

30 May 2018

The Hon. Taylor Martin
Chair
Standing Committee on State Development
Legislative Council
Parliament House
Sydney New South Wales

By email: state.development@parliament.nsw.gov.au

Dear Chair and Committee Members,

Provisions of the Forestry Legislation Amendment Bill 2018

Thank you for the opportunity to comment on this Bill. The Committee's scrutiny of the Bill is welcome, particularly in the absence of full public consultation.

EDO NSW (Environmental Defenders Office Ltd) is an independent community legal centre specialising in public interest environmental law. We have a long history of providing legal advice on forestry issues. Our two priorities are ensuring that NSW has sound laws to protect the environment, and that the community has rights to properly participate in environmental decision-making, oversight and enforcement.

This submission provides:

- A.** An overview of the Bill.
- B.** Comments and recommendations for the Committee to consider and adopt.
- C.** Discussion on the importance of community rights to seek enforcement.
- D.** Brief comments on the intersection between this and other forestry reforms, and the need for full transparency, public scrutiny and participation in those reforms.

A. Overview of the Bill

Broadly, we consider the Bill does four main things:

- First, it shifts the regulation of Private Native Forestry (**PNF**) from the *Forestry Act 2012* (NSW) (**Forestry Act**) to the *Local Land Services Act 2013* (NSW) (**LLS Act**). See **Schedule 1**. This reflects recent administrative orders that put the LLS (and the Minister for Lands and Forestry) in charge of issuing PNF licences to landholders, instead of the EPA.
- Second, the Bill amends the high-level framework, under the Forestry Act, that regulates logging on public land by the NSW Forestry Corporation (i.e. in State forests and Crown-timber lands). See **Schedule 2**. Detailed rules will be in revised Integrated Forestry Operations Approvals (**IFOAs**) – see D below.

- Third, the Bill updates and improves the monitoring and enforcement powers of the NSW Environment Protection Authority (**EPA**) for both private and public forestry. However, it continues to exclude the community from bringing enforcement proceedings in relation to public forestry. See **Schedule 3**.
- Finally, the Bill carries over the operation of existing PNF Codes of Practice, existing PNF licences on private properties, and existing IFOA conditions. These existing instruments are currently under review, or will be shortly.

Schedule 1 of the Bill relates to PNF. It *repeals* Part 5C of the Forestry Act (Private native forestry) and inserts Part 5B of the LLS Act to regulate PNF. This new Part sets out how PNF Codes of Practice are made, how draft Codes are consulted on, and the matters the LLS must consider before approving landholders' PNF Plans.

Schedule 2 relates to public forestry. For example, it amends Part 5B of the Forestry Act (Integrated forestry operations approvals) and consolidates the way forestry is licensed and regulated by the EPA (replacing 'deemed licences' under various Acts). It requires that authorised forestry operations are carried out in accordance with the principles of Ecologically Sustainable Forest Management (**ESFM**), as set out in the Bill.¹ The Bill also removes the requirement for localised 'forest agreements' to be in place before an IFOA can apply.²

Schedule 3 amends other Acts. For example, it adopts and amends enforcement provisions under the *Biodiversity Conservation Act 2016* (NSW) (**Bio Con Act**), except for provisions of that Act that allow anyone to seek civil enforcement in Court. It also makes consequential amendments by updating references to defences, etc.

B. High level comments and recommendations from EDO NSW

1. Embedding the principles of ESFM in both the LLS Act³ and the Forestry Act⁴ is positive – but the principles must be reflected *in practice*, for both private and public forestry. For example, it is unclear how the 'transparency and accountability' principle is given effect, if the public cannot seek enforcement of public forestry laws in Court; and will not know where or when private native forestry plans are approved.
2. As noted, the Bill makes separate amendments for private and public forestry, which need to be considered separately.

¹ Principles of ESFM include, to paraphrase the Bill: (a) maintaining forest values for future and present generations (see details i-vii); (b) ensuring public participation, accountability and transparent information about forestry operations; (c) incentives for voluntary compliance and best practice; (d) applying best available knowledge and adaptive management in forest management; and (e) applying the *precautionary principle* to prevent harm (acting with caution in response to risk and uncertainty).

