



15 December 2022

Part 5A LLS Act Statutory Review
Policy Division
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Dear Madam/Sir

Subject: Review of Local Land Services Act 2013 native vegetation provisions

Lake Macquarie City Council staff wish to comment on the operation of the native vegetation regulatory provisions of Part 5A of the *Local Land Services Act 2013* (LLS Act) and the associated discussion paper prepared to inform the statutory review of this Act.

Local governments are important participants in vegetation management and land use regulation and have a strong interest in the operation of the LLS Act. Key roles for local government are:

1. As a regulatory and consent authority in relation to development and vegetation regulated under the *Environmental Planning and Assessment Act 1979*.
2. A local strategic land use planning authority implementing land use zoning and local vegetation and biodiversity policy.
3. Dealing with approvals that may relate to native vegetation clearing subject to Local Land Services approval or compliance requirements.

A significant area of rural land within the Lake Macquarie local government area is subject to the provisions of Part 5A of the LLS Act, and the submission is based on experience since the commencement of the relevant sections of the Act in 2017.

General comments

Overall, the land management reforms of which the LLS Act native vegetation provisions are part, have brought significantly increased regulation complexity and administrative difficulty with little apparent benefit. Specific problems are caused by often unclear interaction between the provisions of the LLS Act provisions, *Biodiversity Conservation Act 2016* and the *Environmental Planning and Assessment Act 1979*, including the operation of State Environmental Planning Policy (Biodiversity & Conservation) 2021 – Chapter 2. This is further complicated by the provisions that

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allow clearing under the *Rural Fires Act 1997* and Private Native Forestry arrangements.

A key concern is the use of standard instrument local environmental plan zoning as a basis for regulating native vegetation clearing. This is an inappropriate basis for determining native vegetation policy and regulation, and results in significant variation between local government areas. For example, RU6 Transition zoned land is particularly inappropriate for regulation by Local Land Services and should be excluded from the operation of Part 5A of the LLS Act. An objective of this zone is “to protect and maintain land that provides a transition between rural and other land uses of varying intensities or environmental sensitivities”, and typically this land has either conservation or development opportunities. Furthermore, the majority of RU6 land in Lake Macquarie supports high quality native vegetation, it is not suitable or used for rural land uses.

In its submission to the NSW Government dated 27 June 2017 on the exhibited draft NSW Biodiversity Conservation and Land Management Reforms, Lake Macquarie City Council requested that the local government area be included in the list of urban LGAs where the Vegetation SEPP will apply to the whole LGA, thereby simplifying the administration of native vegetation regulation within the City. This approach is still appropriate.

Inconsistent, incorrect and unavailable native state vegetation mapping is also problematic. Inconsistencies in vegetation mapping between state and detailed local scale maps may cause confusion and administrative inequity for landowners.

Local government authorities have a compliance role in relation to native vegetation cleared as a result of development, and this often overlaps with compliance undertaken by the Department of Planning and Environment, and also needs to involve Local Land Services. Having three organisations involved in overlapping compliance and regulatory responsibilities is inefficient and problematic. It would be far preferable for regulation and compliance to operate under one piece of legislation for native vegetation, namely the *Environmental Planning and Assessment Act 1979*.

Inconsistency and inequity between the different native vegetation approval pathways and requirements of different legislation is a significant issue affecting the credibility and public understanding of the regulatory framework, and consequent achievement of policy outcomes. Measures should be introduced to ensure that local strategic land use plans and local strategic planning guidelines are considered in native vegetation regulation, such as local native vegetation retention targets.

Responses to specific discussion paper questions

Responses to each of the questions in the exhibited discussion paper are provided below.

1. *Is it clear how different land use zonings are defined and treated in the Land Management Framework?*

It is inappropriate for land use zones to be used as a basis for regulating native vegetation. These were established for a different purpose (ie to establish the permissibility of land use), and in many circumstances do not reflect the importance or the issues associated with the vegetation that may occur on that land. The use of zoning also causes significant inequity in terms of the process and land management outcomes across the landscape.

It is inappropriate for the LLS Act to be regulating clearing on land that is not being used for rural purposes. This includes land that supports good quality native vegetation or small allotments being used more for rural living.

An alternative approach to determining native vegetation approval requirements would be preferable that has regard to the ecological benefits of protecting native vegetation and the public interest.

The intention of the Land Management Framework is to have different rules for clearing native vegetation for rural and urban land. This is an inconsistency that is difficult to justify and causes confusion in LGAs where the nature of land use is generally urban or rural lifestyle rather than rural production.

2. *How easy to understand are the land categories and the native vegetation clearing arrangements that apply under each category? What, if any, changes are needed?*

Without a completed and fully functioning native vegetation regulatory map, it is difficult to determine what requirements apply. The system has been established to rely on mapping, yet the mapping is not accurate enough to be suitable for clearly providing landowner guidance. A qualitative approach based on site specific conditions may be a more practical and realistic alternative.

There is confusion regarding the:

- categories particularly since there are three divisions in category 2
- terms “exempt” and “excluded” land, and
- “draft” and “transitional” map.

