

CONFIDENTIAL

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Local Land Services
By email to policy@lls.nsw.gov.au

NSW Native Vegetation Code Statutory review:

The review committee must investigate why the NSW Government introduced flawed Part 5 of the Local Land Services Act, knowing that these rules would lead to large-scale clearing & question whether interest group influence has clouded the judgement of native vegetation policy and decision-making

Dear Local Land Services and the minister responsible for this portfolio,

Thank you for the opportunity for public comment on the statutory review of NSW native vegetation clearing rules (Part 5A of the Local Land Services Act 2013). I am deeply concerned this is not a comprehensive review of the codes and hope the incoming government redirects its attention to the principles of Ecological Sustainable Development (ESD), including 'inter-generational equity', 'the precautionary principle' and 'biodiversity issues' which are notably absent in the public discussion paper. It is worth reminding the NSW Government that the object of the LLS Act includes the principles of ESD.

I am further concerned that vested interests have clouded the judgement of decision-makers and officials in developing native vegetation policy and law, as detailed further below in my submission.

Who I am

I live in the Coffs Harbour region and am a mother with a young child, which is why I am highly concerned with the ESD principle of inter-generational equity. My great grandfather was a cedar cutter in the Clarence region, making a living of 'red gold' timber. By the time my grandfather had retired, my family had learnt the red gold was scarce and native biodiversity was become rarer and more fragmented. Essentially as recompense for our family's ill-gotten legacy, my grandfather bought a 40-hectare old dairy farm in the 1980s in Coutts Crossing, a 20-year regrowth bush block. His plan was to let nature be. He loved his trees. I watch them grow as a little toddler in the 80s and am awestruck by how tall these 60-year-old trees are.

When he died, my mother and my uncle inherited this block. They grew up in the Central Coast and had witnessed the transformation of this regional farm and forested landscape into an urban sprawl and, so again, the enlightened generations made the decision to protect this bush block as vital habitat for wildlife.

With the passing of my mother, I am in the process of co-inheriting this bush block and feel a great responsibility to look after it as my two-year-old daughter inheriting it one day. I believe it is my responsibility to wear the scares of previous generations and to right a wrong, in terms of creating the best strategy to restore and protect native biodiversity on this bush block. Indeed, unknowingly, my grandfather and uncle cut down some of the remaining (highly sought) red gum timber trees on this block to build sheds, with a naïve lack of understanding that these koala food trees had become rare on the property, enabling black butts to dominate the landscape. They did not know at the time that black butts are toxic for koalas.

Ignorance is no longer an excuse

Weak native vegetation regulations are perpetuating the destruction of our native landscape, gifting uneducated landholders (like my predecessors) with the power to clear trees under self-assessment.

How is it that the government can entrust all landholders, or contracted tree cutters, to have the knowledge as to what they can clear and can't clear?

For example, I was recently told a story by a local landholder who contracted a tree cutter to clear his block to increase space for farming. He asked the contractor if he knew what species he was chopping down and if any of the trees were endangered. The tree cutter responded that he did not know what he was cutting down. Considering tree species can be incredibly difficult to identify, it seems unconscionable the government would allow self-assessable codes. Just as my grandfather and uncle were ignorant of the species they were cutting down and their role in the wider ecosystem, it begs the question as to whether landholders are the best judges of what should and shouldn't be cut down if they do not have the adequate education.

With biodiversity in 9 out of 11 regions in NSW now at risk, ignorance is no longer an excuse. The introduction of self-assessable codes and a flexible biodiversity offset scheme are tools which have enable the large-scale clearing of vital habitat for our native wildlife.

I've spent a lot of time driving regional NSW far and wide since the new vegetation codes were introduced and am horrified by the piles of freshly clear trees you see driving through the countryside. As such, I am not at all surprised that clearing rates in NSW have increased 13-fold, rising from an annual average rate of 2,703ha per year under the old laws to an astonishing 37,754ha under the new laws.

While people replant unique wildlife habitat trees, others are chopping them down

Recently, my family replanted koala food trees on our property, but I find it concerning that while we do our bit to save the koala, other are needlessly destroying their habitat. A NSW Parliamentary Upper House inquiry (established in 2019) found the old land clearing rules played a vital role in koala habitat protection and that without effective intervention, NSW's most loved iconic will become extinct in 2050. In general, the current policy objectives are not fit for purpose to protect native wildlife. While Part 5A provides some safeguards for

‘core koala habitat’, it facilitates the clearing of other koala habitat. This contradicts the NSW Koala Strategy which seeks to double koala numbers in NSW by 2050.