² Amendments to Part 5A Forestry Act. Forest agreements also required NRC 'forest assessments'.

³ Forestry Legislation Amendment Bill 2018 (**the Bill**), Schedule 1, item [8], clause (or section) 60ZQ.

⁴ Bill Schedule 2, item [20], clause 69L(2).

Private native forestry (PNF) amendments

On PNF, we recommend the Committee seek the following amendments to the Bill:

3. Rebalance and improve the provisions for PNF Code-making, consultation and 'concurrence' requirements, including to align better with the principles of ESFM. (Although the content of the future PNF Codes is a matter for review later in 2018, it is preferable to set minimum requirements and considerations in the Act.)
4. While we welcome the proposed objects of Part 5B – to authorise private forestry in accordance with ESFM, and to 'protect biodiversity and water quality' – the Bill should protect 'soil health', and define 'biodiversity' with reference to other laws.⁵
5. Public consultation requirements should be stronger, transparent and mandatory (s. 60ZU):
 - Extend the minimum public consultation period on draft PNF Codes to three months instead of four weeks (amend subclause (1)).
 - Require that submissions are published, unless marked confidential (subclause (2)).
 - Require further consultation on 'substantial changes' (subclause (4)).
 - A Code should not be valid if public consultation does not occur (delete subclause (5)).⁶
6. The Environment Minister should either make the PNF Code, as now; or (if the Minister for Lands and Forestry makes the Code) be the sole Minister that gives 'concurrence'.⁷ The Bill should not dilute the role of the Environment Minister,⁸ given that PNF Codes provide an exemption from offences and other approvals.
7. Whoever makes the Code, Ministers and officials should be required to exercise powers and functions 'in accordance with', or 'to achieve', the objects of Part 5B.⁹ The proposed requirement to 'have regard to' the objects when making a PNF Code is not sufficient (s. 60ZT(7)).
8. Require the PNF Code to be informed by a peer review by eminent ecologists, to ensure biodiversity, water quality, threatened species and soil are protected.¹⁰
9. Clarify and strengthen mandatory considerations for issuing PNF Plans (s. 60ZY). Subsection (2) is unclear. If this means considering whether PNF can be *lawfully* carried out, it should state that. ESFM principles should be considered, as now.¹¹
10. Require a public register of PNF plans, to give transparency and confidence to the community, reduce complaints, and support voluntary compliance.¹² Also, require the regulatory authority to notify local councils of PNF plan approvals.

⁵ This should include but not be limited to threatened species. See *Biodiversity Conservation Act 2016*

⁶ Failure to comply with consultation requirements should invalidate the Code for at least 3 months, as with strategic plans under Part 3 of the *Environmental Planning and Assessment Act 1979* (NSW).

⁷ Bill, Schedule 1, item [8], s. 60ZT Responsibility for preparation and making of codes, subclause 2.

⁸ i.e. by transferring the code-making power to the Minister for Lands and Forests and giving an additional concurrence power to the Minister for Primary Industries. See Bill Schedule 1, s. 60ZT(2).

⁹ For a general obligation to 'give effect to' the objects see *National Parks & Wildlife Act 1974* s 2A(3).

¹⁰ Amend s 60ZT to require such peer review before the Code is made or before concurrence is given.

¹¹ Forestry Act Part 5C, s. 69ZF(2). Existing clauses also require LLS strategic plans be considered.

¹² This proposal aligns with the 'transparency and accountability' principle of ESFM – and previous publicly available information about PNF Property Vegetation Plans.

