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**EDO(SA) Comment upon the Review of Native Vegetation Act Regulations 2003  
(Native Vegetation Act 1991) Stage 2 Report: Proposed permitted clearing regulations  
(exemptions) - 31 March 2015**

The Environmental Defenders Office (SA) Inc. ("EDO(SA)") is a community legal centre with over twenty years of experience specialising in public interest environmental and planning law. EDO(SA) provides legal advice and representation, undertakes law reform and policy work and provides community legal education.

**The Starting Point:**

Under section 6 of the *Native Vegetation Act 1991* ("NVA"), two clear objectives set out the legislative intent of the Act:

- "the conservation, protection and enhancement of the native vegetation of the State and, in particular, remnant native vegetation"; and
- "the limitation of the clearance of native vegetation to clearance in particular circumstances including circumstances in which the clearance will facilitate the management of other native vegetation or will facilitate the sustainable use of land for primary production".

These objectives set a clear benchmark against which any proposed changes to the *Native Vegetation regulations 2003* ("NVR") should be measured.

Any changes to the permitted clearance regulations under the NVR or the clearance assessment methodology must be justified ecologically, rather than in terms of administrative streamlining.

EDO(SA) opposes any weakening of environmental outcomes in the NVR as it would be inconsistent with the objectives of the NVA. Improving or maintaining environmental outcomes is consistent with maintaining the long-term sustainability and resilience of SA communities, the SA economy and the SA environment.

**Overview:**

*For the reasons set out in this paper, EDO(SA):*

- *supports the retention of the activity-based approach;*
- *supports the simplification of the exemption regulations;*
- *opposes the risk-based approach; and*
- *opposes the proposed changes to the exemption regulations that facilitate increased native vegetation clearance.*

## Option 1: Activity Based Approach

The advantages of the Activity Based Approach are:

- The provision of certainty as to when, how and to what extent native vegetation ('NV') clearance will be permitted.
- Unqualified and inexperienced proponents are not required to identify NV species or assess their biodiversity value.
- NV clearance assessments/decisions are made independently of the proponent using objective "activity" criteria.
- The proponents are not placed in a "conflict of interest" situation where, under a *risk-based approach*, (a) they want to clear NV; (b) they are responsible for determining the risk-based pathway (low; medium; high), using extent and location risk criteria; and (c) either (i) the NVC uses that determination to decide the process to be used to assess the proponent's clearance permit application; or (ii) due to the determination, no clearance approval is required.
- The activity based approach involves greater proponent and NVC transparency and accountability in regard to applications, exemptions and decisions.
- The activity based approach enables comprehensive reporting and auditing of applications and decisions – prerequisites for maintaining the integrity of the system and maintaining community confidence in, and support for, the system .

## EDO Comment on the proposed Activity-based Permitted Clearing Regulations

### 1.1 to 1.4 Existing/new buildings/structures

*EDO(SA) has the following concerns:*

1. In regard to R.5(1)(a), the proposed regulation will weaken the current protection for the genus Eucalyptus by increasing the stem diameter that will require clearance approval. No rationale for this proposal has been provided.
2. The clearance impact of the proposed regulation will very largely be determined by the new definition of "building/structure" that is to be drafted (see Stage 2 Report, page 4). Without knowing the proposed definition, it is impossible to comment upon the scope of the proposed regulation. Other than the current definitions being "too restrictive/specific" and wanting to make the regulation "easier to interpret", no detailed rationale has been provided for the proposed definition change. Under the clearance regulations, definitions need to be detailed to avoid broad open ended interpretation which will allow unintended clearance without approval.
3. In regard to R. 5(1)(k) and the 20/5 metre clearance restrictions, it is unclear whether the current R.6(1) restrictions will remain under the proposed regulations. Again, without knowing this, it is impossible to comment upon the scope of the proposed regulation.

### 1.5 New housing subdivisions

EDO(SA) supports the proposed simplification and amalgamation of the residential subdivision clearance exemption requirements with the 0.5 ha. clearance safeguard.

### 1.6 Infrastructure or buildings that service infrastructure

*EDO(SA) has the following concerns:*

1. It is proposed to expand the existing definition of "infrastructure" to include "flood mitigation works; airstrips; and shipping lanes". The construction and maintenance of these types of "infrastructure" are most likely to be carried out by the private sector. In addition, much of the construction and maintenance of the other types of

infrastructure (that are listed in the definition) are now the responsibility of the private sector not government.

2. The private sector's primary concern is not with the protection and enhancement of the "public interest" or the protection of NV.
3. It is essential that the "public interest" test/declaration (in R.5(1)(d)(i)(A)) for clearance be retained by the government to ensure that there is adequate monitoring of the private sector's infrastructure activity in relation to NV clearance.
4. The proposed regulation provides very little constraint on private sector infrastructure NV clearance - particularly in the context of: "incidental" clearance; clearance for the provision of not just infrastructure but also "services" (undefined); and clearance in "a situation of urgency" (not emergency – what type of "urgency"? Does this include economic urgency? ).

