

23 February 2018

Mr Ewan Waller
Independent Reviewer, NSW RFAs
c/o NSW Regional Forest Agreements
Forestry Branch
Environment Protection Authority
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Sydney South NSW 1232

By email: forestry.policy@epa.nsw.gov.au

Dear Mr Waller,

Submission on A Report of Progress with Implementation of NSW Regional Forest Agreements: Second & Third five-yearly reviews July 2004 – June 2014 (Progress Report)

Thank you for the opportunity to comment on the 2004-2014 RFA Progress Report, dated November 2017, prepared jointly by the NSW and Australian Governments.¹

As you are aware, EDO NSW has engaged extensively on forestry management issues over the life of the Regional Forest Agreements (**RFAs**) and receives many calls from individuals and community organisations who are concerned about the implementation of RFAs and the protection of NSW forests.

In 2011, EDO NSW on behalf of the Nature Conservation Council of NSW, prepared a report *If a Tree Falls: Compliance failures in the public forests of New South Wales*, a copy of which is attached to this submission (**Attachment A**). That report highlighted significant deficiencies in the implementation of the RFAs and management of public forests.

In 2013, EDO NSW together with EDO offices in Tasmania and Victoria and NSW, published a report *One Stop Chop: How Regional Forest Agreements streamline environmental destruction* (**Attachment B**). That report identified that protection of forests' biodiversity and threatened species would be of a higher standard if regulated by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) than under the RFA regime.

This finding was driven by the inadequacy of state threatened species protections accredited by RFAs, insufficient provision for adaptive management and dealing with

¹ Available at: <https://www.epa.nsw.gov.au/your-environment/native-forestry/about-public-native-forestry/regional-forest-agreements-assessments/review-regional-forest-agreements>, accessed Feb. 2017.

site specific or new information, inadequate reviews, deficient monitoring, compliance and enforcement and limited third party participation rights.

In 2014, EDO NSW prepared a submission on the remake of the Coastal Integrated Forestry Operations Approvals (IFOAs) (**Attachment C**).² That submission included a number of recommendations designed to improve ecologically sustainable forest management and incorporate a broader, independent expert review of the RFAs to improve their effectiveness.

The ongoing calls received by EDO NSW in relation to alleged breaches of RFAs and associated legislation and ongoing environmental harm suggest that, despite a number of legislative and departmental changes made since our variation reports and submissions have been released, the key criticisms and recommendations remain valid today. We therefore ask you to consider the issues raised in those reports and submissions as part of the current review.

In this submission, EDO NSW has not addressed each of the milestones and commitments discussed in the Progress Report. Rather, we comment on five overarching issues that apply to the RFA review progress, including the development of this Progress Report. Namely:

- 1. RFA reviews have not occurred in the required timeframes**
- 2. Poor community consultation**
- 3. Lack of third party civil enforcement, and a culture of non-compliance**
- 4. Limited data on environmental indicators**
- 5. Need for transparent forestry governance and operational requirements**

1. RFA reviews have not occurred in the required timeframes

As the Progress Report acknowledges, five-yearly reviews were intended as important oversight and accountability mechanisms for the RFAs. However, the NSW and Australian Governments have failed to conduct the reviews in a timely fashion. Writing a decade ago, the Hawke Review of the EPBC Act noted: 'This is clearly unacceptable.'³ This record has not improved since the first review period.

As we understand it, for NSW RFAs:

- the first review was commenced in 2008, 4 years after the period it reviewed;
- scoping for the second and third reviews was not agreed upon until late 2016 – between two and 12 years after the period being reviewed;
- the NSW and Australian Governments agreed to renew the RFAs when, effectively, only one of the three required five-yearly reviews was completed (and prior to the Progress Report being exhibited for public feedback); and
- any scrutiny of NSW RFA performance and trends between 2014-2018, prior to the proposed renewal of the RFAs, appears to be lacking.

² NB: The present submission and comments are made separately to any submission we may make on the concurrent review of NSW Forest Agreements and Integrated Forestry Operations Approvals.

³ A. Hawke (2009), *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* Australian Government, Ch. 10 'Regional Forest Agreements', at 10.19.

