSW.

However, we are of the view that the Act could be significantly improved in two respects. First, the Act should be broadened to extend its application to the majority of clearing activities in NSW. Currently the Act is mired in exemptions, defences and permitted activities which provide landholders with a myriad of avenues to circumvent the Act.

Second, the Act's objects would be better achieved by strengthening and extending the enforcement provisions under the Act. Indeed, the absence of strong and rigorous enforcement mechanisms in the Act, coupled with insufficient resourcing, is compromising the overall objective of halting broadscale clearing. Illegal clearing, although hard to quantify, is continuing, with the EDO receiving many calls relating to suspected illegal clearing activities. We therefore propose changes to the Act to strengthen and broaden the monitoring and enforcement provisions. However, this must be complemented by the political will to take action to maximise the deterrence effect of robust and consistent enforcement mechanisms.[2]

This submission will address the following aspects of the *NV Act*:

1. Objectives
2. Key mechanisms
3. Definitions and key concepts
4. Excluded clearing
5. Permitted clearing
6. Permitted activities
7. Property Vegetation Plans
8. Enforcement
9. Rural/Urban Divide

[1] We do have some concerns with the EOAM and have ideas on how it can be improved but we note that this is outside the scope of the present review.
[2] See EDO's recent submission on the Draft Native Vegetation Compliance Policy

Our key recommendations are:

*Objectives*

- The EDO submits that a new object should be inserted into the Act to expressly recognise the contribution of broadscale clearing to climate change as well as the important role played by native vegetation as carbon sinks.

*Key mechanisms*

- The EDO strongly opposes any attempt to amend or downgrade the 'improve or maintain environmental outcomes' test.

*Definitions and key concepts*

- Section 9 of the Act should be amended to stipulate that 'regrowth' does not include any native vegetation that has regrown following clearing of remnant native vegetation in accordance with sections 25(b) and 25(c).

*Excluded clearing*

- The EDO submits that s25(e) of the *NV Act*, which stipulates that approval under the Act is not needed for any clearing authorised under a licence issued under Division 1 of Part 6 of the *Threatened Species Conservation Act 1995* should be removed.

*Permitted clearing*

- The EDO submits that native vegetation that has regrown following the application of one of the exemptions in s25 should be automatically classified as 'protected regrowth' under s10 of the Act.

*Permitted activities*

- The EDO recommends limiting RAMAs in s11 to include fewer activities and only those that are genuinely 'routine';
- The Act should make provision for prior notification to DECCW before an landholder can undertake clearing for the purposes of a RAMA on their land;
- The Act should provide for a publicly available register of RAMAs administered by DECCW;
- The EDO recommends that a provisional consent requirement be inserted into the *NV Act* where clearing is to be carried out on remnant native vegetation for the purpose of construction of a new facility or building on a property; and
- There should be a prohibition on selling timber produced from a RAMA for financial advantage. Any landholder seeking to sell such timber should be required to enter into a PNF PVP.

*Property Vegetation Plans*

- Section 28 should be amended to stipulate that a PVP submitted by a landholder may include PVPs that propose to preserve native vegetation on their land in its natural state; and
- The EDO submits that clearing PVPs should expire at the end of a ten year period.

*Enforcement*

- The requirement for landowner's consent, or authorisation from the Director-General, to enter land to determine contraventions of the NV Act in s35 should be removed;
- Section 35 should be amended to allow an authorised officer to enter land for the purposes of determining whether a person is contravening or has contravened this Act;
- The words 'without reasonable excuse' should be removed from ss 35 and 36;
- Section 36 should be amended to clarify that in exercising powers to obtain information the authorised officer can ask questions orally and that the landowner cannot request prior notice of these questions;
- Penalty Infringement Notices must be excluded as options for offences governing illegal clearing,[3] obstructing an investigation,[4] or non-compliance with notices, stop work or remedial orders issued by the Director-General;
- The Act should be amended to introduce a provision similar to section 219 of the *Protection of the Environment Operations Act 1997* expanding third party enforcement action to include criminal proceedings in certain circumstances;
- Section 38 should be amended to provide that remediation orders run with the land, mandatory remediation take place on the cleared area, and a public register of remediation orders is established; and
- Expanded court orders should be provided for in the Act, including 'penalty-for-profit' orders, adverse publicity orders, orders requiring restoration work on other affected properties, costs orders for damage caused, and orders requiring a company to provide financial assurance for restoration works directed.[5]

*Urban/Rural divide*

- Strong consideration should be given to extending the Act to urban areas of NSW. At the very least, the *NV Act* should be extended in scope to apply to proposed clearing in all Endangered Ecological Communities and the habitat of threatened species, regardless of which zone they occur in.

[3] Section 12, *Native Vegetation Act 2003*.
[4] Section 35(5), *Native Vegetation Act 2003*.
[5] Section 250, *Protection of the Environment Operations Act 1997*.

# 1. Objectives

## 1.1. Do the objectives of the Act remain valid?

The EDO submits that the objectives of the *Native Vegetation Act 2003* (*NV Act*) in Section 3 remain valid and should be retained. Moreover, the EDO strongly supports the retention of the overarching requirement that the objects of the Act must be exercised 'in accordance with the principles of ecologically sustainable development.' This accords ESD a higher status than the *Environmental Planning and Assessment Act 1979* (*EP & A Act*), which regulates approvals for clearing native vegetation in urban areas not covered by the *NV Act*. The *EP & A Act* merely lists ESD as one factor to be balanced against other considerations. The inconsistencies between approval processes for clearing native vegetation in urban versus rural areas are discussed in more detail below in **Part 10.**

## 1.2. Should the objectives be changed? If so, what should the changes be?

As above, the EDO supports the retention of the objectives in their current form with no amendment. However, we recommend that an additional objective be added to recognise the important interaction between vegetation management and climate change.

