

24 May 2018

Flying-fox Code of Practice Review  
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**By email: [flying.fox@environment.nsw.gov.au](mailto:flying.fox@environment.nsw.gov.au)**

Dear Flying-fox Code of Practice Review Team,

## **Draft Code of Practice Authorising Flying-fox Camp Management Actions 2018**

As a community legal centre specialising in public interest environmental law, EDO NSW welcomes the opportunity to comment on the *Draft Flying-fox Code of Practice Authorising Camp Management Actions 2018 (Code)*.

EDO NSW retains our significant concerns with the scale of environmental harm that is being authorised through Codes of Practice under the *Biodiversity Conservation Act 2016 (BCA)*. The Code maintains the trend of reducing regulatory oversight and independent expert consideration of harm to threatened species by removing the need to obtain a licence to harm flying-foxes prior to undertaking authorised camp management activities. We make the following comments in relation to the Code.

### **Part 1 – Introduction**

#### *Section 2 Nature and status of Code*

We do not support the application of the Code to any “public land”. Additional limitations on the application of the Code should be applied. We expand on this issue further below.

#### *Section 3 Objectives*

It is disappointing that the Objectives for the Code include no reference to the need to ensure the conservation of flying-foxes, or enabling their long term conservation, as is the case under the *Flying-fox Camp Management Policy 2015 (2015 Policy)*. An Objective requiring the conservation of flying foxes should be included in any final Code. An appropriate Objective would be that included in the *Flying Fox Camp Management Policy 2007 (2007 Policy)* to “(a)ssist... in managing flying-foxes and their camps in a manner that will ensure the maintenance of a network of flying-fox camps throughout their range, and the conservation of the flying-fox population”.

### **Part 2 – Authorisation of Camp Management Activities**

#### *Section 6 Authorisation*

We reiterate our support for non-lethal methods of management for all three species of flying-fox, and welcome the statement that the Code does not authorise the

“intentional or negligent killing of flying-foxes”. However, the use of the words “intentional or negligent” creates uncertainty around the ability to enforce this requirement and should be removed. It should be made clear that the Code does not authorise the killing of flying-foxes and that the Code does not authorise incidental harm to flying-foxes.

Section 6 of the Code permits harm to all listed threatened species and ecological communities (except for pre-emptive actions in areas of critically endangered species and ecological communities) if a Camp Manager decides that harm is reasonably necessary and minimises impact (subject to any directions given the Environment Agency Head). This approach creates a highly subjective decision making framework with the potential to lead to significant environmental harm to listed threatened species and ecological communities. At a minimum, section 6 (3) should be expanded to include endangered and critically endangered species and communities as entities for which the Code does not authorise any damage.

Section 6 also includes insufficient consideration of cumulative impacts. For example, there does not appear to be any limit on the number of sites that can be undergoing camp management activities under the Code at any single time. There should be strict limits on the number of sites where the Code can be applied, to ensure that flying foxes have sufficient refuge areas if they have been disturbed by camp management activities.

#### *Section 7 Camp management actions*

EDO NSW does not support the inclusion of high impact camp management actions within the Code (section 7). High impact camp management actions should only be permitted where they have been assessed under section 7.3 of the BCA and authorised appropriately.

#### *Section 8 Routine camp management actions*

We are concerned that trimming of understorey vegetation as authorised by section 8(a), does not appear to include any limitation on the species or area that could be affected. Given that the regular trimming of some native species can have significant impacts on the health and rigour of those species, limits of impacts should be prescribed.

Section 8(g) should only be permitted where the construction of artificial structures doesn't impact on other threatened species or ecological communities.

#### *Section 9 High impact camp management actions*

While we do not support the inclusion of high impact camp management actions in the Code, if it is permitted in the final Code, high impact actions should only be authorised after the Camp Manager has attempted to manage the camp by using routine camp management actions for a minimum of six months. During this time the Camp Manager should also be required to undertake community education and engagement activities.

Clear definitions of “buffer”, specifically the area or distance from human settlement that can be considered to constitute the buffer, and “habitat modification” must be

included in any final Code to ensure that appropriate limits are placed on activities that can occur under the Code.

The following standard conditions that are currently included in the 2015 Policy should also form part of the requirements for camp management actions in buffer zones in any final Code:

- Pruning or removing of flying-fox roosting habitat should occur at night or at other times when the flying-fox camp is vacant; and
- Any tree lopping, trimming or removal or trees is undertaken under the supervision of a suitably qualified arborist.

#### *Section 10 Pre-emptive camp management actions*

EDO NSW strongly opposes the introduction of pre-emptive camp management actions. Section 10 (1) authorises action “pre-emptively in an area in order to deter flying-foxes from establishing a camp in that area” without any requirement to establish a need for the actions or any limits on the actions that can be undertaken, except where actions will impact on critically endangered species or ecological communities. There is no scientific justification for such an unconstrained defence against harming native plants and animals. Section 10 of the Code should be removed in its entirety.