The failure to meet any of the review deadlines required by the RFAs in a timely manner has exacerbated a public sense of poor transparency, accountability and governance of the RFAs and the NSW forestry sector.

Recommendation to the independent reviewer: That any RFA renewal process be suspended until the independent reviewer's report is published and fully considered.

Recommendation to the independent reviewer: That the completion of any future independent RFA review processes, in a specified timeframe, be a binding statutory duty on the relevant Commonwealth and State ministers.

Recommendation to the independent reviewer: Consider whether future performance reviews of the NSW RFAs (including for the period 2014-2019, and for any future RFAs) be undertaken jointly by the NSW Audit Office and the Australian National Audit Office, with expert assistance and stakeholder consultation.

2. Poor community consultation

It is clear from the requests for advice received by EDO NSW that many key environmental stakeholders and members of the public and have lost all confidence in the RFA consultation process. This loss of public trust has been driven by:

- an ongoing failure of Government to adequately respond to alleged breaches of RFAs and associated legislation;
- lack of a comparable Comprehensive Regional Assessment process;
- the current simultaneous consultation on the Progress Reports and proposed new RFAs;
- NSW Government announcements of an intention to renew RFAs without completion of formal reviews and without the benefit of an independent reviewer's recommendations; and
- the apparent decision that there will be no public consultation on proposed draft RFAs to replace the existing 20-year agreements (as would be required under other accreditation or assessment processes under the EPBC Act⁴).

The creation of RFAs is highly significant in that they displace other legislative protections for the environment, including the usual environmental safeguards under the EPBC Act, and exclude third party civil enforcement rights. As such, it is vital that the consultation process should be as transparent and submissions should genuinely be considered. The current rushed consultation, with an apparently pre-determined outcome, does not provide for this.

⁴ For example, bilateral agreements accrediting state assessment processes under the EPBC Act. See: <http://www.environment.gov.au/protection/environment-assessments/bilateral-agreements/nsw>.

Recommendation to the independent reviewer: That the independent reviewer's findings be considered prior to any decisions on the drafting of any new RFAs.

Recommendation: That drafts of the proposed new RFAs are publicly consulted on.

3. Lack of third party civil enforcement, and a culture of non-compliance

Almost all environmental and planning legislation in NSW, other than *the Forestry Act 2012*, includes 'open standing' for any person to seek redress in a Court for a breach of the law (known as third party civil enforcement). This has been a hallmark of access to justice in NSW for the last four decades.

Third party enforcement rights provide a safety valve for community concern, are a key anti-corruption safeguard, and serve to reinforce the rule of law. However, the right to take forestry breaches on public land to Court was removed from the people of NSW in 1998, with enforcement placed solely in the hands of the government regulator and Minister.

As the Chief Judge of the NSW Land & Environment Court has noted extra-judicially:

The importance of open standing provisions in ensuring enforcement of environmental laws is evidenced by the fact that, under the EPBC Act, the number of civil enforcement proceedings brought by citizens considerably outweigh the number of government actions, both civil and criminal. This is so, even despite the fact that the EPBC Act does not contain an open standing provision as wide as those contained in New South Wales environmental legislation. Under the EPBC Act, if a person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of the Act... [the Environment Minister or an interested person, such as a conservation group]... may apply to the Federal Court for an injunction.⁵

Third party civil enforcement is a necessary feature of any good regulatory design.⁶ This is particularly the case where Government inaction raises ongoing concerns about appropriate enforcement.

In 2011, during the period of the Progress Report, the NSW Land and Environment Court found the NSW Forestry Corporation to have a culture of non-compliance.⁷ Despite the Court's finding, since third party civil enforcement ended in 1998, there have been only four prosecutions in the NSW Land and Environment Court by the

⁵ The Hon B.J. Preston, Chief Judge Land and Environment Court of NSW, 'Enforcement Of Environmental And Planning Laws In New South Wales', a paper presented to the Law and Sustainability Symposium, Queensland, 11 March 2011, available at: http://www.lec.justice.nsw.gov.au/Documents/preston_enforcement%20of%20environmental%20and%20planning%20laws.pdf accessed February 2018.

⁶ See for example, N. Gunningham and D. Sinclair, 'Designing Smart Regulation', 1999, OECD.

