Submission to the Inquiry into the *Local Land Services Amendment (Critically Endangered Ecological Communities) Regulation 2019* and *Local Land Services Amendment (Allowable Activities) Regulation 2019*

prepared by

EDO NSW

13 September 2019

About EDO NSW

EDO NSW is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO NSW is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

EDO NSW is part of a national network of centres that help to protect the environment through law in their states.

Submitted to:

Legislative Council Regulation Committee
NSW Parliament
Macquarie St
Sydney NSW 2000

Submitted online and by email: Regulation.Committee@parliament.nsw.gov.au

For further information on this submission, please contact:

Rachel Walmsley
Director, Policy & Law Reform
EDO NSW
T: 02 9262 6989
E: rachel.walmsley[at]edonsw.org.au

Cerin Loane
Senior Policy & Law Reform Solicitor
EDO NSW
T: 02 9262 6989
E: cerin.loane[at]edonsw.org.au

EDO NSW
ABN 72 002 880 864
Level 5, 263 Clarence Street
Sydney NSW 2000 AUSTRALIA
E: edonsw@edonsw.org.au
W: www.edonsw.org.au
T: + 61 2 9262 6989
F: + 61 2 9264 2412

INTRODUCTION

EDO NSW is an independent community legal centre specialising in public interest environmental law. We have a long history of providing legal advice on laws relating to land management and the regulation native vegetation clearing. We were involved as an expert stakeholder in the Biodiversity Legislation Review, and provided detailed analysis of the new land clearing and biodiversity conservation provisions that became Part 5A of the *Local Land Services Act 2013* (**LLS Act**), incorporating feedback from landowners and economic experts.[1]

It has been two years since the legal reforms commenced, and there is broad community concern regarding the clearing of native vegetation under the Land Management Framework (**the Framework**), as evidenced by the number of calls received by the EDO NSW legal advice line on this issue. These concerns have been validated by recently released clearing figures and an assessment by the Audit Office. EDO NSW therefore welcomes the opportunity to provide feedback to the Inquiry into the *Local Land Services Amendment (Critically Endangered Ecological Communities) Regulation 2019* (**CEEC Regulation**) and *Local Land Services Amendment (Allowable Activities) Regulation 2019* (**Allowable Activities Regulation**).

The two Amendment Regulations make changes to the Framework that was established by Part 5A of the LLS Act. EDO NSW has ongoing concerns regarding the implementation of the Framework and its ability to ensure the proper management of natural resources consistent with the principles of ecologically sustainable development (**ESD**).[2]

In our view, the Allowable Activities Regulation will further weaken already lax land clearing laws, contribute further to substantial increases in land clearing rates, and put native vegetation and wildlife at risk. **We recommend that the Allowable Activities Regulation be disallowed.**

With respect to the CEEC Regulation, we submit that this needs to be considered in the broader context of the recent listing of *Monaro Tableland Cool Temperate Grassy Woodland in the South Eastern Highlands Bioregion* and *Werriwa Tablelands Cool Temperate Grassy Woodland in the South Eastern Highlands and South East Corner Bioregions* as critically endangered ecological communities (**CEECs**) in NSW, and also changes made by the *Land Management (Native Vegetation) Code Amendment (Monaro and Werriwa Grassy Woodland Critically Endangered Ecological Communities) 2019.*

Our submission addresses the following key points:

1. **Overarching comments on the Land Management Framework**
2. **Specific comments on the Allowable Activities Regulation**
3. **Specific comments on the CEEC Regulation**

The purpose of providing some overarching comments on the Land Management Framework is to provide context to the Committee and assist it in understanding our specific comments and the broader implications of each of the Amendment Regulations.

---

[1] Our extensive submissions are available at https://www.edonsw.org.au/biodiversity_legislation_review

[2] See section 3(e) of the LLS Act. The object "*to ensure the proper management of natural resources in the economic, social and environmental interests of the State, consistently with the principles of ecologically sustainable development (described in section 6(2) of the Protection of the Environment Administration Act 1991)*" was inserted into the LLS Act by the LLS Amendment Act 2016 as part of the Land Management and Biodiversity Conservation reforms.