The EDO, in its discussion paper, 'Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis', commented on the emergence of climate change as 'a key additional threat to biodiversity [and] a further major challenge to biodiversity conservation in NSW.'[6] There are essentially two arguments for the inclusion of climate change in the objects of the *NV Act*, both of which stem from the inextricable link between the retention of native vegetation and the ability to mitigate and adapt to the impacts and effects of climate change.

Firstly, climate change is predicted to have an irreversible, and to some extent devastating effect on Australia's biodiversity. Impacts are likely to include reductions in the geographic range of species, changes to the timing of species' lifecycle events, changes in the location of species' habitats, increased risk of extinction for species that are already vulnerable, and changes in the structure and composition of ecosystems and communities.[7] More broadly, it is expected that climate change will become the first or second greatest driver of global biodiversity loss over the next century.[8] Hence, the EDO submits that climate change must now

[6] 'Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis', June 2009, Environmental Defender's Office (NSW), p 6.
[7] 'Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis', June 2009, Environmental Defender's Office (NSW), p 9.
[8] Heller & Zavaleta (2009) 'Biodiversity management in the face of climate change: A review of 22 years of recommendations' Biological Conservation 142 14-32, in 'Climate change and the legal

be considered incorporated into all environmental management decisions, particularly those regarding the retention of native vegetation under the *NV Act*.

Second, native vegetation serves the crucial function of carbon storage. Indeed, deforestation causes the emission of a significant percentage of NSW's total greenhouse gas emissions. Reports have demonstrated that intact natural forests constitute a significant standing stock of carbon that should be protected from carbon emitting land-use activities'[9]. Moreover, Australia's intact natural forests have been found to have a larger carbon storage capacity than has been previously recognised.[10] The *NV Act* must therefore recognise this important role. Inserting a climate change objective into the Act would improve the educative function by highlighting the importance of the conservation of native vegetation as a means of mitigating the impacts of climate change.

As a result of the above, the EDO submits that a new object should be inserted into s3 of the *NV Act*, to expressly recognise climate change. A potential iteration of the new object is:

> *In making decisions under the Act, the contribution of broadscale clearing to NSW's emissions of greenhouse gases should be recognised, as well as the important role played by native vegetation as carbon sinks*

## 2. Key mechanisms

### 2.1. Are changes in the mechanisms and approaches used in order to achieve the Act's objects required?

The EDO proposes no changes to the key mechanisms in the Native Vegetation Act in order to achieve the Act's objectives.

The EDO strongly supports retention of the key mechanism of the Act, which is the 'improve or maintain environmental outcomes' test. This test, as applied through the scientific methodology, ensures that the clearing of native vegetation does not take place unless it demonstrably has a neutral or positive environmental outcome. It imports a high threshold before clearing is allowed, which is particularly important in an age of burgeoning climate change and significant biodiversity loss and decline. The test clearly promotes the objectives of the Act by ensuring the protection of high conservation value native vegetation and promoting improvement in the condition of existing vegetation. We would strongly oppose any attempt to amend or downgrade this test.

framework for biodiversity protection in NSW: a legal and scientific analysis', June 2009, Environmental Defender's Office (NSW), p 8.

[9] Mackey et al (2008) 'Green Carbon: The role of natural forests in carbon storage', produced by the Australian National University, Fenner School of Environment and Society, p 7.

[10] Mackey et al (2008) 'Green Carbon: The role of natural forests in carbon storage', produced by the Australian National University, Fenner School of Environment and Society, p 6.

The EDO also supports Property Vegetation Plans as a key mechanism under the Act. These legally enforceable agreements enables landholders to conduct clearing activities on their sites in clearly defined circumstances, which provides certainty for farmers, while at the same time ensuring the retention of high conservation value native vegetation and also facilitating financial and technical support for farmers to maintain key 'offset' areas as determined by the methodology. The promotion of private conservation measures is crucial to protecting remnant vegetation as it is estimated that 35-40% of all remaining forests in NSW occur on private land.[11] Due to the limited availability of public land for habitat protection, private landholders often hold the key to the survival of many vegetation types.

The EDO recommends some changes to the PVP provisions, which we discuss in **Part 7.**

## 3. Definitions and key concepts

### 3.1. Are the definitions and key concepts in the Act still valid?

The EDO proposes no major changes to the key concepts and definitions in the Act. However, we submit that subsection 9(4) should be expanded to include a further exception to the definition of 'regrowth'. Subsection 9(4) currently reads:

> *Regrowth does not include any native vegetation that has regrown following unlawful clearing of remnant native vegetation or following clearing of remnant native vegetation caused by bushfire, flood, drought or other natural cause.*

The exception is limited to native vegetation that has regrown after unlawful clearing, or following clearing caused by natural processes including bushfire, flood, drought or other natural causes. However, this does not encompass clearing undertaken for the purpose of bushfire management or emergency fire fighting under the *State Emergency and Rescue Management Act 1989* and the *Rural Fires Act 1997* as these are not natural causes. These activities currently constitute excluded clearing under s25 of the Act.