11. Require the regulatory authority to establish a monitoring and reporting program to assess the cumulative impacts of PNF on environmental assets over time.
12. Clarify that PNF is not to be permitted in Environmental Zones – particularly where a Local Environmental Plan prohibits forestry (explicitly or implicitly).
A note could clarify this in the Bill, if this is partly the intention of s. 60ZS(1)(j).
13. Consider explicitly excluding PNF Codes from rural areas mapped as ‘category 2 - sensitive’ and ‘category 2 - vulnerable’ lands (also under s. 60ZS of the Bill).¹³
Sensitive lands include critically endangered plants and ecological communities, ‘core’ koala habitat and Ramsar-listed wetlands.¹⁴ Vulnerable lands include steep slopes, highly erodible soils and protected riparian areas.¹⁵ While some exclusions apply under PNF Codes themselves, those Codes will soon be reviewed, and were made prior to the native vegetation reforms in the LLS Act.
14. There is no need to amend existing provisions to refer to the LLS as the approval body for PNF Plans (60ZX-ZY) as the regulatory authority is currently established via administrative orders (as the Government recently did in appointing LLS).¹⁶
15. We support the EPA’s continued role as investigation and enforcement body; and the modernisation and harmonisation of powers, offences and penalty notices.¹⁷
16. In addition to information-sharing powers in the Bill (e.g. between LLS and EPA), we recommend LLS officers should have a duty to report non-compliance to EPA.

Public forestry amendments

On public forestry, we recommend the Committee seek the following amendments:

17. Reinstate ‘open standing’ for the community to take forestry breaches to Court. This can be achieved by deleting proposed s. 13.14A of the Bio Con Act,¹⁸ repealing s. 69ZA of the Forestry Act, and making any consequential amendments required. Any person should be able to seek to enforce a breach of forestry laws, not just the EPA. This is consistent with other laws including the Bio Con Act itself (see C below).
18. Extend the minimum public consultation period on revised IFOAs to three months instead of four weeks. The Coastal IFOA took four years to finalise (since 2014), and contains a suite of technical details that require sufficient time for scrutiny.
19. Consider whether there should be an ongoing place for ‘regional forest assessments’ that publicly consult and report on environmental and heritage values, economic and social values, ESFM requirements and timber resources.¹⁹

¹³ Under Part 5A of the LLS Act – *Land management (native vegetation)*, s. 60I. The *Land Management (Native Vegetation) Code* under that Act is excluded from these areas, and limited routine allowable activities can apply. Allowable activities in PNF areas are at Part 5 Sch 5A LLS Act.

¹⁴ See LLS Regulation 2014 (as amended 2017), clauses 108, 113 and 124; and LLS Act s. 60I(2).

¹⁵ LLS Act, ss. 60F (vulnerable), (category 2 lands).

¹⁶ *Forestry (Designation of Regulatory Authority for Private Native Forestry) Order 2018*, 29 Mar 2018.

¹⁷ For example, the specific offences for contravening a PNF Plan or Code of Practice (s. 60ZZA).

¹⁸ Bill Schedule 3 items [14-16] insert s. 13.14A to the Bio Con Act – a special provision that says only the EPA, not ‘any person’, can bring civil enforcement proceedings for forestry breaches (cf s. 13.14).

¹⁹ Noting that the Bill removes the requirement for ‘forest agreements’, and such ‘forest assessments’ (s. 69B), under Part 5A of the Forestry Act.

20. We support improvements to EPA investigation, orders and enforcement powers for public forestry. These updates are positive, important and relatively urgent.

C. Modern laws must provide ‘open standing’ for civil enforcement

As noted, the Bill largely adopts the monitoring, compliance and enforcement provisions of the *Biodiversity Conservation Act 2016 (Bio Con Act)*. While this approach is generally supported, there is a glaring inconsistency in these standards, which mean the Bill falls short of the intent to deliver modern best practice regulation.

The Bio Con Act itself provides ‘open standing’ for the community to take breaches of the Act to Court. However, the proposed Bill actively strips out these rights in relation to public forestry, so that only the EPA can address breaches of the Forestry Act, and not the community.

Excluding the community from public forestry enforcement is unjust and retrograde. It contrasts with long-established rights in many NSW laws. Other similar legislation provides open standing for third parties to bring proceedings to remedy or restrain a breach of the law – including NSW planning, native vegetation, local government, water, mining, petroleum and Crown lands laws.

