Friends of Grasslands

supporting native grassy ecosystems

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Dear Sir/Madam

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

Friends of Grasslands (FOG) is a community group dedicated to the conservation of natural temperate grassy ecosystems in south-eastern Australia. FOG advocates, educates and advises on matters to do with the conservation of native grassy ecosystems, and carries out surveys and other on-ground work. FOG is based in Canberra and its members include professional scientists, landowners, land managers and interested members of the public.

FOG welcomes the opportunity to participate in the review, especially in looking back over recent years when the country suffered from severe drought followed extreme fire and then years of heavy rain. Each phenomenon impacts on biodiversity in different ways. At the same time, there appears to have been extreme rates of vegetation clearing. While in the public mind, clearing has impacted koalas and other iconic species, many other flora and fauna species and ecosystems have been highly negatively impacted. We hope that the panel will take a broad view of the role of LLS in vegetation clearing.

We have a good relationship with the south east office of LLS. The staff are committed, approachable and helpful.

However, we find the discussion paper disappointing. Others, with whom we have discussed the paper, have stated that the paper seems solely concerned with land clearing. The paper states that the objectives of Sections 5A, 5B and 5C are "to ensure the proper management of natural resources in the social, economic and environmental interests of the State, consistent with the principles of ecologically sustainable development". We believe, and we hope the panel considers, that there should be a discussion of whether LLS has lived up to this objective. The paper does not satisfactorily define and explain (with practical interpretive examples) what this statement means, despite the centrality of the principles of ecologically sustainable development (ESD) to the LLS Act as confirmed by its inclusion in Part 3 "Objects of Act", and, under Part 5A, sections "60T Responsibility for preparation and making of codes" and "60ZF Obtaining approval for clearing of native vegetation".

The discussion paper, despite including nine (9) references to ESD, instead of at the very least providing a reiteration of the full legal definition it provides a somewhat abbreviated and therefore overly simplified version and like the LLS Act itself leaves it to readers to look it up in section 6 (2) of the Protection of the Environment Administration Act 1991. For the benefit of readers of this submission and the public record we include the full legal definition in a footnote below (a). Clearly, such a term covers maintaining and improving biodiversity and ecological integrity of ecosystems, and while the term "biodiversity" appears some 69 times in the paper, there did not seem to be a mention of what LLS is doing to maintain and recover it.

We came to this conclusion before having read the NSW Audit Office's *Managing native vegetation* report of 27 June 2019 (https://www.audit.nsw.gov.au/our-work/reports/managing-native-vegetation) whose findings we share. We also found that LLS' response to the report itself was very non-committal. We believe that the paper should have addressed the auditor's concerns. Certainly, the panel should pay close attention to these.

We believe a weakness of the paper is the lack of recognition that LLS, the Department of Planning and Environment and the Biodiversity Conservation Trust have a joint responsibility "to ensure the proper management of natural resources … consistent with the principles of ecologically sustainable development". There is no evidence that these agencies see this as a shared responsibility. Furthermore, there is a lack of any analysis and statistical data in the paper to show how these agencies between them meet this objective. We hope that the panel addresses these issues and encourages the development of transparent and readily understood state wide and regional statistics, indicators and other data, by vegetation type, on whether biodiversity is improving or not, and meaningful information on land clearing.

One of our key concerns is the protection and recovery of native grassy ecosystems. We believe that the NSW government went backwards on the protection of native grasslands. During the previous review of the Biodiversity Act, groups like ours were promised that natural temperate grasslands in the South Eastern Highlands would be declared critically endangered, consistent with the status assigned to them by the Commonwealth government. We were also promised that maps would be produced to support their protection. We have been appalled by political decisions made by the NSW government to sabotage this. We hope that the panel will review this matter and make suitable recommendations.

We consider that the discussion paper ought to have clearly stated why the incomplete draft Native Vegetation Regulatory Map, including for the south east region, has not been completed and made available, and when it is likely to be completed and released, or the answer to that question is unknown, what the obstacles are to its finalization and how they will be addressed.

Following on our earlier observation, we urge that the various agencies concerned with natural resource management should act in harmony and consistently with the principles of ecologically sustainable development. We would like to see a moratorium, or at least severe restriction, on further native vegetation clearing, given that it is likely our best defense against fire and flood caused by frequent extreme weather events in a changing climate.