As a result, in situations where remnant native vegetation (generally protected under the Act) has been cleared or burned for the purposes of emergency fire fighting or bushfire management the native vegetation that 'grows back' or recovers is classed as 'regrowth' and can subsequently be cleared by landholders without approval. This applies even where vegetation is not necessarily cleared, but simply burned, (as 'burn' falls within the broad definition of clearing under the Act). The EDO submits that it is imperative that landholders do not benefit from fire fighting and bushfire management activities by being able to clear their native

[11] Prest, James. 2004. The forgotten forests: the regulation of forestry on private land in New South Wales 1997-2002. In Conservation of Australia's Forest Fauna, second edition 2004 Ed D Lunney, Royal Zoological Society of New South Wales.

vegetation without approval if the vegetation has been subject to activities under the *Rural Fires Act 1997* and the *State Emergency and Rescue Management Act 1989*.

To remedy this problem, and prevent inappropriate clearing of native vegetation following fire management activities, it is recommended that section 9 of the Act be amended. This amendment may involve the insertion of an additional subsection 9(5), which could state:

> *(5) Regrowth does not include any native vegetation that has regrown following clearing of remnant native vegetation in accordance with sections 25(b) and 25(c).*

This will ensure that native vegetation that has been burnt is still considered to be remnant native vegetation and any future clearing would therefore require approval. Alternatively, any such 'regrowth' could be automatically identified as 'protected regrowth'.

Whether to broaden this to all legislative exclusions is discussed in **Part 5**.

# 4. Excluded clearing

## 4.1. Are these categories appropriate? Are changes needed?

### *4.1.1. Disparity in assessment*

The EDO observes that the number of legislative exclusions listed in section 25 of the Act are substantially broad, allowing for many situations where clearing can take place without application of the Environmental Outcomes Assessment Methodology (EOAM) assessment. The environmental assessments undertaken under these alternate regimes is not as rigorous as the *NV Act* and decisions made are often based on the subjective opinions of decision-makers who are free to favour economic considerations over environmental considerations. This severely compromises the aim of preventing broadscale clearing in NSW (except in very limited circumstances).

For example, clearing undertaken in accordance with Part 5 of the *EP & A Act*, is exempt from the *NV Act*. Currently, under s111 the *EP & A Act*, a determining authority is required to 'examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity'. A comprehensive environmental assessment, through an environmental impact statement, is only needed if there is likely to be a significant impact on threatened species or ecological communities. Moreover, even where an EIS is needed, the determining authority is only required to consider the statement and can approve clearing of an Endangered Ecological Community (EEC) for example, even if there is likely to be a significant impact. It is also important to note that under s75U of the *EP & A Act*, the requirement for native vegetation approval is not required for an approved Part 3A project. The environmental assessment undertaken under

Part 3A is dependent on the assessment requirements prescribed by the Director-General of the Department of Planning.

In contrast, the *NV Act* prohibits the clearing of a good condition EEC through the application of the EOAM. This significant disparity in assessment means that clearing undertaken by public authorities under Part 5 is not subject to robust processes and as a result, clearing that would otherwise by prohibited or restricted may be approved.

In light of the above, the EDO submits that strong consideration should be given to reducing the number of exclusions under s25. To inform this process DECCW should conduct an audit of environmental assessments undertaken under excluded clearing categories in s25 and compare these with the result that would have occurred under the *NV Act*. This will give a more accurate indication of the extent to which broadscale clearing is NSW has been significantly reduced and whether the maintain or improve test is being made throughout NSW.

*4.1.2. Threatened Species Conservation Act*

The EDO submits that s25(e) of the *NV Act*, which stipulates that approval under the Act is not needed for any clearing authorised under a licence issued under Division 1 of Part 6 of the *Threatened Species Conservation Act 1995* should be removed. Its practical effect is that the *NV Act* will not apply to clearing that is likely to have a significant impact on threatened species and endangered ecological communities. This is explained below.
Under s118D the *National Parks and Wildlife Act 1974*, it is an offence to:

> *do anything that causes damage to any habitat (other than a critical habitat) of a threatened species, an endangered population or an endangered ecological community if the person knows that the land concerned is habitat of that kind*

However, there are several defences to this offence. For our present purposes the defences include:

- that the damage to habitat was authorised under a licence granted under Part 6 of the *Threatened Species Conservation Act 1995;* or
- that the damage to habitat was authorised by a PVP under the *NV Act*; or
- that the damage to habitat was in accordance with a development consent within under the *Environmental Planning and Assessment Act 1979*.

This provision effectively allows landholders to make a choice between *TSC Act* approval and *NV Act* approval (whether under a PVP or development consent) where both Acts would normally apply – which is where they seek to damage or clear habitat of a threatened species or endangered ecological community. If the *TSC Act* route is chosen, the *NV Act* does not apply as per s25(e).