1. OVERARCHING COMMENTS ON THE LAND MANAGEMENT FRAMEWORK

In August 2017, the NSW Government introduced a new legal framework for regulating land clearing and biodiversity impacts in NSW.[3] The new laws featured a strong emphasis on de-regulation, particularly for land clearing in rural areas. Previous laws that prevented broadscale land clearing unless it was shown to maintain or improve environmental outcomes were repealed, in favour of expanded self-assessable codes and a more flexible biodiversity offsets scheme. EDO NSW raised significant concerns during the development of the new laws,[4] and continues to raise concerns with their implementation.[5]

We note the following three issues regarding the implementation of the Framework relating to: land clearing rates, missing elements of the Framework, and recent findings of the Audit Office.

Land clearing rates under the Framework have substantially increased

Data recently released by the Office of Environment and Heritage indicates that rates of native vegetation clearing for agriculture have increased from 8,500 ha in 2011-12 to 27,100 ha in 2017-18.[6] This increase in land clearing rates is concerning given that land clearing is a key threatening process and habitat loss is the biggest threat to biodiversity. Land clearing also contributes to greenhouse gas emissions.

A number of key elements of the Framework are yet to be implemented

Despite the fact the Framework commenced over two years ago, key elements are still missing or have not been implemented as intended. For example:

- The complete Native Vegetation Regulatory Map (**NVR Map**) has not been publicly released.[7] The NSW Auditor General has found that a lack of a complete NVR map can make categorising land more difficult for LLS staff, particularly for areas of groundcover such as shrubs and grassland,[8] and the Natural Resources Commission has found that an incomplete map creates a risk in terms of ensuring providing consistent and accurate advice.[9]
- There is very little publicly available information regarding the Native Vegetation Panel (**NV Panel**) that is to be established by the LLS Act to determine certain applications to clear native vegetation under Part 5A of the LLS Act.[10] There is no publicly available evidence of the NV Panel processing any applications to clear vegetation. This suggests that *all* the recent significant increases in clearing are being done as

---

[3] The new scheme saw the repeal of the *Native Vegetation Act 2003,* the *Threatened Species Conservation Act 1995*, the *Nature Conservation Trust Act 2001* and parts of the *National Parks and Wildlife Act 1974* relating to private land conservation and native animal and plant management; and the introduction of the *Biodiversity Conservation Act 2016*, and Part 5A of the *Local Land Services Act 2013.*

[4] See EDO NSW submissions to the Biodiversity Legislation Review, available at https://www.edonsw.org.au/biodiversity_legislation_review

[5] See for example, our recent series of Legal Updates on the Implementation of the NSW land clearing laws https://www.edonsw.org.au/legal_updates

[6] See rates of woody vegetation loss from crop, thinning or pasture, NSW Woody Vegetation Change 2017-18 spreadsheet, tab 1. Available from https://www.environment.nsw.gov.au/topics/animals-and-plants/native-vegetation/reports-and-resources/reports

[7] Currently the NVR Map only shows excluded land (Category 3) and the sensitive and vulnerable areas of regulated land (Category 2). Other areas of Category 2 land (Regulated land) and Category 1 (Unregulated) has not been publicly identified. Updates to the NVR Map are currently being proposed, but do not include these missing components.

[8] Audit Office of NSW, *Managing Native Vegetation*, 27 June 2019, p 14, available at https://www.audit.nsw.gov.au/our-work/reports/managing-native-vegetation

[9] Natural Resources Commission, *Audit of Local Land Services' implementation of sustainable land management reforms*, October 2018, p 13. Available at www.nrc.nsw.gov.au/audit-and-assurance

[10] Limited information about the Panel can be found at https://www.nvp.nsw.gov.au/

allowable activities or under self-assessable codes with little or no oversight or proper environmental assessment.

- Mechanisms that offer some limits to unfettered clearing, including the ability to declare Areas of Outstanding Biodiversity Value (**AOBV**) under the *Biodiversity Conservation Act 2016,* have not been utilised.[11]

The Audit Office of NSW has recently reported that the clearing of vegetation on rural land is not effectively regulated

The Audit Office found that 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.[12]

Given the poor implementation of the Framework and the substantial increase in land clearing rates, it is apparent that the Framework is not operating to ensure the proper management of natural resources consistent with the principles of ESD. Given the inadequacies and failures of the new laws, any regulation amendments that facilitate further clearing are of serious concern. It is in this context that we now provide comments on the Allowable Activities Regulation and CEEC Regulation.

