



AUSTRALIAN NETWORK for PLANT CONSERVATION INC

ANPC submission on the statutory review of NSW native vegetation clearing rules (Part 5A of the Local Land Services Act 2013)

27 January 2023

The Australian Network for Plant Conservation (ANPC) appreciates this opportunity to make a submission on the statutory review of NSW native vegetation clearing rules (Part 5A of the Local Land Services Act 2013) and provides the following comments and recommendations.

Land clearing data shows that since Part 5A of the LLS Act commenced a significant increase in rates of native vegetation clearing for agriculture have occurred. As quoted by the Environmental Defenders Office, land clearing rates for woody vegetation across NSW have increased from 8,500 ha in 2011 to 27,100 ha in 2017, 29,400 in 2018, 23,400 in 2019, and 13,000 in 2020. Additionally, in 2020, 46,100 ha of non-woody vegetation was cleared for agriculture on rural land. This is clearly unacceptable and having a considerable impact on the conservation of threatened plant species and ecological communities in NSW.

As mentioned in the Discussion Paper, the objective of Part 5A of the LLS Act is 'to ensure the proper management of natural resources in the social, economic and environmental interests of the State, consistently with the principles of ecologically sustainable development'.

Preventing broadscale land-clearing and ensuring clearing 'improves or maintains environmental outcomes' are not included as objectives in the Act (unlike the previous Native Vegetation Act). The new Land Management Framework introduced a system that is less stringent (allowing increased clearing), less evidence-based (with more reliance on self-assessment) and less accountable (with less detailed information available on public registers).

The objectives of Part 5A of the LLS Act need to be more ambitious to reflect the following:

- The 2021 NSW State of the Environment report has confirmed that the number of species considered at risk of extinction continues to rise and permanent clearing of native woody vegetation in NSW has increased about three-fold since 2015 and stands at an average of 35,000 ha cleared each year. Ongoing clearing remains a major driver of species becoming threatened.
- Severe drought, followed by catastrophic fires and unprecedented floods have greatly impacted the NSW landscape.
- broader, global objectives to reduce, halt and reverse forest loss and land degradation by 2030 (Glasgow Leaders' Declaration on Forests and Land Use) or reverse biodiversity loss by 2030 (Leaders Pledge for Nature).
- The federal government's Threatened Species Action Plan 2022, Nature Positive Plan released December 2022 and the commitment to protect 30% of Australia's land by 2030.



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Recommendation: The LLS Act contain clear objectives to reduce broadscale land clearing and a commitment to improve biodiversity outcomes.

The ANPC has significant concerns with the implementation of the Framework.

A 2019 review by the Audit Office of NSW concluded that the new laws may not be responding adequately to environmental risks whilst permitting landholders to improve agricultural activities, and identified significant delays in compliance and enforcement activity to address unlawful clearing. Their conclusion:

“The clearing of native vegetation on rural land is not effectively regulated and managed because the processes in place to support the regulatory framework are weak. There is no evidence-based assurance that clearing of native vegetation is being carried out in accordance with approvals. Responses to incidents of unlawful clearing are slow, with few tangible outcomes. Enforcement action is rarely taken against landholders who unlawfully clear native vegetation. There are processes in place for approving land clearing but there is limited follow-up to ensure approvals are complied with”.

A review of the Framework conducted by the Natural Resources Commission in early 2019 found that:

- Clearing rates have increased almost 13-fold – from an annual average rate of 2,703ha a year under the old laws to 37,745ha under the new laws.
- Biodiversity in 9 out of 11 regions is now at risk.
- Unexplained clearing has increased, with the NRC concluding “compliance frameworks are inadequate and high rates of clearing pose a major risk”.
- The proposed ‘set aside’ areas and areas managed under conservation agreements that were supposed to offset cleared areas – (i.e. the government’s whole justification for relaxing rules and introducing self-assessable codes) – are woefully inadequate being 33,743ha below the minimum required area.
- A Native Vegetation Regulatory Map showing all map categories is not publicly available;
- Compliance frameworks are inadequate and high rates of unexplained clearing pose a major risk; and
- Widespread use of Part 3 of the Code – which relates to thinning – poses a risk to biodiversity state-wide.