## **1.7 Major Developments**

No comment.

### **2.1 Access tracks**

*EDO(SA) has the following concerns:*

1. The increase from 5m to 8m for vehicle tracks (the width of a suburban road) – there is no rationale provided for the 60% increase.
2. The removal of the "pedestrian" use restriction – the use of access tracks by bicycles, motor bikes and/or horses will significantly increase the adverse impacts of human activity on the tracks and the surrounding NV – for instance through erosion, noise, fumes, grazing.
3. No rationale is provided for the extension of these exemptions to the River Murray Floodplain Area.
4. It appears that the current requirement to consider "other practicable alternatives", involving no/less clearance, is proposed to be removed.

### **2.2 Safety**

No comment.

### **2.3 Fences**

EDO(SA) supports the removal of the ambiguity to ensure that the area of cleared land upon which the fence stands is no more than 5 metres wide.

### **2.4 Grazing**

No comment.

### **2.5 Regrowth**

EDO(SA) supports the simplification of this exemption.

*EDO(SA) has the following concerns:*

1. For the purposes of biodiversity conservation and enhancement, the 5 year timeframe should remain in place to ensure that proposed clearance of any significant regrowth (over 5 years old) requires approval. The 5 year time frame is not unreasonably restrictive. Situations such as the car park example can be sensibly addressed under 3.1 – the minor clearance provision.
2. The size limit of trees that can be cleared must be retained. The existing size limit protects significant regrowth from clearance without approval.

### **2.6 Firewood & fence posts (live trees)**

*EDO(SA) has the following concerns:*

1. The fence post exemption is outdated and open to abuse, particularly by corporate owners of large multiple properties. In the 21<sup>st</sup> century, fence post construction no longer needs to rely upon ready access to a close by timber supply.

2. The fence post exemption should be totally removed.
3. The current firewood exemption should remain with the existing restrictions (6 cubic metres; stem diameter etc.) to prevent abuse of the exemption.
4. The Stage 2 Report proposes the removal of the Red Gum protection. No rationale is provided for the removal of the protection of Red Gums (under Schedule 1) from clearance under the fence post/firewood approval exemptions.

## **2.7 Dams**

*EDO(SA) has the following concerns:*

1. As the agricultural sector starts to take measures to counter the impacts of climate change on water availability and cost, the number and size of dams will increase.
2. The proposed significant expansion of this exemption (by the removal of the Red Gum and size restrictions) will have a significant adverse impact upon biodiversity conservation.

EDO(SA) supports a simplification of the Dam exemption provisions but not the proposed significant expansion.

## **2.8 Plants and animal pests**

No comment.

## **2.9 Fire management – fuel reduction & ecological burning**

No comment.

## **2.10 Fire breaks**

No comment.

## **2.11 Whole of Property Vegetation Plans (PVP)**

Under PVPs, landholders will be able to conduct clearing activities on their properties in (what should be) clearly defined circumstances, which provides certainty for farmers. The PVPs will, if properly monitored and enforced, at the same time ensure the retention of high conservation value native vegetation.

The promotion of private conservation measures is crucial to protecting remnant vegetation as much all remaining remnant vegetation in SA is on private land. Due to the limited availability of public land for habitat protection, private landholders often hold the key to the survival of many vegetation types.

In NSW, the PVP process has been criticised for being too slow and complicated. However, EDO(SA) understands that this is a result of implementation issues rather than the tool itself.

*EDO(SA) has the following concerns:*

1. Used in conjunction with other exemptions, PVPs have the potential to allow landowners to incrementally change the land use of their properties. The changes to, and generous buffer zones for, other exemptions in the proposed regulations (e.g. 2.1 access tracks; 2.5 regrowth; 2.6 firewood & fence posts; 2.7 dams), will effectively allow for clearing to take place in order to facilitate land use change, rather than merely to continue or maintain an existing farming practice. The (expanding) definitions of other exemptions create significant potential for landowners seeking to gradually change the use of their land to activities that require an 'open paddock' landscape (such as grazing).
2. There is no indication that the PVPs will be legally enforceable. The PVPs must be legally enforceable to ensure compliance, accountability, transparency and certainty.
3. Will the Natural Resources SA regional offices (and/or the NVMU/DEWNR Conservation & Land Management Branch) have the will, resources and expertise to

properly establish and monitor PVPs? If not, the PVPs will be meaningless irrespective of whether they are enforceable.

4. The Stage 2 Report (page 14) indicates that the PVPs will be “less official” than SEBs and “not subject to the same rigorous assessment process or management obligations”. If that is the case, they will be open to abuse.