⁷ *Director-General, Department of Environment, Climate Change and Water v Forestry Commission of New South Wales* [2011] NSWLEC 102, [100], [103] (Pepper J).

NSW Environment Protection Authority (**EPA**) against Forestry Corporation for breaches of the IFOA threatened species and pollution licences. NSW Forestry Corporation pleaded guilty in all four cases.⁸

Similarly we understand there have been zero prosecutions brought against Forestry Corporation for breaches of the IFOAs, despite demonstrated non-compliance.⁹

The NSW EPA's compliance activities are further limited by their inability to amend, suspend or revoke a threatened species licence or pollution licence associated with RFAs (this can only be done by the Ministers). To our knowledge, no public policy justification for removing third party civil enforcement rights were made at the time;¹⁰ and the community's experience over the life of the current RFAs has shown that this has contributed to a significant degradation of environmental values within areas covered by RFAs.

The lack of community rights to enforce forestry laws must be seen in light of far stronger rights that otherwise exist, under both the EPBC Act (which the RFAs switch off and replace) and other NSW environmental and planning laws.

Recommendation to the independent reviewer: That the *Forestry Act 2012* (NSW) be amended to remove s. 69ZA.

Recommendation to the independent reviewer: That the *Forestry Act 2012* and any successor legislation restore clear community rights for third party civil enforcement in line with other NSW environmental laws, including planning, mining, water, local government, biodiversity, and pollution laws.

4. Limited data on environmental indicators

Our preliminary review of the environmental indicators in the Progress Report in the time available, indicates that these data should be more comprehensive and consistent so as to demonstrate trends and conservation status over each five-year review period and 2004-2014 as a whole.

For example, Table 19 reports threatened species sightings by Forestry Corporation for 2012, 2013 and 2014 but not the prior seven years of the review period. Also, sightings alone do not assess the threat status of listed species in production forests, nor compare the presence of these species to other parts of species' range/habitat. Other tables and statistics tend to provide snapshots of a particular year (e.g. 2011)

⁸ *Chief Environmental Regulator of the Environment Protection Authority v The Forestry Corporation of New South Wales* [2017] NSWLEC 132, *Environment Protection Authority v Forestry Commission of New South Wales* [2013] NSWLEC 101, *Director-General, Department of Environment, Climate Change and Water v Forestry Commission of New South Wales* [2011] NSWLEC 102, *Environment Protection Authority v Forestry Commission of New South Wales* [2004] NSWLEC 751.

⁹ See for example the 2012-2013 reporting year in which there were 202 breaches of the threatened species licence conditions and 127 breaches of the pollution licence conditions as described in the *EPA NSW Forest Agreements and Integrated Forestry Operations Approvals Implementation Report 2012–2013* (2014), p 30.

¹⁰ For example there is no reference to the removal of these rights in the Bill's second reading speech.

rather than trends over time. The statistics on private conservation agreements date from 2016, which is a recent statistic but is outside the review period.

The Hawke Review of the EPBC Act includes a useful list of key matters that RFA reviews should address (at paragraph 10.25) that the independent review should consider.

On environmental data more generally, while we acknowledge the sustainability supplement in the annual reports of the Forestry Corporation, there is limited proactive ecological and threatened species information reported about forest management and biodiversity in NSW or Australia. For example, there is no Forests chapter in the NSW *State of the Environment 2015*, and the national *State of the Forests* report was last issued in 2013 (the next is due in 2018).

Recommendation to the independent reviewer: That the adequacy of the 'Results of monitoring sustainability indicators' in the Progress Report (and other relevant sections) should be assessed against the key matters at paragraph 10.25 of the Hawke Review (2009).

Recommendation to the independent reviewer: That more proactive and detailed ecological and threatened species information be regularly reported for NSW and Australian forests.

5. Need for transparent forestry governance and operational requirements

We are concerned that under the RFAs, the Commonwealth has accredited NSW laws enacted since the date of accreditation (i.e. *Forestry Act 2012* and regulations) without any transparent or independent verification of how these new laws satisfy Ecologically Sustainable Forest Management (**ESFM**) principles; and without clear assessment of how these criteria are practically applied in each of the RFA regions.