A licence under s91 of the *TSC Act* is only required when there is likely to be a significant impact on threatened species, population, ecological communities and their habitats. A Species Impact Statement must accompany the application. In deciding whether to grant the licence, the Director-General is required to consider certain matters, including the Species Impact Statement, public submissions and the principles of ESD. However, there is no legislative indication as to the weight to be given to certain factors so the Director-General is free to issue a licence even where the impacts will be significant on an endangered ecological community or threatened species' habitat. Indeed, the discretion of the Director-General under the *TSC Act* may result in the modification of an activity approved, conditions being attached to the licence, or a requirement that the applicant provide a monetary contribution to alleviate the impacts of the activity on the threatened species rather than a refusal.[12] This contrasts markedly with assessment under the *NV Act*, which requires the application of the methodology to determine whether the clearing would improve or maintain environmental values. Under the methodology, clearing of endangered ecological communities of good condition is prohibited.[13]

Given this disparity, it is clear that a landholder would pick the *TSC Act* route if they propose to significantly affect threatened species or clear an EEC, as the decision ultimately rests on the discretion of the Director-General rather than on a scientific methodology with inbuilt prohibitions. Indeed, lawyers are clearly advising landholders to take this route. An example of this is the case of *Nash v Minister Administering the Environmental Planning and Assessment Act 1979 [2007] NSW LEC 624*. In that case, the applicant initially made an application for a tourist development to the Department of Planning. This application was refused. The applicant then contested this decision in the NSW Land and Environment Court. The Court ruled in favour of the applicant and set a number of conditions that the developer had to comply with. One of these conditions stipulated that the developer had to get approval under the *NV Act*. However, the barrister in the case asked the Court to amend the requirement to 'if required', in recognition of the fact that the Act 'provides a number of alternatives which are open to the applicant to pursue.' He did not elaborate what these alternatives were. The Court agreed with this proviso. Subsequent to this, the applicant put in an application under the *TSC Act* which allowed the applicant to avoid the requirement of *NV Act* approval.

This clearly demonstrates that obtaining *TSC Act* approval is undoubtedly the favoured option for applicants seeking to clear vegetation that is likely to have a significant impact on endangered ecological communities or the habitat of threatened species and that lawyers are advising them to take this route.

In light of the above, the EDO submits that the exclusion in s25(e) should be removed from the Act. This will ensure that endangered ecological communities and the habitats of threatened species are protected where significant impacts are

[12] Section 101, *Threatened Species Conservation Act 1995*.
[13] Assessment Methodology, para. 5.2.1.

likely to ensue from clearing. The current exclusion gives landholders seeking to clear native vegetation a means of circumventing the strict controls of the *NV Act* by seeking a licence under the *TSC Act*. As we have demonstrated, the *TSC Act* applies a less rigorous assessment methodology in granting a licence than the *NV Act* and allows a licence to be issued even where the *NV Act* would have mandatorily refused consent. This has the effect that where proposed clearing of native vegetation is likely to have a significant impact on threatened species, the *NV Act* would not apply to prohibit such clearing as landholders will almost certainly apply for a Division 6 licence under the *TSC Act* to exclude themselves from the *NV Act*.

Importantly, the removal of the exemption will not mean that both approvals would then be required because under s118D of the *NPW Act, TSC Act* approval is not required where a *NV Act* approval is obtained. Thus, there is no duplication of processes.

## 5. Permitted clearing

### 5.1. Are these categories appropriate? Are changes needed?

*Clearing of non-protected regrowth*

Under the *NV Act*, the clearing of non-protected regrowth is permitted.[14] It has been identified in the operation of the Act that where clearing is permitted under certain legislative exclusions[15] there is a potential for the provisions of the Act to be applied cumulatively so that the native vegetation which returns following clearing under a legislative exclusion can now be legally cleared as 'non-protected regrowth'. This can occur without the need for approval despite the fact that prior to the clearing under a legislative exclusion, the vegetation was of the class 'remnant native vegetation' and protected. This is discussed above in relation to clearing permitted for fire management and fire emergency activities.

The EDO is concerned that the automatic categorisation as 'regrowth' results in the gradual removal of significant areas of native vegetation, as over time small pockets are removed under the various legislative exclusions, consequently allowing the 'regrowth' to be cleared without application of the NV methodology (which is much more robust than environmental assessments undertaken under other legislation). This is inconsistent with the abiding object of the Act to ban broadscale clearing.

As a result, we submit that native vegetation that has regrown following the application of one of the exemptions in s25, is automatically classified as 'protected regrowth' under s10 of the Act. Any clearing of the protected regrowth will them require approval under the Act. Of course if an exemption is applied again, then

[14] Section 19, *Native Vegetation Act 2003*.
[15] Section 25, *Native Vegetation Act 2003*.

the regrowth can be cleared without NV Act approval. However, this amendment will establish a presumption that an approval for clearing of regrowth that grows back after an excluded clearing event is required, and it will be up to the applicant to establish that a further exemption applies.

## 6. Permitted activities

### 6.1. Are these categories appropriate?

Under the previous native vegetation regime, it was abuse of the clearing exemptions within the Act that led to excessive broadscale clearing in NSW. For this reason, it is imperative that the NV Act is structured in a way that avoids previous failures and ensures that the key object of the Act - to 'prevent broadscale clearing' - is secured.

The EDO has major concerns regarding the operation of routine agricultural management activities (RAMAs) under the NV Act. The Wentworth Group Report which preceded the introduction of the NV Act, recommended that the new native vegetation regime contain only three limited exemptions, namely clearing for, 'the construction of a dwelling; carrying out routine farm activities, such as collecting firewood for personal use, fencing material and reducing bushfire hazards; and vegetation management in accordance with a certified PVP.'16 However, the NV Act as drafted contains 9 very broad categories of RAMAs, some of which go beyond what would reasonably be understood as 'routine' parts of agricultural management. Indeed, they include infrastructure projects undertaken by councils which are clearly not routine agricultural or management activities.17 Another example is clearing for the construction of an air strip. This is arguably not clearing for the purpose of a routine farming practice as it creates a new activity, that being an activity involving aircraft.