A NSW Parliamentary Upper House inquiry into koala populations and habitat in NSW found that the Framework must be strengthened and made a number of recommendations:

- *Recommendation 33: That the NSW Government amend the Local Land Services Act 2013 to reinstate legal thresholds so that its application improves or maintains environmental outcomes and protects native vegetation of high conservation value.*
- *Recommendation 34: That the NSW Government review the impact on koala habitat of the application of regulated land and self-assessment frameworks under the Local Land Services Act 2013.*
- *Recommendation 35: That the NSW Government adopt all of the recommendations made by the Natural Resources Commission in its 2019 Report on Land Management.*



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Recommendation: that Recommendations 33, 34 and 35 from the NSW Parliamentary Upper House inquiry be fully endorsed and implemented.

In August 2020, the Environmental Defenders Office released its report *Restoring the balance in NSW native vegetation law - Solutions for healthy, resilient and productive landscapes*.

The report examines 10 key failings of the Framework relating to the regulation of land clearing and identifies solutions, listed below. It makes specific recommendations for urgent law reform to strengthen protections for native vegetation and biodiversity and to improve implementation, monitoring and enforcement in order to curb the return to broadscale land clearing and provide genuine protection for biodiversity and landscape functions.

1. Curb excessive clearing: Mandate appropriate assessment pathways
2. Clarify where the rules apply: Complete a comprehensive Native Vegetation Regulatory Map
3. Efficient and effective assessment: A clear role for the Native Vegetation Panel
4. Protecting biodiversity: Set clear limits and incentivise stewardship
5. Best practice science-based biodiversity offsetting: Strengthen the rules
6. Vegetation in urban areas: Clarify the rules
7. Track how the laws are working: Improve monitoring and reporting
8. Landscape health: Assess impacts on soil, salinity, and water
9. Integrate climate change considerations: Identify impacts and opportunities
10. Compliance and enforcement: Ensure the laws are implemented

Recommendation: that the 27 Recommendations from the EDO's report be fully implemented.

The Native Vegetation Regulatory Map is a fundamental and essential component of the framework to help determine if and where the rules apply on applicable land. The current Transitional NVR Map is incomplete and insufficient, covering only a small percentage of NSW. The mapping of 'Category 2 – Regulated land' needs to be provided as soon as possible. Permitting landholders to 'self-categorise' unmapped land exposes the framework to misuse and illegal clearing.

Recommendation: the Native Vegetation Regulatory Map be urgently finalised to create the regulatory certainty that is currently lacking.

As with all regulatory regimes, appropriate monitoring and enforcement is vital to ensuring the aims and objectives of the laws are being met. Monitoring of, and reporting on, land clearing is vitally important for understanding how much clearing is occurring across the state and what impacts this is having on biodiversity including threatened native plants. Detailed information would allow the community to understand better where land clearing activities are being undertaken lawfully, and where illegal clearing may be occurring.

Public registers are essential for ensuring transparency and accountability of the Framework as they can be used to monitor cumulative impacts of clearing at the local, regional or landscape scale. Compared to the previous regime under the *Native Vegetation Act 2003* there is a significant reduction in information included in the public registers under the new framework as most clearing is now undertaken as code-based clearing, or via allowable activities provisions. The LLS Act only requires reporting on aggregated



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information for code-based clearing that requires notification or certification, or an annual estimate of allowable activities. The lack of similar detailed information for notification and certification applications under the Code means monitoring and reporting is less transparent.

A lack of effective monitoring was highlighted by the Audit Office, which found that the LLS undertakes only limited monitoring of whether landholders are meeting the requirements of the Code, including whether set-asides are being established and managed appropriately.

Recommendation: the roles and responsibilities for monitoring and enforcing the Code be reviewed.

Recommendation: monitoring of compliance with certifications and notifications to clear, including the establishment and management of set asides, needs to be strengthened, including increasing transparency.

The Audit Office reported that clearing of vegetation on rural land is not effectively regulated and managed because the processes in place to support the regulatory framework are weak and there is no evidence-based assurance that clearing of native vegetation is being carried out in accordance with approvals. The Audit Office also found that there are lengthy delays in assessing compliance because identifying breaches requires satellite imagery to be compared against clearing authorisations and exemptions to identify and investigate potentially unlawful clearing.

Recommendation: processes to report up-to-date data on unexplained clearing every six months should be developed as a priority.

Recommendation: the drivers behind high rates of unexplained clearing should be reviewed and measures implemented to address any issues.

