



31 May 2011

Natural Resources Division
Department of Natural Resources, Environment, The Arts and Sport

By email: pastoralnativevegetationbill.nretas@nt.gov.au

To the Natural Resources Division,

Re: *Native Vegetation Management Bill 2011*

The Environmental Defenders Office (NT) Inc (EDO NT) welcomes the opportunity to provide comment on the draft *Native Vegetation Management Bill 2011 (NT) (NVM Bill)*. EDO NT is a community legal centre specialising in public interest environmental and planning law. This includes supporting appropriate legislation passed for the good government of the Northern Territory¹. The submission focuses on legal aspects of native vegetation management which must underpin implementation of the *NVM Bill* and the *PL(A) Act*.

Summary of submission to Native Vegetation Management Bill 2011

EDO NT submits that the NVM Bill should be best practice and include essential elements including:

1. The achievement of ecologically sustainable development as an overarching objective of the *NVM Act*.
2. The NVM Act should seek to achieve the goal of 'no net loss' of native vegetation across the Territory.
3. The underlying principles of the *NVM Act* should implement the decision-making hierarchy of avoid, minimise, offset to avoid loss of native vegetation across the Territory.
4. The achievement of the objectives and underlying principles should form criteria for all decision-making under the *NVM Act*.
5. The setting of the retention levels should be based on scientific evidence as to the necessary retention levels for the conservation of biodiversity, 'increased carbon storage

¹ The fundamental obligation vested by s6 of the *Northern Territory (Self-Government) Act* in the Territory government.

in soil and vegetation'² and 'reduced greenhouse gases emission'³. The precautionary principle should be applied to situations where scientific uncertainty exists.

6. Increased public participation and third party review and enforcement rights
7. The integration of the institutional and regulatory framework for the management of native vegetation in the Territory requires the application of the *NVM Act* to all land in the Territory and the integration of other laws that currently regulate native vegetation in the Territory. The NVM Bill should recognise mechanisms under other laws to protect native vegetation and fauna.

Part 1

Part 1: Division 1 Preliminary matters

The Objects and Underlying Principles provided by clauses 3 and 5 of the Bill, together with the definitions section need to include express reference to some important aspects, as follows:

1. Objects

Ecologically Sustainable Development

The overarching objective of the *NVM Bill* in section 3 should be to 'achieve ecologically sustainable development through the proper management of native vegetation'. The concept of ESD should be implemented throughout the *NVM Bill* by provision in the objects, underlying principles, criteria for decision-making, conditioning of permits, enforcement and public participation.

The international community has recognised the concept of ecologically sustainable development as imperative for the preservation of the environment for current and future generations since the *United Nations Conference on the Human Environment* in 1972 and the *Brundtland Report* in 1983. The concept of ESD is recognised and accepted as the fundamental concept for sustainable development at a national level in a number of policy initiatives, agreements and legislation including, in particular, the *National Strategy for Ecologically Sustainable Development*, the *Intergovernmental Agreement on the Environment*, the *National Greenhouse Response Strategy*, the *National Strategy for the Conservation of Australia's Biological Diversity* and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

The Northern Territory Government has already recognised the concept of ESD as the fundamental principle for the management of the environment and natural resources through the *Territory 2030 Strategy*⁴ and the *Climate Change Policy*⁵ and in legislative

² Section 3(c)(i), *Native Vegetation Management Bill 2011* (NT).

³ Section 3(c)(ii), *Native Vegetation Management Bill 2011* (NT).

⁴ See for example, the Target to 'Manage the Northern Territory's natural resources according to the principles of ecologically sustainable development' to implement Objective 1 of the Environment Policy

and institutional reform, particularly, the appointment of an independent Environment Protection Authority with the function 'to advise the Minister, businesses and the community about ecologically sustainable development in the Territory'⁶.