Moreover, the EDO submits that the activities provided for in the definition, and the generous buffer zones for RAMAs in the regulations, effectively allow for clearing to take place in order to facilitate a change in land use, rather than merely a continuation or maintenance of an existing farming practice. In our experience, the definitions of RAMAs has created significant potential for landowners seeking to gradually transform the use of their land from one activity to another, where the latter activity requires an 'open paddock' landscape (such as grazing). Although we understand that the Native Vegetation Regulation 2005 is not currently under review, we submit that many of the current RAMA buffer zones are excessive, which allows farmers to incrementally change the land use of their properties. It is difficult to review the appropriateness of RAMAs without taking these buffer zones into account.

The EDO also notes that with the rollout of Standard LEPs across the State, councils may no longer have the ability to require consent for certain grazing, extensive agricultural activities and ancillary uses in Zone RU1 Primary Production and RU2

[16] 'A new model for landscape conservation in NSW', Wentworth Group of Concerned Scientists, 2 February 2003, p 5.
[17] Section 1(1)(i), *NV Act*.

Rural Landscape.18 This is further reason to restrict RAMAs, especially in High Conservation Value areas, as RAMAs will not be subject to any consent requirements or environmental assessment under either the NV Act or the EP & A Act.

Finally, the difficulties seen in enforcement and compliance under the Act (discussed in further detail below) are inextricably linked to the way in which RAMAs take place under the Act. On the ground, it has been observed that authorised officers responsible for administering the enforcement provisions of the Act, upon entering land, have difficulty determining whether certain clearing that has occurred was in fact undertaken within the exceptions permitted by the definition of RAMAs in section 11. Landowners have been quick to dismiss investigations, claiming that they have not acted outside of the limits prescribed by the RAMAs definition.

In light of the above, the EDO submits that the current operation of the RAMA provisions is not achieving the Act's objectives.

## 6.2. Are changes needed?

Our overall recommendation is for an upfront process where authorities are aware of landholders' intention to clear before such clearing work is undertaken. Currently, whether an activity is a 'RAMA' and falls within permitted clearing is left to the subjective opinion of landholders.

The EDO recommends four key amendments to the RAMA provisions;

- Limit the activities for which clearing is permitted under the RAMAs definition;
- Introduce a requirement for prior notification to the local Catchment Management Authority (CMA) by a landowner where they intend to employ a RAMA exception;
- Implement a register of RAMAs; and
- Introduce a requirement for provisional consent where clearing for a new facility or infrastructure is to be constructed.

*First*, the EDO recommends limiting RAMAs in s11 to include fewer activities. We support the Wentworth Group's recommendation that only a few RAMAs should be allowed, limited to activities that are indeed a 'routine' part of farming practice and that do not assist farmers in facilitating land use change without approval.[19]

*Second*, the Act should make provision for prior notification to DECCW before a landholder can undertake clearing for the purposes of a RAMA on their land.. Prior notification to DECCW would be a requirement that must be satisfied in

[18] Part 2, *Standard Instrument—Principal Local Environmental Plan*.

[19] As above, we also have significant concerns with some of the RAMA buffer zones in the *Native Vegetation Regulation.2005*.

order for RAMAs to be undertaken, even though specific approval is not required. To introduce this prior notification requirement, a new section 22(3) could be inserted, which would prohibit clearing for the purpose of any of the activities listed in s11(1) without prior notification to the relevant CMA.

*Third*, the EDO recommends that the Act provide for a publicly accessible register of RAMAs administered by DECCW. The register would be maintained by the Department. This would enhance the ability of authorised DECCW officers entering land to enforce the provisions of the Act where clearing under the RAMAs exception is being undertaken or appears to have been undertaken.

*Finally*, where clearing is to be carried out on remnant native vegetation for the purpose of *construction* of a new facility or building on a property, the EDO recommends that a provisional consent requirement be inserted into the *NV Act*. The consent process would not be as cumbersome as a development consent process under the *EP & A Act* and could be administered by the local council.

Such a requirement would be similar to the process for obtaining consent to lop or remove a tree under a tree preservation order (TPO). Where a council's Local Environment Plan (LEP) provides that a tree is subject to a TPO, any removal of any part of or damage to the tree requires council consent. This can usually be obtained by completing and submitting a form available on a council's website. The process proposed for seeking consent to carry out clearing of remnant native vegetation under a RAMA involving the construction of a new facility would be similar, with the intention that the process remains relatively streamlined. The Act should therefore specify that the clearing of remnant native vegetation for one of the purposes listed in section 11(1)(a) can only be undertaken with consent.

The four key amendments we propose would introduce 'checking' mechanisms for RAMAs while also improving transparency and addressing the public perception that RAMAs provided unbridled opportunities for landholders to clear native vegetation on their properties without consent.

### 6.3. Commercial use of timber after RAMA clearing

The EDO is aware that DECCW has recently confirmed that landholders are able to commercially sell timber that they remove for the purpose of RAMAs (such as where they clear native vegetation to build a permanent fence - which allows for 6 metres of clearing either side). The EDO has significant concerns with this as it leads to potential windfalls for farmers and creates a perverse incentive for landholders to undertake unnecessary RAMAs in order to profit from the resulting timber. The EDO submits that RAMAs must not be connected in any way with commercial activity or financial gain. There should therefore be a prohibition on selling timber produced from a RAMA for financial advantage. Any landholder seeking to sell such timber should be required to enter into a PNF PVP.