Biodiversity offsetting (a key part of the codes) is particularly harmful as biodiversity offsets attempt to create a ‘like for like’ worth on unique trees (which can never be replaced) in exchange for replanting new trees. ‘Koala credits’ and other credits, such as squirrel glider credits’ which attach a monetary market value to the loss of wildlife habitat, is essentially blood money. For example, the loss of hollow-bearing trees is contributing to the decline for vulnerable species, such as the [squirrel glider](#) which depend on up to 19 different hollows throughout a year. It can take 100 to 200 years for a hollow in a tree to form, demonstrating that ‘like for like’ worth is impossible within this instance as a young tree simply cannot provide the habitat function required for the survival of hollow bearing species.

The minister should take heed that the fundamentally flawed Biodiversity Credits have received a lot of criticism — with market-driven mechanisms failing to achieve their no net loss goals for biodiversity. For example, see The Saturday Paper’s [‘Why biodiversity environment market doesn’t work.’](#)

When to clear and when not to clear?

I would like the review to start from the premise that clearing native vegetated land for new agriculture is not acceptable. Rather, it must consider how to better utilise existing cleared land to increase productivity utilising sustainable methods of farming. It further must consider mechanisms to boost the value of native vegetated land to disincentivise landholders to clear land.

When it comes to exceptions, I understand that in certain instances where there is an abundance of a native timber (i.e. the blackbutt) which could be harvested to boost timber supply, that this should be acceptable, but managed in a sustainable and strict way. I also accept that in some instances that understory shrubs pervasive, which may need cleared to improve vegetation health or access for cattle.

I do not know the answer to how to manage this appropriately, but I personally hope ecologists are widely consulted, and consensus sought, on exceptions of ‘when to clear’ and ‘when not to clear’. For me personally, I would like to know the best options to manage my property with conservation in mind, as I was told by one expert that black butts are toxic for koalas and that I should consider selectively harvesting some of our blackbutt trees and then replant these areas with koala food trees i.e. red forest gums. I am not interested in profit. I am interested in biodiversity outcomes, so would like the laws to be designed in a way that enable a landholder to still remove a native tree if the ecological consensus determine that this is an acceptable outcome.

The right to farm without public oversight or consequence is a ‘folk view’

As a landholder, I am fundamentally concerned about the inequality of power between large agricultural landholders and agricultural business vs. the broad public interest and the principle of inter-generational equity. In NSW, pro-private advocacy ideology has driven

government policymaking over the last two terms of government, trumping the public interest, overhauling important nature laws designed to protect dwindling biodiversity.

Part 5 is a direct result of pro-private property rights advocacy. The [NSW Famers](#) has been the led advocate of loosening land clearing laws. It is an industry association, representing the interests of the agricultural industry — fundamentally the rights of property holders and commercial business. An example of its advocacy includes [The Right to Farm campaign](#). Most concerningly, the [Guardian 2016](#) reported the NSW Government adopted recommendations for the overhaul of native vegetation rules in line with the NSW Farmers lobbying platform.

Therefore, it is essential the review panel investigate and release internal government documentation in regards the motives for loosening the native vegetation codes, including documentation of correspondence with interest groups and relevant ministers and the department. The questions to ask are— did the government know the overhaul of the vegetation rules would lead to runaway land clearing? And, to what extent did the NSW Government adopt the NSW Farmers recommendations to reform the native vegetation rules in 2016? The review further needs to investigate whether it was appropriate to reform policy in line with policy asks by a niche interest group in light of the ESD principles.

Ultimately, this situation draws attention to a ‘folk view’ that private property rights trump the beneficiaries of ‘inter-generational equity’ with the NSW Government and politics — despite legislation designed to ensure that the environment is maintained or enhanced for generations to come.

Legal scholar [Takacs \(2008\)](#) ‘The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property’ asks the question ‘*Who owns the Earth and its resources?*’, referring to tension that has spanned humanity across centuries and continents, which has led to divisions between those who wish to use the Earth’s bounty for private or collective use. He says ‘*private property — sequestering Earth’s resources for personal, exclusive use — has its zealous advocates, and in many locales its legal status is unimpeachable, and its ideology is unquestionable*’, (Takacs, 2008, p. 711).