It would be inconsistent with international conventions and national and Territory initiatives, policy and legislation for Parliament to pass the *NVM Bill* without express provision for the achievement of ESD as a mandatory objective and criteria for decision-making. The glaring omission of the concept of ESD in the *NVM Bill* will result in the Territory government adopting a regulatory regime that fails to adequately implement its own policy objectives to appropriately manage natural resources and address the global issue of climate change. Such an approach lacks integration with international, national and Territory approaches to addressing the issues of biodiversity decline and mitigation of, and adaptation to, climate change. Integration is a principle of ESD and best practice regulation.⁷

EDO NT submits that the objectives should include the overarching objective of achieving ecologically sustainable development in clauses 3 and 5 (as s3 and s5(3) respectively), reading; "achievement of ecologically sustainable development" and "the particular clearing in the context of the region constitutes ecologically sustainable development". The concept of ESD is a framework of principles consistent with international, national and Territory approaches to sustainability managing natural resources and the environment.

Healthy Landscapes

In relation to 'Clearing of native vegetation', the *National Strategy for the Conservation of Australia's Biological Diversity* (National Biodiversity Strategy) identifies the objective: 'Ensure effective measures are in place to retain and manage native vegetation, including controls on clearing'. The *National Biodiversity Strategy* identifies the following government initiative, amongst others, to achieve this objective:

3.2.2. In accordance with the Inter Governmental Agreement on the Environment, review legislation relating to clearing and ensure that criteria for assessing land clearance applications take account of biological diversity conservation, land protection, water management, and landscape values.⁸

'Custodians of our natural heritage' in the *Territory 2030 – Strategic Plan 2009*: See Northern Territory Government, *Territory 2030 – Strategic Plan 2009*, 60.

⁶ See sections 4, 5 and 8, *Environment Protection Authority Act* (NT).

⁷ For principles of best practice regulation, see Australian Government Productivity Commission, *Impacts of Native Vegetation and Biodiversity Regulations*, Productivity Commission Inquiry Report (No 29, 8 April 2004).

⁸ See the *National Strategy for the Conservation of Australia's Biological Diversity*, Section 3.2 – Clearing of native vegetation, 36-37 accessible at <http://www.environment.gov.au/biodiversity/publications/strategy/pubs/national-strategy-96.pdf>.

The concept of 'landscape values' is one component of the criteria for assessing land clearance applications in accordance with Initiative 3.2.2 of the *National Biodiversity Strategy*. The definition of 'healthy landscapes' includes the broader range of indicators set out under Initiative 3.2.2. However, the concept does not replace the overarching goal of ESD and the principles that comprise ESD. The achievement of ESD in the management of native vegetation must be the central goal and framework for assessing whether policy and decision-making will maintain and achieve 'healthy landscapes' in the Northern Territory.

The phrase "promotion and maintenance" features in various clauses of the *NVM Bill*. This phrase should be changed to "maintenance and improvement". The concept of 'maintaining and improving' would be consistent with legislation in other jurisdictions, and national best practice.

Biodiversity Conservation

The *National Greenhouse Response Strategy*⁹ recognises initiatives for the management of native vegetation and biodiversity for the purposes of climate change mitigation and adaptation. The preservation of biodiversity should be an equal objective to the objectives of 'increased carbon storage in soil and vegetation'¹⁰ and 'reduced greenhouse gases emission'¹¹. The equating of these objectives would avoid perverse outcomes such as the planting of monocultures for carbon sequestration purposes as these would not have the same biodiversity benefits.¹²

5. Underlying principles of Act

Hierarchy of principles

The maintenance of healthy landscapes requiring 'increased carbon storage in soil and vegetation' and 'reduced greenhouse gas emissions' requires that, at a minimum, there is no net loss in the native vegetation in the Northern Territory. In order to avoid loss of native vegetation in the NT, the management of native vegetation should be in accordance with a decision-making hierarchy as outlined in '*Australia's Native Vegetation Framework-Consultation Draft*':

⁹ Commonwealth of Australia, *National Greenhouse Strategy-Strategic Framework for Advancing Australia's Greenhouse Response*, Sections 6 and 8 accessible at <http://www.australianpolitics.com/foreign/environment/ngs.pdf> .

¹⁰ Section 3(c)(i), *Native Vegetation Management Bill 2011* (NT).