### **3.1 Minor clearance**

EDO(SA) supports the intent of this proposed regulation.

*EDO(SA) has the following concerns:*

1. The NVC will not be required to be satisfied that “there is no other practicable alternative” that would involve less/no clearance (as under the current R.5(1)(da)(iii)(B)).
2. It is unclear whether the NVC will be relying solely upon information provided by the proponent to make its determination or will the NVC be required to undertake its own investigation into the considerations listed in 3.1?
3. If the NVC will be relying solely upon information provided by the proponent, this will amount to self-assessment, by the proponent, on issues in which he/she has a personal interest and about which he/she is unlikely to have the requisite expertise (e.g. conservation significance; accumulative impacts).

### **3.2 Ecological restoration & management of vegetation**

*EDO(SA) has the following concern:*

1. The purpose of this exemption is to improve environmental outcomes by allowing clearance. To ensure that the exemption is not abused, NVC specific management plans should be required for all such clearance activities, small or large.

### **3.3 Cultural activities**

EDO(SA) assumes that Aboriginal communities have been consulted in regard to this proposed exemption.

### **3.4 Taking of seeds, specimens or materials**

No comment.

### **3.5 Clearance required in accordance with other legislation**

No comment.

### **4.1 Road reserves & transport corridors**

This exemption appears to duplicate the proposed infrastructure exemption under 1.6.

### **4.2 Government departments managing native vegetation**

*EDO(SA) has the following concerns:*

1. The NVC has the skills and expertise to advise upon and oversee clearance activities. Government departments should be required to access that expertise and advice. Annual reporting to the NVC, rather than on going oversight, does not enable the NVC and government departments to implement “best practice” NV management.
2. If government departments are not required to lead by example in regard to NV management, then the rationale of the NV Act will be undermined. The result will be loss of community confidence in, and support for, the NV management regime in SA.

### **4.3 Mining**

*EDO(SA) has the following concerns:*

1. The government is not taking the opportunity, afforded by this review, to revisit the predominance given to exploration/mining/petroleum activities in the context of NV management.

## Option 2: Risk Based Approach

*EDO(SA) is opposed to the risk-based approach for the following reasons:*

In the Stage 2 Report, “improved efficiency”, “quick and efficient processing” and “rapid assessment and approval process (possibly automated)” appear to be the predominant reasons for the proposed shift from an activity based approach to a risk based approach.

This shift will require proponents to determine the risk-based pathway (low; medium; high), using extent and location risk criteria. That pathway determination will then be used to determine either the process for assessing the clearance application or that no clearance approval is required.

For example, the risk-based approach for “general clearance activities” (page 19, 1.1) places the emphasis upon the proponent to determine the appropriate risk-based pathway (low, medium, high) - using “extent” and “location” as risk criteria in a standard risk-assessment matrix. The proposed process amounts to “self- assessment” by the proponent in regard to the most appropriate pathway.

EDO(SA) is very concerned that the efficiency “rationale” is being given far too much weight, at the expense of, if not ignoring, then giving very little consideration to the objectives of the NVA.

*EDO(SA) is concerned that:*

1. The evidence base to justify a risk-based approach is not provided.
2. Evidence/assurances have not been (and cannot be) provided to guarantee that the same level of environmental protection will be maintained under the risk-based approach.
3. The NVC is outsourcing its responsibilities to the proponent.
4. The proponent is being asked to “self-assess” in circumstances where he/she has a clear personal and financial interest.
5. The proponent will be required to use risk assessment skills that he/she is unlikely to possess. The effective implementation of the self-risk assessment requires a high degree of technical knowledge that many proponents will not possess. For example, species and vegetation community identification would be required; knowledge of best practice management approaches for invasive native species would be required; skills in the identification of habitat features in paddock trees would be required.
6. Unless there is significant investment by the government in the ongoing provision of information and advice to, and the training of, proponents in the identification of NV species and the risk-based approach, even the most conscientious proponents will struggle to meet the objectives of the NVA and the risk-based approach requirements.
7. Location risk assessment dependent upon (proposed) mapping, and not on site assessment, will result in incorrect assessments unless the mapping is up to date and accurate.
8. By not having the threshold question of the application pathway independently and expertly determined, the risk of endangered/threatened species being cleared is greatly increased. How are threatened/endangered species going to be identified through self-assessment? Without a genetic analysis, many species can only be identified at certain times of year, for example when they are in flower, and many species consist of individuals with differing morphology.