Rossi and Argenton ([2020, p14](#)) argue this ‘folk view’ of a moral right to private property (and how they wish to use it) is difficult to dispute, as this ideological belief has become normalised in capitalist societies. Social structures encourage strong property beliefs and are resilient to alternative views, advancing the most powerful interests in society. The authors say ‘*As Hume and Kant understood, property is not a relation between a subject and an object, but a social construct. A change in property relations is premised on a change in social relations,*’ (Rossi and Argenton, 2020, p. 12).

The NSW Government should consider exploring adopting the ancient and globally recognised concept of the Public Trust Doctrine

Contrary to bowing to pressure by interest groups, it is the responsibility of public officials to govern within the public interest. As such, I strongly suggest the review panel considers literature on the ancient Public Trust Doctrine, such as by Wood, M. C. (2007) ‘[Nature’S](#)

[Trust: a Legal, Political and Moral Frame for Global Warming](#), *Boston College Environmental Affairs Law Review*, 34(3), pp. 577–603. The doctrine’s philosophy is adopted in countries worldwide, [including in the USA](#). Woods says it is an instrument which can be used to ensure governments adopt an obligation to protect nature, as opposed to destroy nature. It enables environmental protection to be reconciled with private property rights. It isn’t an anti-property rights instrument. Rather, it affirms collective property rights in environmental assets which support humanity. Private property owners depend on the infrastructure of nature. The threat of nature’s collapse makes property boundaries redundant, such as when private property is submerged by rising sea levels (Woods, p589).

The Public Trust Doctrine enables governments, as stewards, to prevent the ‘*tragedy of the commons*’ and the private arrogation of resources in a world that has severely suffered from a ‘*business-as-usual*’ approach (Takacs, 2008, pp. 770 & 764). If the NSW governance system were to embrace the nature’s trust framework, it would either need to be invoked via common law or be passed by an Act of Parliament to acknowledge the obligation of government, as a steward of nature.

Urgent innovative reform is essential

- 1. Local Land Services and the review committee must share the truth with the public: Considering the serious flaws in Part 5, the review panel should investigate why these rules have failed — Why were these new rules established in the first place? Were they introduced at the request of an interest group? Did the NSW Government know that these new rules would lead to large-scale clearing?**
- 2. This review should trigger the need for much larger, substantial nature law reform, inspiring the NSW Government to investigate new reform measures, such as the idea of the Public Trust Doctrine as laid out in this submission.**
- 3. A comprehensive review must consider whether the current native vegetation regulations are consistent with ESD principles. The review should investigate whether the rules:**
 - apply the ‘precautionary principle’ by (a) avoiding ‘serious or irreversible damage to the environment’ (where practical) and (b) providing ‘an assessment of risk-weighted consequences of various options’;
 - provide ‘inter-generational equity’ — by ensuring the diversity, health and productivity of the environment is enhanced or maintained for future generations;
 - and it must ensure the ‘conservation of biological diversity’ is a core consideration.
- 4. In order to achieve this, we need to recognise without strong regulation, incentive and market schemes are simply too weak to resolve runaway land clearing. The NSW Government must:**
 - There is a need for urgent technical assistance, education, and formal government-endorsed ecological accreditation schemes to boost farmer’s ecological understanding and appreciation of native vegetation.

- Ensure the review takes a whole-of-landscape approach, recognising all landscapes are connected, including the land and the sea i.e., agricultural runoff is considered 'High Risk' to the marine estate under the NSW Marine Estate Strategy. As such, NSW must map and plan landscapes to inform what needs greater protection and what types of farming are suitable and where.
- We further need to regulate farming practices so that if types of farming negatively impact on inter-generational and environmental health, that the offenders are banned from farming into the future.
- We need to create education accreditation schemes, just like in other industries, such as finance, to ensure that our farming landscapes are adequately managed.
- Government prioritise reform to ensure that the native vegetation rules are linked to the national target to protect a third of the sea by 2030, while ensuring the remaining 70% is sustainably managed. To do this, I believe.
- We need an immediate moratorium on land clearing while we await the outcomes of the review.
- Overhaul the biodiversity offset scheme.

I urge the government to implement these changes as a matter of urgency. We must protect our native vegetation which underpins the survival of our native fauna, flora, and ecosystems. Native vegetation further provides essential ecosystem services, including water security, healthy soil, and improving landscapes for human health and wellbeing.

Yours sincerely,

A large black rectangular redaction box covering the signature area.