In addition to those issues raised in our **attached** reports and submissions, other reviews have identified concerns with RFAs, most notably the Hawke Review of the EPBC Act. The comprehensive and consultative Hawke Review recommended:¹¹

- that RFAs be subject to rigorous independent performance auditing (including assessment against outcomes to protect biodiversity and continuously improve ESFM), reporting, and sanctions for serious non-compliance;
- that the EPBC Act be amended to enable the full protections of that Act to apply where RFA reviews are not completed on time, where reviews indicate serious non-performance, or provide inadequate information to judge if there is serious non-performance issues

¹¹ Hawke (2009) *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, 'Chapter 10: RFAs', recommendations 38 and 39.

- the Australian Government work with the States to improve the independence of compliance monitoring, and develop processes to make publicly available information about the number and nature of complaints about Regional Forest Agreement operations and the results of any investigations.

Finally, the duties, operations and governance of NSW Forestry Corporation since it transitioned from a state commission to a state owned corporation should be clear and transparent. For example, despite being a state owned corporation, in some ways Forestry Corporation still appears to act in a quasi- government regulator role, such as by granting licences, including to potential competitors. It is not clear that issuing licences is an appropriate or best-practice role for a state owned corporation (as distinct from the EPA, Department of Primary Industries or the Office of Environment and Heritage). In any case the receipt of licensing fees and revenue needs to be clarified and transparently reported.

Recommendation to the independent reviewer: That the substantive comments and recommendations of the Hawke Review of the EPBC Act, Chapter 10 (RFAs), be considered and applied by the independent reviewer and governments.

Recommendation to the independent reviewer: That the NSW Audit Office conducts a review of the governance, performance and operations of the Forestry Corporation under its statutory role as a State Owned Corporation; and a performance review of its RFA obligations.¹²

For further information, please contact me or Dr Megan Kessler, EDO NSW Scientific Director on 9262 6989.

Yours sincerely,
EDO NSW

Rachel Walmsley
Policy & Law Reform Director

Attachment A:

N. Hammond-Deakin, and S. Higginson, *If a Tree Falls: Compliance failures in the public forests of New South Wales* (2011) EDO NSW - [Download PDF](#).

Available at: http://www.edonsw.org.au/forestry_clearing_vegetation_trees_policy.

Attachment B:

J. Feehely, N. Hammond-Deakin and F. Millner, *One Stop Chop: How Regional Forest Agreements streamline environmental destruction*, (2013) Environmental Defenders Offices (Australia) and Lawyers for Forests.

¹² Under Part 3 of the *Public Finance and Audit Act 1983* (NSW).

Attachment C:

EDO NSW, *Submission on the remake of the Coastal Integrated Forestry Operations Approvals (2014)*, [Download PDF](#).

Available at: http://www.edonsw.org.au/forestry_clearing_vegetation_trees_policy.

Summary of recommendations below.

Summary of EDO NSW recommendations on the review of the Coastal Integrated Forestry Operations Approvals (April 2014)

Introductory

Recommendations:

- *The new IFOA should include ecologically sustainable forest management (ESFM) as its principal underlying objective. A further objective should be to maintain or improve environmental values and outcomes in State forests and other Crown timber lands.*
- *Issues of balancing wood supply with the need to maintain or improve environmental values should be the subject of a broader, independent expert review involving the NSW Natural Resources Commission (NRC), to report publicly in the near-term.*
- *The NRC should advise on the IFOA remake, before and after a draft IFOA is exhibited, to provide an arms-length appraisal of environmental effectiveness of any new IFOA, and input on associated protocols, guidelines and monitoring framework.*

Other key changes proposed in the Discussion Paper are addressed below.