3. *How useful is the Native Vegetation Regulatory Map as a tool for categorising private rural land? What, if any, other tools could help landholders make decisions about their land?*

The Native Vegetation Regulatory Map is inherently problematic for categorising rural land, and fails to consider a range of matters that are important such as habitat connectivity, needs for rehabilitation and restoration, and other factors such as catchment protection. A more integrated approach would be more effective.

The Map is undermining the system because it has not been completed for the majority of the State. It is too complex for the average person to interpret from the map which rules apply.

The Map is consistent with the Biodiversity Values Map in some places and not in others leading to a disjointed approach to management of biodiversity values across the State. Native vegetation can be removed in rural zones before a Development Application is submitted leaving a loop hole in the process.

In order to rely on mapping as a regulatory tool, it needs to be:

- accurate at the local scale and reflect on ground conditions
- kept up to date
- self-explanatory and easy for general public to interpret, and
- able to be reviewed and corrected in a rigorous, quick and efficient way.

4. *How comfortable and capable are landholders in self-assessing their land according to the land categories? What, if any, improvements to the Transitional Arrangements should be made?*

Experience suggests that many landholders probably do not undertake realistic self-assessment of land categories for the purpose of regulation. This is made more problematic due to native vegetation mapping limitations.

There are serious doubts about the ability of landholders to adequately self-assess their land and identify biodiversity values.

The ability for land holders to clear Category 1 – Exempt land without authorisation or consideration fails to protect threatened species and biodiversity values.

Experience also suggests the LLS officers are very helpful and provide a valuable extension service to landowners to assist them through this complex system.

5. *Do each of the approval pathways for native vegetation clearing provide landholders with adequate options while managing environmental risks? Please give reasons and/or examples to support your answer.*

Approval pathways for native vegetation clearing are variable from site to site as well as depending on the reason for the clearing. Multiple options are problematic. In particular, the system has created significant inequities based on the approval pathway. Different requirements can apply to clearing of native vegetation on land with the same environmental values.

It takes significant time and effort to work through the maze of approval pathways. It is difficult to ascertain how environmental risks being able to be managed within such a complex framework.

6. *Is it clear what native vegetation clearing activities are “allowable” i.e. don’t need notification or approval?*

It is clear that allowable activities do not require approval, however, these change according to the category of the land which leads to confusion and misinformation in rural sectors.

Whilst it is understood that there need to be practical arrangements in place for rural landholders to undertake regular maintenance activities, allowable activities:

- pose risks to threatened species/ communities
- fail to protect biodiversity values, and
- are subject to wide interpretation.

Improved clarity would be preferable. Allowable activities are likely also to vary from area to area, and would be improved through having a single piece of legislation that regulates native vegetation clearing, rather than multiple legislation, regulation and other regulatory instruments.

7. *What, if any, other native vegetation clearing activities should be “allowable?” How could the requirements for allowable activities be improved?*

“Allowable activities” provisions that enable vegetation clearing should vary from region to region according to the environmental and land characteristics of that region. What is allowable is dependent upon which activities are regarded as rural and those that constitute development under the *Environmental Planning and Assessment Act 1979*, and this is may not be clear under the existing arrangements. For example, clearing for some exempt development under the *Environmental Planning and Assessment Act 1979* may not be permitted under the LLS Act and an alternative approval pathway may be required.

What is an “allowable activity” should be clarified based on the policy objectives for native vegetation regulation, which can be clarified by amending the objects of the legislation, and improving consistency of approval processes between the applicable legislation.

8. *How effective are the requirements for establishing, managing, monitoring and reporting for set asides?*

It appears too early to make any judgement about the effectiveness for managing, monitoring and reporting. However, experience suggests that this is most likely to be highly ineffective. The set aside areas must be secured by legally enforceable instruments that are also recognised within local environmental plans if they are to be secured in the long term.

9. *What are the barriers to using the Native Vegetation Panel approval pathway and how could this pathway be improved?*

The lack of applications being referred to the Native Vegetation Panel suggests that the overall regulatory system is flawed, and has been established in a way that is inconsistent with the need for it. A more effective alternative would be for this role to be given to local government, with more resources to be provided to local government for administrative purposes.

10. *Is the public register for reporting on native vegetation certificates and notifications accessible, and is the information useful and easy to understand? What if any improvements to reporting should be made?*

The public register is not easy to use. This should be a spatially based GIS system that can be integrated with other spatial databases such as used by local government authorities.

For full transparency there should be publicly accessible compiled map for each region showing areas that are to be set aside and those approved for clearing in a way that the relevant properties can be easily identified.

It is quite a task to ascertain whether observed clearing was lawful or not. Such a map would facilitate public scrutiny and assist other government authorities.

11. *How adequate are the penalties for offences for illegal clearing and breaches of set aside obligations? Please give reasons and/or examples for your answer.*

Penalties in the LLS Act should be consistent with those in the *Environmental Planning and Assessment Act 1979*. Consideration should be given to imposing penalties for unauthorised land clearing based on the expected monetary gain resulting from the activity.