¹¹ Section 3(c)(ii), *Native Vegetation Management Bill 2011* (NT).

¹² ANEDO, 'Submission on Australia's Native Vegetation Framework – Consultation Draft', 31 March 2010 accessible at www.edo.org.au .

An increase in use by jurisdiction of a system to apply a decision-making hierarchy to managing native vegetation where the first aim is to avoid loss; and, if that is not possible, then to minimise loss; and if vegetation loss is unavoidable, impacts should be managed to maintain ecosystem functions including, where feasible, the use of offsets.¹³

Three important qualifications to the effective implementation of the decision-making hierarchy are:

1. The use of the decision-making hierarchy must be mandated by explicit inclusion in the *NVM Bill*.
2. The category of 'unavoidable impact' should not apply to the highly threatened vegetation types where such a minimal percentage of the vegetation type is left, that *any* impact is unacceptable. Clear guidelines should be developed to better define what 'unavoidable' means, so that this step of the hierarchy is meaningful. Any claims that clearing is unavoidable must involve clear evidence of all alternatives considered.
3. The use of 'offsets' must be the last option (avoid and minimise). Offsetting impacts of clearing native vegetation is problematic as no two patches of vegetation are identical in terms of ecosystem functions and values. There is always therefore a loss of the unique functions and values being cleared. Any limited use of compensatory vegetation or habitat must be regulated by clearly articulated principles in the *NVM Bill*.¹⁴ Where it is impossible to avoid impacts according to the decision hierarchy, and 'offsets' are proposed, there must be clear scientific and legal principles in the *NVM Act* applying to any proposed measures, for example, any offset must be additional, verifiable, and like-for-like.¹⁵

Part 1, Division 2: Interpretation

Ecologically Sustainable Development

An appropriate definition of "ecologically sustainable development" in section 7 of the *NVM Bill* is required. The NSESD sets out the principles of ecologically sustainable development. A comprehensive definition of ESD and its principles, incorporating the principles set out in the NSESD, is included in section 4 of the *Commissioner for Environmental Sustainability Act 2003 (Vic)*:

4 What is ecologically sustainable development?

¹³ Australian Network of Environmental Defender's Offices, *Submission on Australia's Native Vegetation Framework – Consultation Draft*, 31 March 2010, 2, accessible at www.edo.org.au.

¹⁴ Australian Network of Environmental Defender's Offices, *Submission on Australia's Native Vegetation Framework – Consultation Draft*, 31 March 2010, 2-3, accessible at www.edo.org.au.

¹⁵ Australian Network of Environmental Defender's Offices, *Submission on Australia's Native Vegetation Framework – Consultation Draft*, 31 March 2010, 6, accessible at www.edo.org.au.

- (1) Ecologically sustainable development is development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends.

- (2) The objectives of ecologically sustainable development are—
 - a. to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations;
 - b. to provide for equity within and between generations;
 - c. to protect biological diversity and maintain essential ecological processes and life-support systems.

- (3) The following are to be considered as guiding principles of ecologically sustainable development—
 - a. that decision making processes should effectively integrate both long-term and short-term economic, environmental, social and equity considerations;
 - b. if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
 - c. the need to consider the global dimension of environmental impacts of actions and policies;
 - d. the need to develop a strong, growing and diversified economy which can enhance the capacity for environment protection;
 - e. the need to maintain and enhance international competitiveness in an environmentally sound manner;
 - f. the need to adopt cost effective and flexible policy instruments such as improved valuation, pricing and incentive mechanisms;
 - g. the need to facilitate community involvement in decisions and actions on issues that affect the community.

Healthy Landscapes

Best practice regulation requires clear definitions. The definition of 'healthy landscapes' needs to be clarified as it refers to concepts undefined in the *NVM Bill*.

Comments are invited on the use of exemptions shown in section 32(2) (page 22). These are intended to avoid interference in day to day activity affecting small numbers of plants in small areas, but also to avoid “backdoor” ways of getting around the intent of the law: which is to treat all decisions involving significant clearing of native vegetation as important and requiring careful consideration.