Fears that such provisions would create a flood of litigation are not supported by experience in the Land & Environment Court, and have been ‘wholly discredited’.²⁰ Reflecting on a decade’s experience in the NSW Land and Environment Court, the then Chief Justice Cripps noted:

*It was said when the legislation was passed in 1980 that the presence of section 123 [in the NSW planning law] would lead to a rash of harassing and vexatious litigation. That has not happened and, with the greatest respect to people who think otherwise, I think that that argument has been wholly discredited.*²¹

In 2005, another former Chief Judge of that Court reinforced the value of open standing in NSW over the previous 25 years:

Any fears that open standing will encourage proceedings which have the potential to destabilise orderly government have been unfounded.

...[T]here has been no suggestion that the open standing provisions have led to litigation which adversely impacts upon the well-being of the whole community.

*The contrary is undoubtedly true.*²²

²⁰ See Stein J in the Court of Appeal case - *Melville v Craig Nowlan & Associates Pty Ltd & Anor* [2002] NSWCA 32: “42. In the draft judgment of Young CJ in Eq, ... his Honour mentions the potential floodgates that open standing provisions may release. By 2002, I had thought that this argument had been put to rest. In *Oshlack* at first instance ((1994) [82 LGERA 236](#) at 245) I mentioned that the opening of the gates had barely caused a ‘wetting of the wellies’. This was referred to by Kirby J in the High Court (at [121]). The Annual Reviews published by the Land and Environment Court since 1994 have confirmed my earlier remarks.”

²¹ Justice J.Cripps, “People v The Offenders”, Dispute Resolution Seminar, Brisbane, 6 July 1990.

²² Justice P. McClellan, ‘Access To Justice In Environmental Law – An Australian Perspective’, Commonwealth Law Conference, London, Sept 2005. See also, analysis by Dr Chris McGrath, ‘Myth drives Australian Government attack on standing and environmental “lawfare”’, (2016) 33 *EPLJ* 3.

In the EDO's view, open standing for civil enforcement is an essential accountability mechanism for a functioning regulatory scheme. It should be available to facilitate important proceedings in the public interest. This would bring forestry laws into line with equivalent existing best practice standards in NSW law.

D. Several reforms to forestry are underway – public scrutiny is essential

The Forestry Legislation Amendment Bill is one of several active forestry reforms.

In early 2018, EDO NSW made separate submissions to the review, and proposed renewal, of Regional Forest Agreements between NSW and the Commonwealth.²³ The timing and content of the belated RFA consultations has left much to be desired.

More recently, the draft Coastal Integrated Forestry Operations Approval is currently on public exhibition until 29 June 2018.²⁴ As noted, the current Bill updates the legal framework for the proposed Coastal IFOA, and any other revised IFOAs in future.

We note that further significant details will be determined in future regulations under the LLS Act and Forestry Act, draft IFOAs, and the review of PNF Codes of Practice. Recommendations of the Natural Resources Commission (**NRC**) in relation to wood supply and remapping of Old Growth Forests, and the Government's response, are also of very significant interest to forest stakeholders and the wider community.²⁵ In all of these cases we recommend the Government ensure early engagement, adequate time and genuine consultation with NSW communities, to gather and respond to feedback.

In our experience the standard 'four to six weeks exhibition' process is insufficient, particularly on long-term changes that raise complex scientific, legal and socio-economic issues. As noted, consultation periods (and methods) should be extended to give communities and stakeholders time to interrogate information, provide considered feedback, and see how their input is considered in the final product.

Conclusion

Thank you for considering this submission and the recommendations at Part B. If the Committee requires further assistance please contact me or Ms Rachel Walmsley, Policy and Law Reform Director, on 02 9262 6989 or by return e-mail.

Yours sincerely,
EDO NSW

Mr Nari Sahukar
Senior Policy & Law Reform Solicitor

²³ Available at https://www.edonsw.org.au/forestry_clearing_vegetation_trees_policy, 'Submissions'.

²⁴ <https://www.epa.nsw.gov.au/your-environment/native-forestry/forestry-regulatory-reforms/coastal-ifo-remake>

²⁵ Response at <https://engage.environment.nsw.gov.au/29948/documents/77096> accessed May 2018.