A prohibition could be achieved through the making of a regulation under s46 of the Act. Section 46(1) allows for the making of a regulation to specify the circumstances where dead wood can be removed by landholders for the purpose of commercial firewood collection. The EDO has consistently called for this regulation to be made as a matter of urgency.[20] However, the potential commercial use of timber following a RAMA or otherwise extends beyond the sale of commercial firewood (such as sawlogs). Therefore, s46 should be extended in order for the regulation to apply to all potential commercial uses of dead wood.

## 7. Property Vegetation Plans (PVPs)

### 7.1. Are there other uses PVPs should be put to?

The EDO notes that there is currently no provision for a pure 'conservation' purpose PVP under the *NV Act*. The existing categories of PVP - clearing PVPs, incentive PVPs and certification of existing vegetation management practices PVPs – do not seem to accommodate landowners seeking to preserve their land in its current state where there are significant patches of remnant native vegetation on that land (rather than conducting management activities, etc). It is suggested that the function of PVPs could be extended to include a general 'conservation' PVP.

Whilst any landowner with this intention would arguably also seek funding to maintain the vegetation in its state, the capacity of CMAs to provide such financial assistance has recently been significantly reduced, with the removal of their funding under the federal government's 'Caring for Country' scheme. For this reason, the introduction of a new category of PVP where the primary goal is to secure a legally binding agreement for conservation over the land (and subsequently the remnant native vegetation on that land), would enable CMAs to enter PVP agreements with landowners without also needing to provide incentives for vegetation management activities. The outcome of such PVP agreements would be to improve the ability of the Act to retain existing habitats for the conservation of biodiversity, which is noted as a key underlying principle of ESD, in the Act's objectives.

Section 28 of the Act should therefore be amended to stipulate that a PVP submitted by a landholder may include proposals that enable landholders to preserve native vegetation on their land in its natural state.

### 7.2. Is the 15-year period of clearing PVPs suitable?

DECC has stated that the 15 year period for clearing PVPs 'seeks to achieve security for farm planning and investment'.[21] However, the EDO submits that a period of 15 years is excessive.

[20] Alternatively, the definition of 'native vegetation' under the Act could be amended to include 'dead wood', which would mean that any removal of such wood is subject to the requirement for approval under the Act.

[21] 'How do I get a PVP?', Info Sheet 3, Department of Environment and Climate Change, available at http://www.environment.nsw.gov.au/resources/vegetation/nvinfosheet3.pdf

The Environmental Planning and Assessment Act 1979 provides for the approval of development in accordance with various processes under the Act, depending on the type of development and the planning controls applying to the land subject of the application. Under Part 4 of the Act, which deals with the majority of development applications, a development consent, once granted, lapses after a period of five years if the development is not commenced.22 Arguably, this provision has also been established in order to allow for economic certainty and investment security for developers and landowners, but balances this against public interest considerations and future strategic planning.

Whilst the farming and agricultural industry may require longer-term planning due to its reliance on natural cycles and other variables, the EDO proposes that 15 years is an overly generous time period for a clearing PVP to remain in force. It is unreasonable that a landholder should get the benefit of a 15-year agreement which substantially reduces the level of regulation (for example, the landholder need no longer be concerned about new threatened species listings or any prohibitions in LEPs) on the farm, without ongoing assessments and inspections to ensure compliance. Neither the Act nor the Regulations provide for such inspections.

All PVPs are to be reviewed after a period of ten years.[23] The EDO submits therefore that clearing PVPs should expire at the end of a ten year period, keeping them consistent with the review period under the Act. This may be achieved through an amendment of section 30(1) of the Act.

## 8. Enforcement

### 8.1. Are the provisions for enforcement in the Act effective?

The EDO has provided extensive comment on enforcement under the NV Act and previous native vegetation regimes in NSW. We recently provided comment to DECC on the Draft Native Vegetation Compliance Policy which we rely on in this submission.24

We have been of the consistent view that the compliance and enforcement measures under the *NV Act* are failing to achieve the Act's objects. Illegal clearing is continuing at a significant rate in NSW, highlighting the lack of a robust enforcement regime that encourages compliance with the Act and deters breaches.

The DECCW *NSW Annual Report on Native Vegetation – 2008* contains data relating to the conservation and management of native vegetation over the period 2007-08. The report provides that in this period only 2060 hectares were approved to be legally cleared, however a total reduction in the area of woody vegetation of

[22] Section 95, *Environmental Planning and Assessment Act 1979*.
[23] Section 30(3), *Native Vegetation Act 2003*.
[24] This was submitted to the Department on 6 February 2009.

48,193 hectares occurred. This was allegedly as a result of fire scars, cropping, pasture and thinning, forestry, and rural and major infrastructure. No figures detailing the specific extent of illegal clearing (or clearing that has taken place under the individual exemptions) is provided by DECCW. Despite this anomaly in the amount of clearing that has occurred, in 2008 only 10 prosecutions were commenced, 4 convictions secured (under NV legislation, but not necessarily under the *NV Act*), 8 penalty notices issued, 4 remedial directions issued, 53 other legal directions issued and 103 formal warnings and advisory letters sent by DECCW.