We believe that a regime of self-assessment has failed. We are aware of at least one case where someone has destroyed a remnant natural temperate grassland. This was reported to us by someone who was afraid of bullying behaviour by the landholder undertaking the clearing and was also skeptical that the authorities would protect them or do the right thing. We are aware that many landholders simply do not believe that government has any authority in this area and are unlikely to be prosecuted if they clear land without permission. If there is to be self-assessment, details of the NVR Map should be available to the public so that members of the public can rightfully report offences.

The attachment is our attempt to answer the questions raised in the paper. We concur with the auditor's observations and our answers should be taken as additional comments.

Yours sincerely

Professor Jamie Pittock
President
Friends of Grasslands Inc.
19 December 2022

(a) - "Part 3 Objectives of the Environment Protection Authority

6 Objectives of the Authority

Section 6(2) of the Protection of the Environment Administration Act 1991

(2) For the purposes of subsection (1) (a), ecologically sustainable development requires the effective integration of social, economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs—

a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by—

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
(ii) an assessment of the risk-weighted consequences of various options,

b) inter-generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,
c) conservation of biological diversity and ecological integrity—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,
d) improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services, such as—
   (i) polluter pays—that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,
   (ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,
e) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems."

Attachment: FOG's comments on questions in the discussion paper.

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.

The question asks "Is it clear…?". This would depend upon who is answering the question. The persons involved in the preparation of this submission, are broadly aware of the Land Management Framework as they have followed the history of its development over many years. However, we believe that many landholders would have problems understanding how the framework may apply to them. More conscientious landholders may seek advice from LLS staff, (or other experts?) while others may avoid seeking advice and clear their land anyway.

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?

Our answer to the previous question is relevant here.

It would be useful for the panel to ask LLS officers about the likelihood of landholders approaching them to seek advice, how clearly that advice was understood by landholders, and do they know of any landholders whom they suspect think that they know best and are likely to go ahead with clearing.

We are concerned that "low conservation grassland or land containing only low conservation groundcover" is exempt. We see a number of problems here. From our experience most land owners would not know what "low conservation grasslands" are, as many cannot identify native grasses species. Even native grasslands with little diversity may be important habitat for native fauna, may provide connectivity between better quality remnants, and may with little effort be restored to higher value. Often alleged low conservation areas are regarded as such because weed management has been neglected. Instructions should be given to LLS staff to consider the conservation values of such areas carefully, and such areas should not be regarded as automatically exempt. We are also concerned that LLS staff may feel under pressure to write off such areas. In such situations LLS staff should be advocates for native grasslands, especially given that native grass seed is a highly valued resource.

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?

Our comments provided here pick up on and augment related comments already given above Given the overall complexity of the guidelines, landholders should be encouraged to seek proper advice.

The NVR Map is a fundamental component of the framework – it is intended to categorise land to determine if and where the rules apply. Landholders are expected to interpret this map when they self-assess their property. The map reliability is therefore critical. As the NVR Map has not been finalized, currently, transitional arrangements are in place. The published Transitional NVR Map only shows excluded land and the sensitive and vulnerable areas of regulated land (Category 2). The mapping for the vast majority of the state, which is supposed to be categorised as either Category 2 (regulated land) or Category 1 (unregulated land) is incomplete. For these areas, landholders are required to 'self-categorise' unmapped land in accordance with transitional arrangements. An incomplete NVR Map makes an already confusing regulatory scheme even more difficult to navigate for landholders and other stakeholders alike, and transitional provisions are open to misuse. The release of a draft NVR map for landholders in eleven local government areas in sections of the Riverina, Murray and South East regions is a long overdue first step. Given that the NVR Map is intended to underpin the entire Framework, it must be finalised in full as soon as possible to create the regulatory certainty that is currently lacking.

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.

From our experience, landholders, apart from a minority, have little knowledge of native vegetation, and as such have little or no ability to adequately identify native plant and fauna species, vegetation (or

ecological) communities and their conservation status. Hence, they are not capable of self-assessing land unless they get expert advice. In addition, as the panel will be aware, there is a significant number of landholders, hostile to government, who ignore LLS guidelines and take the law into their own hands.