Prosecution is difficult and expensive. The costs of resourcing enforcement action are prohibitive. Confusion and responsibility shifting between governments is common.

Comprehensive change requires that incentives need to be in place for maintenance/retention of native vegetation as well as disincentives for clearing.

12. *To what extent does the public have confidence in compliance and enforcement of native vegetation regulation? How could public confidence be improved?*

Experience suggests that public confidence in compliance and enforcement of native vegetation is low.

Council has reported unauthorised clearing to the regulator and with no feedback on outcomes. Council does not have the resources to ascertain which government department approved the clearing – whether the clearing is likely to be lawful and hence whether further investigation is required. The complexities of the system and difficulties in prosecution have disincentivised reporting of unauthorised clearing.

It is widely recognised that the risk of being prosecuted for unauthorised clearing is low and the fines are affordable for large companies and the wealthy.

Public confidence could be improved by an active and high profile regulator that provides regular feedback on outcomes and achieves results.

13. *Overall, how relevant are Part 5A and Schedule 5A and Schedule 5B of the Local Land Services Act in achieving the social, economic and environmental interests of the State?*

No clear criteria exist to determine whether Part 5A of the LLS Act is achieving the social, economic and environmental interests of the state. However, it appears that native vegetation loss is continuing, biodiversity loss is accelerating, and land degradation continues. Therefore, there are doubts as to whether the LLS Act provisions have served the state well. As an example, the provisions of Part 5A appear to undermine the objectives of important NSW policy initiatives such as the NSW Koala Strategy 2022. This suggests that a broad review of the appropriateness of the current regulatory regime should be undertaken.

Although the discussion paper and the summary document on exhibition both state that *“the policy objective of the native vegetation provisions in the Local Land Services 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’* this is misleading. The Act identifies this as one of nine legislative objects. It is not correct to state that this is the “policy” objective of Part 5A of the LLS Act. It is a significant failure of

the legislative package that nowhere are the policy objectives of the native vegetation provisions clearly stated. This must be recognised in the review.

A more realistic question upon which to judge the effectiveness of the native vegetation provisions would be the extent to which it has achieved ecologically sustainable land clearing.

It is noted that land clearing statistics have been reported in the discussion document, however, this is not presented in a way that allows native vegetation gains to be assessed against native vegetation losses. It should also be noted that regrowth takes many years to reach a condition equal to mature forest or other ecosystem.

Land clearing exacerbates climate change and biodiversity loss. *Part 5A and Schedule 5A and Schedule 5B of the Local Land Services Act* appear to be aimed at facilitating clearing for rural uses rather than achieving environmental outcomes.

14. What if any other issues should be considered as part of the statutory review of Part 5A and Schedule 5A and Schedule 5B of the Local Land Services Act?

A range of additional issues should be considered as part of the statutory review including:

- The desirability of introducing a specific object of the LLS Act to guide native vegetation approvals such as “achieving no net loss of native vegetation in NSW”, and “requiring regulatory approvals to quantify and consider carbon emissions associated with the granting of native vegetation approvals, with a view to achieving net zero carbon emissions”.
- Reviewing how the regulatory process can be made simpler with consistent requirements applicable for all types of development and land use.
- Review how incentives to retain/maintain native vegetation could be implemented.
- Regulatory requirements that should apply to restored and rehabilitated land.
- More effective regulation of vegetation clearing authorised under other natural resource and land management legislation, including the *Rural Fires Act 1997*, *Water Management Act 2000*, *Electricity Supply Act 1995* and other legislation identified in Section 600 of the LLS Act.
- Publish spatial data on clearing and set aside decisions a more user-friendly way.

Recommendations

The following recommendations should be considered in the review of Part 5A of the LLS Act:

1. There should be a consistent approach to regulation of clearing native vegetation that is irrespective of land use zoning. Standard instrument local environmental plan zones should be removed as the basis for regulating native vegetation.

2. Native vegetation clearing and development should be regulated under one legislative instrument, preferably the under the *Environmental Planning and Assessment Act 1979* as was the case in the past.
3. An additional object should be introduced into the LLS Act to clarify the policy objective for native vegetation. The policy objective should be no net loss of native vegetation in NSW and protection of native vegetation at the state, regional and local scales.
4. The native vegetation regulatory framework should be amended so that it is not so reliant on the production of a native vegetation regulatory map and self-assessment.
5. The system should be made more transparent with the publishing of spatial mapping relating to set aside areas and areas that are approved for clearing or can be cleared for each region and LGA.
6. Exclude Lake Macquarie LGA and other similar urban and coastal areas from the operation of the LLS Act native vegetation provisions.
7. Approvals for native vegetation clearing should be required to consider local strategic land use plans and local strategic planning guidelines including local native vegetation retention targets, maintenance of native vegetation corridors and biodiversity objectives.

Thank you for your consideration of the above matters.

Should you require further information, please contact me on +61 2 4921 0131.

Yours faithfully,

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