2. SPECIFIC COMMENTS ON THE ALLOWABLE ACTIVITIES REGULATION

The LLS Act identifies certain clearing activities as 'allowable activities' that can be carried out without any approval or other authority under Part 5A of the LLS Act.[13] This is similar to the concept of 'routine agricultural management activities' (**RAMAs**) under the now repealed *Native Vegetation Act 2003* (**NV Act**).

We do not object to the concept of allowable activities that are genuinely minimal-impact routine activities necessary for productive farms. However, we have concerns about expanding the list of allowable activities, the exemptions being used to justify significant amounts of clearing, and the unknown cumulative impacts of clearing under the exemptions if misused. There are no mechanisms in the Framework to monitor and record the amount of clearing that is undertaken as allowable activities, and it is difficult to ensure that limitations on clearing for allowable activities are being complied with.[14]

The purpose of the Allowable Activities Regulation is to:

- allow the clearing of native vegetation for maintaining water supply and gas supply infrastructure as an allowable activity;
- expand the range of allowable activities permitted on category 2-vulnerable regulated land and category 2-sensitive regulated land to include collecting firewood, clearing planted native vegetation and maintaining telecommunications infrastructure; and
- require certain proximity areas for coastal wetlands and littoral rainforests to be designated category 2-regulated land (rather than category 2-sensitive regulated land).

---

[11] See EDO NSW Briefing Note, Areas of Outstanding Biodiversity Value under the Biodiversity Conservation Act 2016, available at https://www.edonsw.org.au/aobv_briefing_note

[12] Audit Office of New South Wales, *Managing Native Vegetation,* 27 June 2019.

[13] LLS Act, section 60Q and Schedule 5A. Generally, allowable activities are set out in Part 2 of Schedule 5A of the LLS Act and clearing that is allowed for rural infrastructure is set out in Part 3 of Schedule 5A of the LLS Act. In the case of category 2-vulnerable regulated land and category 2-sensitive regulated land, allowable activities are set out in Part 4 of Schedule 5A of the LLS Act (which is generally more restrictive than the general allowable activity provisions in Part 2 and Part 3).

[14] This has been an ongoing concern for native vegetation regulation. Even under previous laws it was acknowledged that it was very difficult to determine the number of times that clearing is undertaken under as a RAMA and that reporting requirements did not extend to those activities. See EDO NSW Briefing Note on the 2012 Native Vegetation Regulation Review, available here.

Our assessment of the changes introduced by the Allowable Activities Regulation is as follows:

- ***Maintaining water supply and gas supply infrastructure***

  The maintenance of public utilities associated with water supply infrastructure and gas supply infrastructure is now authorised as an allowable activity if carried out by or on behalf of the owner of the infrastructure or by or on behalf of the landholder. We note that 'the maintenance of public utilities' (including water and gas utilities) was previously a routine agricultural management activity under the former NV Act. We also note that the Schedule 5A of the LLS Act contains a general restriction that the clearing of native vegetation that is authorised by this Schedule for any purpose only authorises clearing to *the minimum extent necessary* for that purpose (LLS Act Schedule 5A, Part 1, clause 7). However, we also note that is difficult to tell how or if this limitation is effectively and appropriately applied.

- ***Allowable activities on category 2-vulnerable regulated land and category 2-sensitive regulated land***

  The Allowable Activities Regulation expands the range of activities that can now be undertaken on category 2-vulnerable regulated land and category 2-sensitive regulated land without notification, certification or approval. These activities include collecting firewood, clearing planted native vegetation and maintaining telecommunications infrastructure.[15]

  Given that land is included in category 2-vulnerable regulated land and category 2-sensitive regulated land for reason of it being environmentally sensitive land, allowable activities within these areas should be strictly limited. In our view, environmental assessment and approval should be required before any clearing can occur on category 2-vulnerable regulated land and category 2-sensitive regulated land rather than activities being permitted as allowable activities.

- ***Proximity area for coastal wetlands***

  Clause 108 of the *Local Land Services Regulation 2014* (**LLS Regulation**) identifies land that is to be designated as category 2-sensitive regulated land. This includes 'coastal wetlands and littoral rainforests' (see Clause 108(2)(b) of the LLS Regulation which refers back to 60I (2)(i) of the LLS Act).