While any person can commence civil enforcement proceeding in the NSW Land and Environment Court to enforce the law, it is the regulator that has the power to enter premises for the purpose of investigating whether the law has been breached and gathering evidence to support criminal or civil legal action. It can be extremely difficult for a member of the public to determine whether observed clearing is lawful because the NVR Map is still not complete and the public registers that record authorised clearing do not, for the most part, identify the relevant property.

There is a lack of notification requirements and inadequate reporting for “Allowable activities” under the approval pathways under the Act which makes it difficult to determine what percentage of ‘unallocated clearing’ is carried out under allowable activity rules.

Recommendation: Only genuinely low impact clearing should be allowed as an allowable activity under the LLS Act.

The Land Management (Native Vegetation) Code is an inappropriate regulatory tool for managing impacts on biodiversity in rural areas. It permits broadscale clearing without any robust environmental assessment or approval requirements (although notification or certification may be required). There is limited ability for LLS to refuse certification and prevent unacceptable and cumulative impacts on threatened species. The most recent figures (31 October 2022) indicate that total hectares approved for clearing under the Codes is more than 780,000 ha, (but not all approved clearing has been carried out).



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Purported environmental safeguards in the Native Vegetation Code are inadequate, meaning that the Native Vegetation Code does not adequately manage the environmental risk associated with substantial amounts of clearing undertaken with limited environmental assessment and oversight.

Code-based clearing cannot be undertaken on category 2 sensitive land. While this provides some protection for environmentally sensitive areas, the scope of category 2 sensitive land is limited.

Recommendation: No clearing should be permitted for species and ecological communities considered under the NSW Biodiversity Conservation Act to be Serious and Irreversible Impact (SII).

Species and ecological communities considered to be SII are defined by sound scientific principles and cannot tolerate further loss. All SII species and ecological communities must be added to the Native Vegetation Regulation map as a red flag (no clearing permitted).

Recommendation: Category 2 sensitive land should include vulnerable and endangered threatened ecological communities, in addition to critically endangered ecological communities, so they too are off-limits to code based clearing.

The use of an arbitrary set ratio for determining set asides requirements under the Native Vegetation Code is not ecologically sound.

Recommendation: The Native Vegetation Code should specify that the vegetation to be set aside should be in the same condition (or of ecological equivalence) as the vegetation being cleared, and what condition the vegetation should be in.

The Native Vegetation Code states that clearing is not authorised under the Code if the person who carries out the clearing harms a threatened species, and that person knew that the clearing was likely to harm the species. Framed in this way, ignorance can provide an excuse; a person could claim they did not know clearing was likely to harm the species.

Recommendation: Landholders should be required to 'ought reasonably to know' that clearing will harm a threatened species.

Recommendation: Landholders be provided with more information on what threatened ecological communities and threatened species do or may occur on their land. These landholders should be targeted by LLS and DPE with easily accessed onground and online extension activities and tools, eg. regional vegetation guides and native plant identification.

Maximum clearing caps under the Native Vegetation Code to prevent excessive clearing in the initial three years have expired.

Recommendation: The caps on maximum clearing under the Code be revised and enforced.

The Native Vegetation Panel was established to assess and determine clearing applications for clearing on rural land that cannot be carried out as an allowable activity or under the Native Vegetation Code. However, since the commencement of the LLS Act, only one application has lodged and been determined by the Panel. It is hard to believe that all land clearing that has taken place on rural land since the Framework commenced has been undertaken as an allowable activity or under the Code. This raises



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questions as to whether the Panel and the overall Framework and approval pathways are operating as intended.

Given the high land clearing rates, this is concerning given the alternative approval pathways (allowable activities provisions and the Code) are less rigorous in terms of environmental assessment requirements. It also suggests that the scope of allowable activities provisions and the Code are too broad or open to misuse.

Recommendation: the Native Vegetation Panel application process be reviewed and strengthened.

The review of Part 5A of the LLS Act should have been undertaken in conjunction with the review of the Biodiversity Conservation Act, as explicitly stated in Section 212(2) of the LLS Act.

When introduced it was acknowledged that the Land Management and Biodiversity Conservation reform package “may lead to some increased clearing at a property scale, but that checks and balances such as set asides, biodiversity offsets and investment in private land conservation would ensure the impacts of that clearing are managed”.

Recommendation: the review of the Biodiversity Conservation Act commence immediately.

Thank you for this opportunity.

Yours sincerely,

Dr Tony Auld
President

On behalf of the Management Committee of the Australian Network for Plant Conservation Inc.