9. There will be very limited checks and balances to ensure the integrity of the pathway self- assessment system.
10. Self-assessment processes are not capable of being effectively monitored or enforced. As a result they are not capable of adequately implementing the environmental objectives of the NVA.
11. The principles of clearance of native vegetation, contained in Schedule 1 of the NVA, are the principles against which clearance proposals need to be tested. The proposed pathway self-assessment process is not capable of being effectively applied, monitored and enforced, and therefore will weaken the effectiveness of the principles.
12. In a political environment of departmental resourcing cutbacks, there will be little opportunity for a proponent's pathway self-assessment to be properly examined and tested. The great advantage of activity based assessment is that the clearance criteria are objective and transparent.

### **The Victorian Risk-based Approach Experience**

The concerns expressed above are confirmed by the experience in Victoria under the recently introduced risk-based approach, upon which the proposed SA approach is based. Only a little over a year after the introduction of a risk-based approach, the Victorian government is reviewing the system.

The identified defects in the Victorian system include the following:

- The reliance on inaccurate modelled datasets combined with the inability to contradict the result (unless you are a landowner);
- The inaccuracy of the specific maps that are generated by these datasets, resulting in significant valuable native vegetation not being recorded (and, as a consequence, cleared);
- Failure to confirm the accuracy of the maps through on-site assessments;
- Failure to specifically identify and value large old trees;
- Failure to properly identify the vegetation type being cleared and how depleted it is; and
- Facilitation of clearance permission through the reduction in the amount and type of information proponents need to supply, and a comparable reduction in the considerations a decision-maker is required to take into account in making decisions about clearance applications - both reductions achieved through reliance on (inaccurate) digital mapping.

### **Summary:**

#### *1. The risk-based approach:*

EDO(SA) is opposed to the risk-based approach for the reasons set out in this paper. The activity-based approach should be retained.

The *risk-based* approach appears to have as its the primary purpose improved efficiency and government cost savings. It involves:

- relaxing monitoring criteria and reporting processes;
- a significant shift from protecting remnant vegetation to allowing increased clearing;

- a significant shift of responsibility for NV protection from government to the private sector;
- a failure to acknowledge and address the “conflict of interest” position of the proponent in such a system; and
- providing fast-track assessment pathways.

Proposals to change from an activity-based approach to a risk-based approach must be evidence-based, explicitly include any value judgements applied and be guided by the concept of ecologically sustainable development (ESD).

*If the risk-based/self-assessment approach is to be adopted, EDO(SA) recommends that:*

- Prior to the shift to the risk-based/self-assessment approach:
  - ❖ a comprehensive review of the current status of native vegetation across SA should be undertaken. The review should examine the trends and drivers for retention and loss.
  - ❖ an independent audit of the current offset system should be undertaken to determine whether it is delivering the required gains and if not to determine methods of ensuring this.
- Simple but effective record keeping requirements should be imposed upon proponents. This is essential in order to determine if the revised scheme is actually meeting the objectives of the NVA. The information required should include: date, location, and type of clearing activity. It is in the interest of proponents to keep a basic record to assist them in responding to any compliance inquiries, and it is essential for the functioning and ongoing implementation and review of the NVA.
- Natural Resources SA regional offices (and/or the NVMU/DEWNR Conservation & Land Management Branch) must be properly resourced to maintain a clear compliance role, including a compliance presence in rural communities in order for the NV offence provisions to have a deterrence impact.

2. *The proposed activity-based permitted clearing regulations:*

While recognising the need to simplify the current exemption regulations, EDO(SA) has significant concerns about the proposed regulations.

In summary, those concerns are:

- A failure of the proposed regulations to give effect to the objectives of the NVA.
- The weakening of clearance protections for species (such as the Red Gum).
- The relaxation of minimum vegetation size restrictions applying to exempt clearance.
- The absence of evidence to support the need for and desirability of many of the proposed changes.
- Many of the proposed changes are not in the “public interest” and weaken the public ownership that resides in SA’s native vegetation – as illustrated by the proposed removal of the “public interest” test/declaration in regard to infrastructure related clearance (see 1.6).
- With less than 20% of NV remaining in SA, many of the proposed changes taken individually and as a whole incrementally wind back NV protection by increasing the scope for permitted NV clearance without the need for NVC approval.



- Natural Resources SA regional offices (and/or the NVMU/DEWNR Conservation & Land Management Branch) must be properly resourced to maintain a clear compliance role, including a compliance presence in rural communities in order for the NV offence provisions to have a deterrence impact.

3. *The NVR must be:*

- robust, clearly principled and enforceable;
- science-based and evidence-driven; and
- supported by good governance, resourcing and accountability.

Changes to the NVR should not focus upon “improved efficiency”, “quick and efficient processing” and “rapid assessment and approval process (possibly automated)” at the expense of considered and effective protection of SA’s native vegetation.

The NVR should be designed to support a positive vision for long-term environmental stewardship in SA, consistent with the long-standing concept and principles of ecologically sustainable development.

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