  We understand that the purpose of the Amendment Regulation is to clarify that the 'proximity area for coastal wetlands' and 'proximity area for littoral rainforest' (as identified in *State Environmental Planning Policy (Coastal Management) 2018*) (**Coastal SEPP**)) are to be designated category 2-regulated land (rather than category 2-sensitive regulated land). We understand that this amendment does not reverse an existing provision but clarifies a potentially unclear application of clause 108.

  The effect is that there will be weaker restrictions on clearing in coastal proximity areas (by virtue of them not being given categorised as category 2-sensitive regulated land). This seems to undermine the premise in the Coastal SEPP that these proximity areas are sensitive and warrant additional environmental protection.[16] We recommend that the

[15] These activities must be carried out in accordance with the relevant provisions in Schedule 5A of the LLS Act. For example, the clearing of firewood as an allowable activity is prohibited if the vegetation comprises or is likely to comprise a threatened species, part of a threatened ecological community or habitat of a threatened species, and the clearing of vegetation as an allowable activity is prohibited if the native vegetation was planted with the assistance of public funds granted for any purpose other than for forestry purposes.

[16] See clause 11 of the Coastal SEPP.

reverse position be taken - that is, proximity areas for coastal wetlands and littoral rainforests should be designated as category 2-sensitive regulated land to ensure they can be maintained as appropriate buffer zones.

We note however that the practical implications of the amendment are unclear. We expect that a number of proximity areas may be zoned as environment zones (under relevant Local Environment Plans) in which case the *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017* (clause 5(1)(b)) rather than the LLS Act applies to clearing of vegetation (section 60A(a) of the LLS Act). While we haven't undertaken this activity, we note that the Native Vegetation Regulatory Map (prepared under the LLS Act) shows urban areas and environment zones in grey (as they are excluded from provisions of Part 5A of the LLS Act), and this could be compared with the mapping of proximity areas under the Coastal SEPP to get a sense of how much land would be affected by this amendment.

In our view, the Allowable Activities Regulation does appear to weaken environmental protections and facilitate increased land clearing by:

- Expanding the scope of allowable activities under the LLS Act (being activities that can be carried out with approval or other authorisation), including on category 2-vulnerable regulated land and category 2-sensitive regulated land; and,

- Treating proximity area for coastal wetlands and proximity area for littoral rainforest as general category 2 - regulated land rather than category 2 - sensitive regulated land.

We recommend that the Allowable Activities Regulation be disallowed.

3. SPECIFIC COMMENTS ON THE CEEC REGULATION

The CEEC Regulation needs to be considered in the broader context of the recent listing of *Monaro Tableland Cool Temperate Grassy Woodland in the South Eastern Highlands Bioregion* and *Werriwa Tablelands Cool Temperate Grassy Woodland in the South Eastern Highlands and South East Corner Bioregions* (**Monaro and Werriwa CEECs**) as CEECs in NSW, and also changes made by the *Land Management (Native Vegetation) Code Amendment (Monaro and Werriwa Grassy Woodland Critically Endangered Ecological Communities) 2019.*

The Monaro and Werriwa CEECs were gazetted as CEECs on 28 June 2019.[17]

Following listing of the Monaro and Werriwa CEECs:

- The Government introduced the CEEC Regulation**,** which amends Schedule 5A of the LLS Act as it relates to allowable activities;[18] and

- The Government introduced the *Land Management (Native Vegetation) Code Amendment (Monaro and Werriwa Grassy Woodland Critically Endangered Ecological Communities) 2019* which amends the *Land Management (Native Vegetation) Code 2018* (**Land Management Code**) to allow the clearing of the Monaro and Werriwa CEECs if, in the opinion of the LLS, the vegetation does not form a functioning ecological community.[19]

---

[17] See https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Regulation_2019_2019-283.pdf
[18] See *Local Land Services Amendment (Critically Endangered Ecological Communities) Regulation 2019,* available at https://www.legislation.nsw.gov.au/regulations/2019-362.pdf
[19] The *Land Management (Native Vegetation) Code Amendment (Monaro and Werriwa Grassy Woodland Critically Endangered Ecological Communities) 2019* commenced on 2 August 2019, available at https://www.legislation.nsw.gov.au/regulations/2019-361.pdf

The CEEC Regulation makes amendments to Part 4 of Schedule 5A of the LLS by specifically naming the Monaro and Werriwa CEECs as land to which Part 4 of Schedule 5A applies. Our understanding is that these amendments ensure that despite Monaro and Werriwa CEECs having not yet been mapped as category 2 - sensitive land on the NV Map,[20] the Monaro and Werriwa CEECs are managed in the same way as category 2 - sensitive land for the purpose of clearing of native vegetation for allowable activities.