Exempted land clearing should be factored in as cleared vegetation for the purposes of assessing the contemporary levels and retention levels under Part 2, Division 2 of the *NVM Bill*. The inclusion of exempted land clearing requires resourcing for monitoring and auditing land clearing. The exemption in Section 2(a)(i) may serve as a potential loophole for the management of cumulative impacts of land clearing where a large piece of land is subdivided into several lots of less than 1 hectare. To reduce the risk of a single registered proprietor subdividing a large landholding to circumvent the *NVM Act*, the EDO submits that the exemption should apply to a landholding owned by a single registered proprietor that is less than 1 hectare. The exemptions should clarify that they do not apply to highly threatened native vegetation or habitat for highly threatened species.

Should additional provision made to permit clearing of some (generally small) areas of significant native vegetation where the loss can be fully compensated by rehabilitation or creation of an equivalent or larger area of a similar vegetation type at another site?

The exemptions should not apply to highly threatened native vegetation or habitat for highly threatened species. As discussed above, the decision-making hierarchy of ‘avoid, minimise, remove and offset’ should be implemented in determining permissions to allow the removal of native vegetation.

Part 2 Framework for managing native vegetation

Part 2, Division 1: Preliminary matters (page 10)

The object of this Part at section 15 should also refer to the objects of the *NVM Bill* including achieving ESD.

Part 2, Division 2: Retention of native vegetation (page 11)

The setting of the retention levels should be based on scientific evidence as to the necessary retention levels for the conservation of biodiversity, ‘increased carbon storage in soil and vegetation’¹⁶ and ‘reduced greenhouse gases emission’¹⁷. The precautionary principle should be applied to situations where scientific uncertainty exists.

Part 2, Division 3: Targeted Clearing

The criteria for the setting of Territory annual caps by the Minister under section 19 should include

¹⁶ Section 3(c)(i), *Native Vegetation Management Bill 2011* (NT).

¹⁷ Section 3(c)(ii), *Native Vegetation Management Bill 2011* (NT).

the achievement of ESD, particularly biodiversity conservation and the precautionary principle, and the objectives of the *NVM Bill*.

Likewise, the criteria for the notice under 19(4)(b) should include the achievement of ESD, particularly biodiversity conservation and the precautionary principle.

Part 2, Division 4: Regional Plans

The persons who can request the preparation of regional plans under section 21 and variation under section 27 should be extended to individuals and organisations with objectives of protecting the environment and who are not necessarily located in that region.

Suggestions are invited on criteria for identifying the sorts of areas that might warrant protection from clearing under this section.

The criteria should be:

- As submitted, the overall objective should be to achieve ESD.
- Scientific evidence as to the value of native vegetation for the preservation of biological diversity, carbon sinks and to allow species to adapt to climate change
- Achieving the objectives of the *NVM Bill* including healthy landscapes based on preserving different sectors of the environment marked by the indicators
- The precautionary principle should guide decision-making where there is scientific uncertainty
- The assessment of cumulative impacts of native vegetation removal on biodiversity conservation
- Highly threatened native vegetation and vegetation that protects highly threatened species should be protected.

Comment is invited on any additional issues that should be dealt with in a regional plan and matters that the Minister should consider in approving such plans. These could be included in the proposed Act or in regulations.

Again, the achievement of ecologically sustainable development should form part of the decision-making criteria.

Part 3 Clearing of native vegetation

Part 3, Division 1 Preliminary matters

The exemptions listed are thought to cover most situations where requiring a permit would be unreasonable. However, additions might be considered where there is no risk of opening loopholes that undermine the intent of the proposed Act. Suggestions are invited.

The EDO submits that exemptions native vegetation removal should be limited and focussed towards preventing land clearing in anticipation of the operation of the *NVM Act*.

Part 3, Division 2 Clearing under permits

Should the institutions that the CEO must notify about applications be expanded, perhaps to include Indigenous Land Councils, prescribed bodies corporate under the Native Title Act, and industry representative bodies?

