

19 December 2022

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

Bathurst Regional Council Submission into the Statutory Review of the native vegetation provisions (Part 5A and Schedule 5A and Schedule 5B) of the Local Land Services Act 2013

1. Is it clear how different land use zonings are defined and treated in the Land Management Framework? What, if any, changes are needed? Please give reasons for your answer.

There is a general perception by many landholders that land zoned RU1 Rural does not require an approval for the clearing of native vegetation. Anecdotally, and based upon Council's experience, this is common in landholders who were previously not rural landholders, or those about to undertake development activities on the land. In these instances, clearing has occurred outside the provisions of the framework, or would have required consent due to being in association with an activity that required development consent under the Environmental Planning & Assessment Act (EP&A Act). Council has witnessed a decrease in the cover of native vegetation in the Local Government Area that does not yet appear to be offset by an increase in other locations.

The wording of the Local Land Services Act (LLS Act), in particular Part 5A, section 60A, 60D and 60E, is onerous in the way that identifies land that the part applies to. This may lead to the assumption that clearing on any land that is zoned rural and not mapped is classed as exempt and does not require any further action prior to the undertaking of clearing activities. Part 5A should be framed primarily in a way that identifies the land that it does apply to, the triggers for additional action for rural land management and then any exemptions that may apply.

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?

The land categories and the native vegetation clearing arrangements that apply are not easy to understand. The land categories, Category 1 – Exempt Land and Category 2 – Regulated Land (and vulnerable or sensitive lands) are mapped either through a draft map which only covers 11 local government areas, and a transitional map. The draft map is based upon ground information relating to the sensitivity or vulnerability of the vegetation or local landscape. Notwithstanding it is a broad brush that tries to provide some freedom for landholders to manage their land within certain boundaries. The draft map does not apply to the Bathurst Regional Council LGA. The transitional map applies to the parts of the state not included in the draft map, including the Bathurst LGA.

The transitional map is a coarse assessment of land that is classified as category 2 – regulated land and does not consider other freely available and reliable information including confirmed threatened species records, threatened ecological communities, critical habitat or critically endangered populations. It is based primarily on steep, highly erodible landscapes and key waterways. There is a large amount of freedom in the interpretation of the map for a particular landholding which allows, according to section 60F(4), a person to act based upon “what a reasonable person would believe about the matter”. Section 60F(4) potentially provides an ignorance defence for a breach of the LLS Act. The provision for the inclusion of sensitive land is based upon it being mapped as category 2 – regulated land. Land not mapped as such is, according to section 60I(3), to be category 1 – exempt land, regardless of the on-ground conditions. This has resulted in the clearing of native vegetation, habitat and threatened ecological communities that is to be protected through other legislation and approval pathways.

Category 2 land should consider known on-ground conditions that are mapped or identified through other acceptable processes, including Biodiversity Values Map, Atlas of Living Australia, SEED mapping, Waterfront land e-tool, Areas of Regional Koala Significance or if a local authority has information or reports to identify other sensitivities such as koala populations or Critically Endangered Ecological Communities.

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 a coarse method of assessing the sensitivity of landscapes and does not consider an array of other NSW Government map tools to categorise rural land. It is recommended that the Native Vegetation Regulatory Map include other accepted and/or ground-confirmed mapping data such as Biodiversity Values Map, Atlas of Living Australia, SEED mapping (for Threatened Ecological Communities), BioNET (for the presence of threatened species) Waterfront land e-tool to identify riparian land and Areas of Regional Koala Significance to identify important koala habitat.

There should also be a tool or check list whereby landholders can undertake an assessment of the vegetation proposed to be cleared, including the presence of native fauna, hollows, nests and potential cultural heritage sites.

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? Please give reasons for your answer.

Council's experience is predominantly with landholders clearing for proposed development activities. There appears to be a general confusion between allowable activities, code clearing and clearing that requires consent. Unfortunately, this has meant on at least three occasions in the Bathurst LGA whereby landholders have cleared land thinking that it was allowed only to be later informed that it required consent as it was in preparation for a new dwelling. On each occasion, the Biodiversity Offset Scheme was triggered, and each landholder was required to pay biodiversity credits before the consent was obtained. In two of the instances the landholder was then unable to proceed with the development and the credit liability stayed with the land and subsequent development activity.

Anecdotally, the impression that landholders have is that there is a lot of leeway in clearing allowed before any approval process is needed. Where Council has passed on complaints to the Environment Line, the activities that were cleared under allowable activities were later deemed to be code clearing activities. Council is unsure if any enforcement was undertaken for these activities that occurred outside the land management notification and approval pathway.

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.