Regarding transitional arrangements, it is not clear how good the transitional maps are. Also, we are somewhat in the dark as to whether these maps, or the final maps, include grasslands, given the shenanigans of the previous deputy premier.

What was said earlier about low-quality grasslands applies here. We consider that landholders should seek advice where land contains areas of native grasslands. Also, it is not clear what this statement means i.e. "Landholders must maintain supporting records for five years after making a self-assessment that their land is Category 1- Exempt based on the native vegetation being low conservation value grasslands"? Surely, if someone removes a low-quality grasslands, what is the point of keeping records for the next five years. At a recent meeting in Cooma attended by the minister many landholders complained about the volume of record keeping required by the NSW government regarding conservation land and offsets.

As mentioned earlier we basically concur with the NSW auditor's report and found that the LLS response was somewhat non-committal. We consider that the panel should pay close attention to the auditor's findings.

We do not think that the discussion paper adequately addresses why it is taking so long for these maps to be prepared and what is the timetable for the release of final maps and the draft and final map for the south east region.

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.

Broadly, the answer is 'yes' to landholder options but 'no' to managing environmental risks. The devil is in the detail which is very complex. Also, a lot of judgement is required by the landholder - conscientious landholders may carry out the spirit of what is required but others may exercise undue discretion. Our concerns about management of environmental risks are elaborated immediately below.

The Land Management (Native Vegetation) Code (herein referred to as the 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 even though notification or certification may be required. The Auditor-General has raised similar concerns regarding the limited ability for LLS to refuse an application for certification, and therefore to prevent unacceptable and cumulative impacts on threatened species, even if it is concerned about the level of impact of the clearing and how well it will be managed - see Audit Office of NSW, Managing Native Vegetation, 27 June 2019, p16. The most recent figures (31 October 2022) indicate that since early March 2018 the total hectares approved for clearing under the Code is around 782,000 ha, although not all approved clearing has been carried out (see Public Information Register - Certificates Under Section 60Y).

Although Code based clearing cannot be undertaken on category 2 sensitive regulated land and only a restricted range of allowable activities are permitted, the scope of this category is too narrow – see Local Land Services Regulation 2014, clause 124. While this provides some protection for environmentally sensitive areas, the scope of category 2 sensitive land is limited. For example, in relation to koalas only 'core koala habitat in a plan of management' is classed as category 2 sensitive land but the scope of the term 'core koala habitat' is limited. Therefore, any other koala habitat outside of this definition may be able to be cleared under the Code.

Other examples of the narrowness of category 2 sensitive regulated land of immediate relevance to us are that only high conservation grasslands and critically endangered ecological communities are off-limits to Code based clearing – see the Code 2018, clause 7. Other categories of threatened ecological

communities (e.g. vulnerable and endangered) may be able to be cleared under the Code and could move these communities closer to collapse. Likewise, grasslands that are neither low nor high conservation grasslands sit under the NVR Map category 2 regulate. These may be able to be cleared under the Code and be subject to the full range of allowable activities despite any significant landscape ecological connectivity and potential for improvement in condition and conservation value.

Echoing our reply to Q2 above, land not mapped as native vegetation or of sensitive character is not subject to biodiversity assessment. This includes isolated farm trees that are important for species of birds, arboreal mammals and invertebrates – some of which assist agriculture. The only hope for these often-old growth farm trees is that landholders voluntarily maintain them.

Protections for threatened species are not stringent enough. For example, in relation to native fauna the Code indicates that clearing is not authorised under the Code if the person who carries out the clearing harms an animal that is a threatened species, and that person knew that the clearing was likely to harm the animal – see the Code, clause 9. This implies ignorance can provide an excuse - a person could claim they did not know clearing was likely to harm the animal. This safeguard could be strengthened by requiring that a landholder 'ought reasonably to know' that the clearing would harm a threatened animal species – in the case of grassland reptiles in the ACT/Monaro region such as the Monaro grassland earless dragon, pink-tailed legless lizard, striped legless lizard, little whip snake or Rosenberg's goanna.

Maximum clearing caps have expired. The Code includes maximum limits on the amount of clearing that can be undertaken under Part 5 – Equity Code in the initial three-year period immediately following publication of the Code – see clause 82. This was included as a safeguard to prevent excessive clearing. However, the cap on maximum clearing was not revised once the initial three-year period expired, meaning there is currently no cap on clearing under the equity code.