EDO submits that it is essential to involve Indigenous peoples in native vegetation management and EDO supports the expansion of notification of applications to include Indigenous peoples including Indigenous Land Councils and prescribed bodies corporate under the *Native Title Act*.

Should the CEO be obliged to publish review notices or otherwise provide increased public access to reasons for decisions?

In accordance with the principle of ESD regarding public participation and access to justice, the public should have access to reasons for decisions. As with all regulatory schemes, transparency and accountability are important. These can be primarily guaranteed by public availability of information, together with independent and informed decision-making and adequate rights of review. The instruments provided for under the Act will obviously be publicly available; however any proposal to clear native vegetation should be made known to the public with the written proposal being available for comment.

Part 3, Division 4 Clearing under self-assessment schemes

Comment is invited on the self-assessment proposal and the arrangements proposed to prevent misuse that might compromise the objects of the proposed Act.

The effective management of native vegetation under self-assessment forms requires penalties that act as a deterrent to breach and the allocation of resources for enforcement and auditing of properties. The criteria for self-assessment schemes in accordance with the objectives of the *NVM Bill* need to be included.

Submissions are also invited on the potential to treat matters now listed as exempt (section 32(2)) as matters for self-assessment (that is, to require submission of records and establish audit arrangements).

As part of the self-assessment scheme, the NT Government could encourage sustainable land management practices by providing incentives to landowners for retaining native vegetation that would otherwise be exempted from requiring a permit to remove native vegetation.

Part 4 Compliance and enforcement

It is important for the Territory government to confirm its commitment to ensuring that the compliance and enforcement of contraventions of the proposed Act. This can only be achieved through adequate resourcing, and clear public commitment to this would be well-received.

EDO submits that the NVM Bill should provide for open standing to make an application to the Lands, Planning and Mining Tribunal to seek an enforcement order for a contravention of the *NVM Act* or a permit granted under the Act.

Part 5, Division 5 Other administrative matters

Comments are invited about the array of information that land owners may require and the public have interest in accessing, as well as modes of information delivery.

In the public interest, all material to support a permit application should be publicly available including expert material. Modes of information delivery should include exhibition on the DNRETAS website, hard copies available for review at DNRETAS locations and local councils.

Schedule: Reviewable decisions and affected persons

Comments are invited on the proposed appeal arrangements, particularly in regard to the standing of third parties.

The EDO supports according third parties with standing to seek merits review of decisions relating to permits under the NVM Bill. EDO advocates for an expansion of standing for third parties to seek merits review. The principles ESD include public participation and access to justice. Reviewable decisions by interested persons should be expanded to include:

1. Decisions to give large clearing notices for a region under section 20
2. Decisions to approve regional plans under section 23 and decisions to vary regional plans under section 27
3. Decisions relating to small land clearing

This law will interact with many other laws, including the Planning Act, Mine Management Act, and Territory Parks and Wildlife Conservation Act. Comments are invited on the way such interactions should be handled, especially how the principles and practices set out in the proposed Act should influence decisions made under other law.

The institutional and regulatory framework for the management of native vegetation in the Territory should be integrated with other laws that impact on native vegetation as a matter of best practice regulation and in accordance with the principles of ESD. As the NT Government has decided to draft the *NVM Bill* for the management of native vegetation in the Territory, this should form the central regulatory regime for native vegetation management in the NT. This is particularly important for the principle of equity, an objective of the *NVM Bill*. The *NVM Bill* should form the central Act under which to seek permission for the removal of native vegetation to achieve a consistent approach to the objectives of protecting biodiversity and implementing the NT government's climate change policy. If the framework under the *NVM Bill* applies to all land in the Territory, the mechanisms for protection of native vegetation under other legislation need to be recognised under the *NVM Bill*.

Regulations

Much of the operational mechanism and procedure providing the working framework for the Act will be provided by the Regulations. The Regulations have not yet been drafted; however their content will be crucial to the efficacy of the Act. The Territory Government should confirm its commitment to genuine and timely public consultation in relation to the content and drafting of the Regulations.

Yours faithfully,

Environmental Defenders Office (NT) Inc



Emily O'Connell

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