The EDO observes that whilst minor penalties are employed in a relatively consistently manner by the Department, the harsher penalties and legal prosecutions are few and far between. Considering the context of ongoing clearing despite the introduction of the *NV Act* (which sought to remedy this failure under the *Native Vegetation Conservation Act*), the extent to which compliance and enforcement measures have been exercised seems relatively low.

To date, only two convictions have been secured under the NV Act which has operated since December 2005.25 The penalties imposed by the Land and Environment Court were significant in both cases and it is noted that the penalties under the Act are reasonably high (for example up to $1.1 million with daily penalties for ongoing offences under section 12(2) of the NV Act). These cases demonstrate the court's willingness to punish offenders and deter others. The difficulty appears to be the reluctance of the Department to initiate proceedings to enforce the Act. The EDO argues that the lack of political will coupled with insufficient resourcing, are undermining the deterrence role that large penalties can play.

More specifically, the EDO has identified the following fundamental flaws in the *NV Act* in relation to compliance and enforcement:

*Requirement for landowner or Director-General's consent*

The requirement for landowner's consent, or authorisation from the Director-General, to enter land to determine contraventions of the *NV Act* places severe restrictions on compliance and enforcement activities. The requirement has the potential to cause delay and the loss of vital evidence where landowners have illegally cleared native vegetation. A requirement for similar consent is not found in any other environmental law in NSW. The EDO recommends that this requirement be deleted from s35.

*Power of entry to assess compliance*

The Act does not provide the ability for authorised officers to enter land for the purposes of assessing compliance with remediation notices. Entry for this purpose needs to be provided to ensure remedial orders are successfully enforced. Therefore,

[25] See *Director-General of the Department of Environment and Climate Change v Hudson* [2009] NSWLEC 4; *Director-General of the Department of Environment and Climate Change v Rae* [2009] NSWLEC 137.

s35 should be amended to allow an authorised officer to enter land for the purposes of determining whether a person is contravening or has contravened this Act.

*Reasonable excuse provisions*

The presence of 'reasonable excuse' provisions where a landowner refuses to comply with a direction from an authorised officer, obstructs an officer from entering the property, fails to comply with a notice or provides false information,[26] (f) work to create a defence for any landowner seeking to avoid enforcement and compliance measures and reduces the effectiveness of these measures. These provisions are unprecedented in criminal law and do not support the work of authorised officers on the ground in their investigations or enforcement procedures. The EDO therefore recommends that the words 'without reasonable excuse' be removed from ss 35 and 36.

*Powers to obtain information*

Powers to obtain information under section 36 of the *NV Act* may be misinterpreted in their current form as requiring that the authorised officer formally specify the questions he/she wants answered. This uncertainty relates to the way in which the section has been drafted. The EDO recommends that this should be clarified to ensure it is only the notice from the Director-General that is required to be in writing, any questions may be given orally and that the landowner cannot request prior notice of these questions. This could be achieved through the introduction of a new subsection following subsection 36(3).

*Penalty Infringement Notices*

Section 43(1) of the *NV Act* provides authorised officers with the discretion to issue a penalty infringement notice (PIN) for offences committed under the Act or the Regulations. Clause 34 and Schedule 1 of the Regulations has extended the giving of penalty notices to all offences under the Act.

The EDO is of the view that the availability of PINs for all offences, including the most serious such as clearing native vegetation without approval, is inappropriate. The issue of a PIN is appropriate for minor-breaches where the offence is a one-off situation that can be easily remedied and where the facts are seemingly incontrovertible.[27] It is important that the PIN is also able to be a practical and effective deterrent in the particular situation. The EDO submits that these notices should be reserved for technical breaches and excluded for offences governing

[26] See sections 35(5) and 36(4), *Native Vegetation Act 2003*.
[27] See EPA Prosecution Guidelines – Section E, available at http://www.environment.nsw.gov.au/legislation/prosguide/prosecutionguidelines_sectionE.htm

illegal clearing,[28] obstructing an investigation,[29] or non-compliance with notices, stop work or remedial orders issued by the Director-General.[30]

*Third party enforcement rights*

Under the Act, third party enforcement rights are provided for in section 41(2). The EDO notes that these rights are restricted to civil enforcement actions in the Land and Environment Court and not to criminal proceedings.

While the EDO acknowledges that criminal proceedings are more appropriately taken by the Government we submit that a role for third parties to prosecute has significant potential to enhance the deterrence value of the regime.

An analogous situation where this right exists is under the Protection of the Environment Operations Act 1997 (POEO Act), where third parties have the ability to enforce the Act in both civil and criminal proceedings under section 219 in particular circumstances. The EDO recommends that a similar provision be inserted into the NV Act, replacing and expanding the existing third party rights mechanism.

*Routine agricultural management activities*

The EDO argues that the operation of routine agricultural management activities (RAMAs) under the Act is inextricably linked to compliance and enforcement issues. The failure of the Act to provide for any notification requirements or consent requirements where a landholder seeks to undertake a RAMA is recognised as particularly problematic (and is discussed in more detail at Part 6). The EDO recommends that the Act provide for a register of RAMAs, as notified to CMAs by landholders. This would enable compliance officers to distinguish between RAMAs and illegal land clearing, and would assist officers in detecting patterns of RAMAs use and misuse.