The Native Vegetation Panel (NVP), as established under the LLS Act, does not appear to be operating as intended. The primary function of the NVP is to assess and determine clearing applications for clearing on rural land that cannot be carried out as an allowable activity or under the Code. We understand that since the commencement of Part 5A of the LLS Act, only one application has lodged and been determined by the NVP. This implies that essentially 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. Therefore, it begs the question are the NV Panel and the overall Framework and approval pathways are operating as intended?

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

We consider the answer is yes, but we very concerned that landholders are allowed such wide discretion without consulting LLS officers.

Lack of notification requirements and inadequate reporting makes it difficult to determine what percentage of 'unallocated clearing' is carried out under allowable activity rules. Unallocated clearing, which is clearing where a clearing activity has not been allocated to a particular native vegetation loss event (see Discussion Paper p19), is reported on by The Department of Planning and Environment reports and can include:

- lawful clearing or reduction of landcover on rural regulated land that does not require an approval, notification and/or keeping of records (e.g. allowable activities)
- vegetation loss for which the Department of Planning and Environment does not have access to information or records that authorise, explain or allocate the clearing to a particular land management activity
- areas that have been cleared unlawfully or are not fully compliant with approvals.

See https://www.environment.nsw.gov.au/topics/animals-and-plants/native-vegetation/landcover-science/2020-landcover-change-reporting/unallocated-clearing#:~:text=Unallocated%20(previously%20'unexplained'),been%20recorded%20or%20is%20unlawful

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

We cannot think of any. Our previous answer also applies. Only genuinely low impact clearing should be allowed as an allowable activity under the LLS Act.

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

We have heard complaints that these are unnecessarily complicated. We believe that these should be relatively simple provided LLS staff undertake a more in-depth periodic monitoring. From what we can tell set asides appear to be arbitrary and have little ecological basis. The use of an arbitrary set ratio of 1:2 in most cases for determining set asides requirements under the Code has no ecologically justified basis. The Code also does not specify that the vegetation to be set aside should be the same plant community type (or of ecological equivalence) and what condition the vegetation should be in (see the Auditor-General, Audit Office of NSW, Managing Native Vegetation, 27 June 2019, p 21).

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

The main barrier is its complexity and the judgement required by landholders in its use. Again, more conscientious landholders will approach LLS for advice and the less conscientious may in using their judgement err on the side avoiding the spirit of what is intended. Given land clearing rates, the failure of the NVP to operate as intended (as identified in Q5 above) is concerning and suggests that the scope of allowable activities provisions and the Code are too broad or open to misuse.

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.

We are not aware of how it operates. This aside, we consider that the monitoring of and reporting on land clearing is important for understanding how much clearing is occurring across the state and what impacts clearing is having on biodiversity. Detailed information would allow the community to understand better where land clearing activities are being undertaken lawfully, and where illegal clearing may be occurring. We note 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

We also note that the Natural Resources Commission has recommended that the roles and responsibilities for monitoring and enforcing the Code (between LLS and the Department of Planning and Environment) needs to be reviewed; and monitoring of compliance with certifications and notifications to clear, including the establishment and management of set asides, under the Code needs to be strengthened, including increasing transparency (see Natural Resources Commission, Final Advice on Land Management and Biodiversity Conservation Reforms, July 2019, p 6, available at https://www.nrc.nsw.gov.au/land-mngt).

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.

We are not aware of how stiff the penalties are. We are more concerned that illegal land clearing seems rife, and that LLS officers are under pressure to allow land clearing when they shouldn't. In any case, as

with all regulatory regimes, appropriate monitoring and enforcement is vital to ensuring the aims and objectives of the laws are being met.

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

We believe that there are many press reports on land clearing that a significant portion of the public are alarmed and appalled by the rate of land clearing. 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 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.

The Natural Resources Commission advised that as a priority, the NSW Government should develop processes to report up to date data on unexplained clearing every six months and also review the drivers behind high rates of unexplained clearing and implement measures to address any issues (see Natural Resources Commission, Final Advice on Land Management and Biodiversity Conservation Reforms, July 2019, p 33).

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. Picking up on a related point raised in our covering letter 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.

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.

These are discussed in the covering letter.

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.

These are discussed in the covering letter.