Category 1 – exempt land categorisation and terminology infers that the clearing of native vegetation does not require approval. Clearing under Category 2 – regulated land lists allowable activities which also infers that clearing for a range of purposes can be undertaken without further safeguards or mitigation in place, and is based upon the judgement of the landholder. There is no verification process to ensure the clearing is an allowable activity. This has the potential to result in net environmental harm or degradation.

Clearing that is undertaken in accordance with the Land Management (Native Vegetation) Code 2018 is generally undertaken with heavy machinery with little regard for soil disturbance and erosion control. Evidence has been provided to Council that shows trees that have been bulldozed and stacked for future burning. The soils have been left scarified of vegetation with little ground cover. Soil disturbance may be high and prone to wind and rain erosion. If these activities were done as part of a development which has consent under the Environmental Planning & Assessment Act it would be contrary to conditions of consent with rectification works enforceable. Council is not aware that landholders have been required to undertake rectification works for such damage caused through code clearing of native vegetation. Part 1, of the code also provides guidance for avoiding impacts to threatened species and critically endangered vegetation communities (CEEC).

However, there is a defence under section 9 of the code for landholders who unknowingly kill or harm threatened species, but do not require landholders to undertake a minimum level of inspection of clearance to ensure that threatened species are not within the native vegetation being cleared, as would be required on development sites. Furthermore, section 19 provides protection for CEEC but only applies to communities that are, "in the opinion of the Local Land Services" that "the vegetation forms a functioning ecological community that is likely to be viable over the long term." Though section 19 provides some guidance as to what "viable over the long term" is, this level of assessment is vague and contrary to the intentions of the Biodiversity Conservation Act (2016) under which the ecological community is listed.

Council is not aware of any instance of the need for Native Vegetation Panel vegetation approval for clearing undertaken in the LGA, indicating that this requirement is rarely required or that local authorities are not informed of the results of this approval pathway.

6. Is it clear what native vegetation clearing activities are "allowable" i.e. don't need notification or approval?

The activities are perhaps clear however uncertainties may exist in the definition of these activities. Definitions make statements that the vegetation cannot be or likely to comprise threatened species, threatened species habitat or be part of a threatened ecological community (TES) yet do not provide clear access to information as to whether the vegetation on the landholding is home to threatened species or a TEC. This is where reference to SEED or BioNET data would be valuable to ensure that landholders are making informed decisions and removing the potential for an ignorance defence where a breach has occurred.

The minimum extent necessary under Schedule 5A section 7 is not defined and relied upon the determination of the landholder, stating only "clearing to the minimum extent necessary for that purpose". Council worked with a landholder who was requesting Council clear native vegetation along a road reserve to prevent any future tree or branch falling on the boundary fence. Due to it being assessed as a High Conservation Value Roadside and an Endangered Ecological Community (now classed as critically endangered), and little evidence or history of a high risk, Council only allowed for the clearing of up to 1m on the road reserve to facilitate the construction of the replacement fence. The landholder objected to this and then cleared between 15m and 20m of the vegetation community on his land for the purpose of fence line construction and maintenance. Council considered this clearing excessive, but the landholder argued it was within the minimum extent necessary.

Given the overlap between the allowances and the requirements of the Local Land Services Act, Rural Fires Act (including the recently added Boundary Clearing Code), Environmental Planning & Assessment Act and the Biodiversity Conservation Act, there is much confusion from landholders, developers and consultants around what constitutes an allowable activity. This is particularly confusing when an internal fence that can be maintained under the LLS Act is proposed to be a boundary fence as part of a subdivision. Though the physical infrastructure remains, the nature of allowable clearing for that asset changes, potentially triggering EP&A Act and BC Act issues. Council would object to allowing internal fences to be maintained to the level of an external fence; rather, the objectives and application of the four pieces of legislation should be consistent.

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

Bathurst Regional Council objects to further activities being included in the allowable activities list, as per Schedule 5A Part 2. There are sufficient provisions under the Rural Fires Act, The Environmental Planning & Assessment Act and Electricity Supply Act for the maintenance of essential property infrastructure and conducting agricultural activities. Council would argue that further oversight be placed on existing allowable activities such as a notification system similar to an exempt development notification process which would allow Local Land Services to better track native vegetation clearing. This process would also help LLS determine where proposed activities would require additional assessment or approval by the Native Vegetation Panel prior to the clearing occurring. Council considers activities that result in landscape change regardless of the purpose should always require an assessment and approval process.

8. How effective are the requirements for establishing, managing, monitoring and reporting for set asides? Please give reasons for your answer.

Bathurst Regional Council is not aware of these being used in the local government area. It should be noted that Council/s do not receive notification from Local Land Services regarding clearing that is in accordance with the code or approval, nor is Council informed of the outcome of investigations. As Council is not aware of land that has been set aside, there is a potential for conflict with future development approvals ,in particular rural subdivisions and rural dwellings.