Proposed coastal IFOA structure & framework (single IFOA, outcomes-based principles)

Recommendations:

- *The new IFOA must continue to protect regional environmental and heritage variations.*
- *EDO NSW supports clear and enforceable conditions, based on a mix of prescriptive and outcomes-based requirements.*
- *Outcomes-based conditions must be measurable and enforceable, with appropriate resources and agency culture; and must emphasise proactive prevention of damage.*
- *At the next consultation stage, the Government should release a comparison or translation of old and new IFOA licence requirements and environmental safeguards.*
- *FCNSW should be required to document its outcomes-based approach, publish its compliance policies (e.g. a compliance charter), and maintain a non-compliance register.*
- *The EPA should clarify the enforcement mechanisms and operation of forestry protocols, and ensure transparent procedures for any iterative amendments.*

Landscape-based measures and reduced surveys for threatened species

Recommendations:

- *Further information is needed on the extent to which a landscape-scale approach will replace targeted surveys for threatened species, and the processes involved.*
- *Landscape-based approaches should specifically address climate change risks, and cumulative impacts of forestry and surrounding land uses on biodiversity outcomes.*
- *The Government should examine a broader range of measures to improve survey methods based on experience, assisted by OEH, the NRC or independent ecologists.*
- *A precautionary approach must inform IFOA measures to protect threatened species.*

- *New processes should be developed to encourage communities to share their local ecological knowledge with regulators in order to enhance protection and outcomes.*
- *The Government should investigate how ecological survey data can be captured for publication, research and re-use within and outside government.*
- *The review of the Threatened Species Licence framework by the Forest Practices Authority of Tasmania should be conducted jointly with OEH or independent ecologists.*

Offences, penalties and enforcement reforms

Recommendations:

- *EDO NSW supports increased forestry penalties and enforcement tools. This must be accompanied by increased use of tools and prosecutions, and a 'culture of compliance'.*
- *The Government should consider a tiered enforcement system, as in NSW pollution law.*
- *The Forestry Act 2012 should be amended to include 'open standing' for third party enforcement of breaches.*
- *FCNSW and contractors should be jointly liable for breaches of forestry legislation, supported by minimum competency requirements for contractors.*

Streamlining licence contents

Recommendations:

- *Measures to better integrate and align licence conditions must adopt a 'highest common denominator' approach to protecting environmental values and outcomes.*
- *The NSW Government should consider alternatives to removing IFOA provisions on heritage protection (including Aboriginal heritage), grazing, weed and pest control.*
- *The Government should engage with Aboriginal groups on the proposal to remove Aboriginal heritage requirements from licenses and how to best ensure protection.*
- *Further information on proposals for grazing, weed and pest control is needed.*
- *If references to legal obligations under other Acts are removed from the new IFOA, FCNSW staff and contractors must be fully trained and educated on these requirements. The Forestry Act 2012 should also be amended to require greater regulator cooperation.*
- *Clarify and demonstrate how other forest uses will be regulated to avoid loopholes.*

Steep slope harvesting trial

Recommendations:

- *EDO NSW opposes the introduction of a steep slope harvesting trial.*
- *Before any trial is contemplated, a peer review should be undertaken, measures employed to mitigate environmental impacts, and independent assessments undertaken and made available to the public.*
- *Steep slope harvesting could be subject to a broader forestry review by the NRC.*

Mapping technology, surveying, ground-truthing & environmental monitoring

Recommendations:

- *The expanded IFOA monitoring framework must align with key principles of ESFM; and include measurable strategic and detailed environmental aims and outcomes.*
- *Forestry regulators and FCNSW should be required to report on:*
 - *fulfilment of updated and rigorous ESFM criteria and indicators*

- *whether strategic environmental outcomes are being maintained or improved*
- *whether detailed targets are being achieved*
- *how adaptive management is being used to improve environmental outcomes.*
- *The Government should immediately publish the report entitled 'ESFM Criteria and Indicators for the Upper North East, Lower North East, Southern and Eden regions of NSW', referred to in the 10-year IFOA review (2010), to inform public consultation.*
- *Online IFOA information should be presented in accessible and user-friendly forms.*
- *IFOA data should be linked into strategic planning and environmental accounts.*

Delivering the new coastal IFOA

Recommendations:

- *Any new Coastal IFOAs should be reviewed within two years of commencement, to allow an interim assessment of the new outcomes-based approach (if adopted).*
- *The Government should amend s 69G of the Forestry Act 2012 to ensure this.*
- *The Government should clarify expectations regarding content and timing of future statutory reviews of the forest agreements and IFOAs under the Forestry Act 2012.*