### 8.2. Is the range of regulatory tools adequate and comprehensive?

*Remedial work*

Under section 38, the Act makes provision for the Director-General to issue a 'remedial order' if satisfied that clearing has been undertaken on land in contravention of the Act. The EDO submits that this provision in its current state is inadequate to achieve effective and timely remediation work where harm to native vegetation has occurred. We suggest the following amendments to s38.

- Providing that remediation orders should run with the land and be recorded on title;
- Mandating that remediation take place on the cleared area;

[28] Section 12, *Native Vegetation Act 2003*.
[29] Section 35(5), *Native Vegetation Act 2003*.
[30] See sections 36(4), 37(5) and 38(4), *Native Vegetation Act 2003*.

- Providing that remediation orders are to be for an adequate period of time; and
- Providing that orders pursuant to section 38 are placed on a public register for transparency and accountability purposes.

8.3. Are the provisions in relation to evidentiary provisions and penalties in civil and criminal proceedings, effective and in line with current practices?

*Innovative court orders*

As noted above, the issues surrounding enforcement and compliance under the NV Act are seemingly related to a lack of political will by DECCW and other relevant delegated authorities to prosecute and initiate proceedings, rather than a reluctance by the Land and Environment Court to impose penalties. For this reason, the EDO proposes that the powers of the court should be expanded, in both civil and criminal proceedings, to be made consistent with the powers available under Part 8.3 of the POEO Act. The absence of a broad range of orders otherwise available under pollution legislation only intensifies the failure of the NV Act to deter offenders.

Under Part 8.3 of the POEO Act, various powers are available to the court, including 'penalty-for-profit' orders, where the offender has to pay a penalty amount relative to the profit gained by the commission of an offence under the Act,[31] orders requiring adverse publicity statements regarding the offence to be published,[32] orders requiring restoration work on other affected properties,[33] costs orders for damage caused,[34] or an order requiring a company to provide financial assurance for restoration works directed.[35]

Under section 124 of the *EP & A Act*, the court also has the power to make such orders as it thinks fit. This provision is also recommended for inclusion in the *NV Act*, to improve the deterrence value of the penalties available to the court.

The Act should be amended to explicitly provide for an extension of the Land and Environment Court's powers in civil and criminal proceedings under the Act, making them consistent with those available under planning and pollution law. It is recommended that all of the orders available to the court under Part 8.3 of the POEO Act and the power to make orders as the court thinks fit, otherwise available under section 124(1) of the *EP & A Act*, should be inserted into the *NV Act*. We note the recent proposals to include such orders in the *National Parks and Wildlife Amendment Bill 2009*. This should now be addressed in the NV Act.

## 9. Rural/urban divide

[31] Section 249, *Protection of the Environment Operations Act 1997*.
[32] Section 250(1)(a), *Protection of the Environment Operations Act 1997*.
[33] Section 245, *Protection of the Environment Operations Act 1997*.
[34] Section 246, *Protection of the Environment Operations Act 1997*.
[35] Section 250, *Protection of the Environment Operations Act 1997*.

## 9.1. Are changes required regarding the Schedules to the Act?

*Clearing in urban release areas*

As has been demonstrated throughout this submission, there is a significant disparity between environmental assessment for clearing of native vegetation under the *NV Act* and other regimes. This is nowhere more telling than in areas where the *NV Act* does not apply, particularly in metropolitan and 'urban areas'. Indeed, regulation of clearing of native vegetation in urban areas has been described as 'disjointed, haphazard and confused, unable to escape the planning system's traditional addiction to unsustainable development'.[36]

In urban areas (and other areas where the NV Act does not apply), clearing is primarily assessed through the EP & A Act under Part 3A, Part 4 or Part 5. These contain procedural requirements that must be followed, including environmental impact assessment and mandatory relevant considerations, but do not mandate prohibitions of approval for clearing of high conservation value remnant native vegetation and EECs. Decision-makers are free to give greater weight to economic and social considerations even where clearing will have an adverse impact on native vegetation and endangered species. Furthermore, there is no equivalent to the 'maintain or improve' test.

This is in contrast to the EOAM under the *NV Act* which requires that clearing activities are prohibited outright if they are in EEC's of good condition, and mandates offsets to counterbalance any clearing that is allowed. The EDO submits that this disparity in approaches is not justified, especially where endangered vegetation in urban areas is under more pressure from development and often represents the last pockets of previous vegetation types in the region, such as Cumberland Plain Woodland in Sydney. Attempts by the NSW Government to introduce more robust assessments in urban areas, such as Biobanking are as yet unproven and voluntary, which does not ensure that high conservation value vegetation is protected in NSW.

As a result, the EDO proposes that strong consideration must be given to extending the Act to urban areas of NSW. At the very least, the *NV Act* should be extended in scope to apply to proposed clearing in all Endangered Ecological Communities and the habitat of threatened species, regardless of which zone they occur in. This will ensure that threats to the most threatened vegetation types in NSW are subject to robust scientific assessment in order to facilitate the maintenance or improvement of environmental values in NSW. Schedule 1 should be amended to facilitate this.

**For further information about this submission please contact Robert Ghanem on Robert.ghanem@edo.org.au or (02) 9262 6989.*

[36] Farrier, Kelly and Langdon, 'Biodiversity offsets and native vegetation clearance in New South Wales: The rural/urban divide in the pursuit of ecologically sustainable development' (2007) 24 *EPLJ* at 427.