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

Bathurst Regional Council considers that if a native vegetation clearing activity results in triggering the Biodiversity Conservation Act (BC Act) under the Environmental Planning & Assessment Act, then the same clearing activity under the Local Land Services Act should require the Native Vegetation Panel Approval. The purpose of the BC Act is, amongst others, to conserve biodiversity, and to (section 1.3(k)) “to establish a framework to avoid, minimise and offset the impacts of proposed development and land use change on biodiversity” and (1.3(l)) “to establish a scientific method for assessing the likely impacts on biodiversity values of proposed development and land use change”. The objectives of the LLS Act are similar: (section 3(e)) “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” and (3(f)) “to apply sound scientific knowledge to achieve a fully functioning and productive landscape”. The science that underpins the assessment of impacts from an activity or development are the same for both pieces of legislation. The impacts to biodiversity conservation from Allowable Activities or code clearing under the LLS Act are contrary not only to the purpose of the Act with regards to ecologically sustainable development and a science based approach, but are contrary to the objectives of the BC Act which are to maintain biodiversity and ecosystems for future generations. Council recommends that activities that would require approval under the Biodiversity Conservation Act should require Native Vegetation Panel approval if conducted under the Local Land Services Act.

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? Please give reasons for your answer.

Bathurst Regional Council is aware that the register exists. However, as Councils are also a consent authority for the removal of native vegetation, an improvement would be to notify other authorities of certificates or notifications to ensure that Environmental Planning & Assessment Act approvals do not conflict or override those issued under the Local Land Services Act

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.

Bathurst Regional Council is unaware of penalties being issued in the Local Government Area or other areas. The issuing of penalties is a deterrent to the landholder involved and publicising the issuing of penalties can be an effective deterrent for others. The community may also feel that the Act is not strict enough if they do not hear about penalties being issued for offences. Council recommends that the issuing of penalties is better communicated through existing channels such as the Local Land Services newsletter and local traditional and social media.

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

Bathurst Regional Council is unaware of any enforcement action for clearing of native vegetation in the Local Government Area. Council has referred three complaints to the NSW Environment Line based upon evidence provided to Council. In all three examples, no enforcement was undertaken even though the clearing was undertaken outside the provisions of allowable activities or code clearing. Council communicated the response to members of the community who shared the concerns that apparent breaches of Schedule 5A are not being enforced. Council recommends that there is stronger oversight over existing allowable activity or code compliant pathways, to undertake audits of clearing and to better communicate with local government and the community when enforcement is undertaken.

In experience of Bathurst Regional Council, there is little confidence in compliance and enforcement through this approval pathway.

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? The other questions in this Discussion Paper consider the individual provisions of the Local Land Services Act in more detail and may provide you extra context when answering this question.

The provisions of the Part 5A and Schedule 5A and Schedule 5B of the Local Land Services Act provide avenues for landholders to conduct activities that may be contrary to the local, regional or state interests. The Local Land Services Act allows for landholders to undertake assessment and subsequent activities without the oversight that the same activities would require under the Environmental Planning & Assessment Act. This may result in a negative impact being felt by those outside the property or local area which may be of regional or state significance.

The provisions of Part 5A and Schedule 5A and 5B allow some clearing of native vegetation without regard to threatened species or ecological communities and so do not protect the environmental interests of the State.

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? Please give reasons why they should be considered in your answer.

Bathurst Regional Council considers the current provisions of Part 5A and Schedule 5A and Schedule 5B of the Local Land Services Act allow for an increase in the clearing of native vegetation at a time where there is an increased need to maintain the extent and quality of ecosystems to ensure the resilience of the environment and ecological communities in a rapidly changing climate.

Council reiterates that the Local Land Services Act should not be used as a loophole to conduct activities that would require approval, mitigation, offsetting or refusal under other legislation. Council argues that the impact of the activity should be the trigger for the approval, not the activity itself. This is currently the case for entry into the Biodiversity Offset Scheme. Legislation should not provide a loophole or easier pathway for the permanent destruction of native vegetations, habitat or ecosystems.

Local Land Services
19 December 2022

Council acknowledges that additional bureaucratic oversight may cause issues for landholders and consent authorities. Readily accessible mapping, threatened species and ecological community information available via existing NSW Government mapping portals should be used to quickly determine if activities are allowable in that location and whether additional notification or approval is needed. Additional resources should be provided to ensure that there is a speedy approval pathway where required. All activities should be recorded and reported to ensure appropriate monitoring and regulation.

All approval pathways should be based upon the precautionary principle – where there is no information then further information should be sought prior to granting approval. The current process which is based upon the transitional map ignores other environmental information. The wording of Part 5A and Schedule 5A and Schedule 5B of the Local Land Services Act does not clearly articulate the responsibility of landholders to seek out further information, avoid and mitigate where possible and act with the environment in mind when undertaking land management activities.

Yours faithfully



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