In the event that Section 10 is retained, at a minimum it should include further information on what constitutes a circumstance in which a Camp Manager could reasonably assume that flying-foxes may be about to establish a camp in a particular area. It should not provide a defence to harming any other listed threatened species or ecological communities, and the area over which such activities can be applied should be limited.

### **Part 3 Manner of carrying out camp management actions**

#### *Section 11 Notification of Environment Agency Head*

An additional requirement should be included in Section 11 for the Environment Agency Head to consider the cumulative impacts of all camp management notifications and give directions to the Camp Manager to minimise cumulative impacts, where required.

#### *Section 13 Requirement for a flying-fox expert*

The advice received by a Camp Manager under Section 13 (1) must be made publicly available at least three business days before carrying out camp management activities.

Under Section 13 (4) (d) of the Code, the Camp Manager must be required to follow (rather than consider) the advice provided by the flying-fox expert.

#### *Section 14 Before carrying out camp management actions*

There should be mandatory public notification, via a public register of proposals, to carry out camp management activities at least five business days before carrying out those activities.

Section 14 (2) should be expanded to require population counts of surrounding flying-fox camps immediately prior to camp dispersal or disturbance being undertaken and continue at least once a week whilst actions are undertaken.

Section 14 (3) should specify that wildlife rehabilitation groups must be notified at least five business days before carrying out camp management activities.

#### *Section 15 While carrying out camp management actions*

Section 15 (2) states that “(d)isturbance actions must be limited to a maximum of 2.5 hours in any 12-hour period, preferably at or before sunrise or at sunset”. This wording potentially allows disturbance action to continue for 5 hours if the first 2.5 hours are considered part of one 12-hour period and the second 2.5 hours are considered part of a second 12-hour period. This would appear to contradict the intention of the section and should be clarified in any final Code.

Section 15 (3) should provide additional guidance on the minimum size of the designated rest area.

Section 15 (5) should be expanded to include a maximum timeframe over which any disturbance actions may occur, regardless of the number of flying-foxes occupying the camp.

EDO NSW is concerned about the potential interaction between section 15 (7) allowing clearing of 50% of the area of vegetation in a camp and section 8 (a) allowing trimming of understorey vegetation. Large areas of native vegetation could suffer significant impacts if a Camp Manager is permitted to clear 50% of an area and undertake routine camp management actions, such as trimming, in the area that remains. Further consideration needs to be given to limiting cumulative impacts under these sections of the Code.

#### *Section 16 Community education and engagement*

The requirements under section 16 are insufficient to meet the stated objective of the Code “(t)o ensure that communities impacted by flying-fox camps have access to accurate information, are consulted in the process of planning camp management actions and notified prior to implementation of camp management actions”.

Community education and engagement activities must be made mandatory for a minimum of four (4) weeks prior to any routine camp management actions being permitted and during the minimum of six months of routine camp management actions required before high impact camp management actions can be undertaken (as recommended above).

Notification requirements should be expanded from the proposed residents within 300m of a camp (section 16 (2)) to include notification via a public register.

#### *Section 17 Record keeping*

A Camp Manager must be required to provide all records collected under section 17 to the Environment Agency Head within 7 days of the camp management actions occurring.

All information required to be collected under section 17 should also be made available on a public register. Information should be required to be available on the public register within 7 days of the camp management actions occurring.

## Dictionary

A number of important terms in the Code remain undefined. This lack of definitions creates serious doubt about the ability of Camp Managers to appropriately apply the Code and for regulators to appropriately enforce the requirements of the Code.

Specifically the following terms should be defined in the dictionary:

- Part 1, s 3 Objectives (1) – minimal impact
- Part 2, s 6 Authorisation (4) – reasonably necessary
- Part 2, s 9 High impact camp management activities (a) – buffer
- Part 2, s 9 High impact camp management activities (i) – habitat modification
- Part 3, s 15 (8) – significant impact on residents

The existing definition of “flying-fox camp” should specify a minimum period of time over which vegetation has been occupied by flying-foxes for the area to be considered to be a camp. For the purposes of the Code, the definition of flying-fox camp should not include those areas that are only occupied occasionally.

Further guidance should be provided on what constitutes food availability being low under the definition of “period of significant food stress”.

## Other Comments

Authorising activities under a Code of Practice does not remove obligations for appropriate environmental assessment and, where necessary, approval under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**). We recommend that any final Code include a note reminding Camp Managers of their obligations under the EPBC Act.

For further information on this submission, please contact EDO NSW Policy & Law Reform Director, Rachel Walmsley at [rachel.walmsley\[at\]edonsw.org.au](mailto:rachel.walmsley[at]edonsw.org.au) or (02) 9262 6989.

Yours sincerely,  
**EDO NSW**



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