While we recognise the rationale for the CEEC Regulation insofar that it regulates allowable activities on land containing Monaro and Werriwa CEECs, the CEEC Regulation highlights the failure of the Framework to ensure that newly listed CEECs are properly mapped and categorised as category 2 - sensitive land in a timely manner. We also reiterate our broader concerns with allowable activities in general, and our opposition to the expansion of allowable activities under Part 4 of Schedule 5A of the LLS Act under the Allowable Activities Regulation (see comments above).

Additionally, for the purposes of providing all-encompassing commentary on the treatment of Monaro and Werriwa CEECs, we make comments on the follow key issues:

- ***Mapping of Monaro and Werriwa CEECs***

  The Government released a new advisory layer of Monaro and Werriwa CEECs to the NVR Map Viewer on 2 August 2019.[21] The Government has indicated that this layer is advisory only and does not imply any particular land category.

  Additionally, the Government is currently seeking public comment on a Revised Transitional NVR Map[22] that incorporates updated data for category 2 - vulnerable and category 2 - sensitive regulated land categories into the published Transitional NVR Map, but this update does not include the new Monaro and Werriwa CEECs. Given the importance of ensuring that listed CEECs are mapped as category 2 – sensitive land, we suggest that the Monaro and Werriwa CEECs layer be included in the Revised Transitional NVR map.

- ***Land Management (Native Vegetation) Code Amendment (Monaro and Werriwa Grassy Woodland Critically Endangered Ecological Communities) 2019* (Monaro and Werriwa CEEC Code Amendment)**

  The Monaro and Werriwa Code Amendment allows the clearing of the Monaro and Werriwa CEECs under the Land Management Code if, in the opinion of the LLS, the vegetation does not form a functioning ecological community.[23] This Code amendment essentially overcomes the restriction on clearing CEECs under the Code.[24]

  The Government's explanation for the Monaro and Werriwa CEEC Code Amendment is that "*(b)ecause the newly listed CEECs occur in productive areas that may require ongoing management in an agricultural context, the NSW Government has developed an approach to balance flexible land management*".[25] This reasoning undermines the entire

---

[20] Category 2 - sensitive land includes mapped critically endangered ecological communities - see clause 108 of the LLS Regulation and section 60I (2)(m) of the LLS Act

[21] See https://www.lmbc.nsw.gov.au/Maps/index.html?viewer=NVRMap

[22] See www.environment.nsw.gov.au/exhibition-annual-update

[23] The *Land Management (Native Vegetation) Code Amendment (Monaro and Werriwa Grassy Woodland Critically Endangered Ecological Communities) 2019* commenced on 2 August 2019, available at https://www.legislation.nsw.gov.au/regulations/2019-361.pdf

[24] See clause 7 of the *Land Management (Native Vegetation) Code 2018*

[25] NSW Government, *Fact Sheet - The Land Management Framework and the Monaro and Werriwa Cool Temperate Grassy Woodlands critically endangered ecological communities,* See https://www.lls.nsw.gov.au/sustainable-land-management/facts-sheets2/the-land-management-framework-and-the-monaro-and-werriwa-cool-temperate-grassy-woodlands-critically-endangered-ecological-communities

premise of the threatened species and ecological communities listing process – which is to identify species and ecological communities at risk from extinction and to provide appropriate safeguards in place to prevent such extinction. The single safeguard that has been put in place - that an opinion be formed that the vegetation does not form a functioning ecological community that is likely to be viable in the long-term - has been put in the hands of the LLS rather than the expert Scientific Committee. Furthermore, if CEECs are to be recovered, it will be necessary for land managers to actively manage sites to improve their viability, not be encouraged to degrade them to the point where they are no longer considered viable and therefore not protected.

While the Monaro and Werriwa CEEC Code Amendment only applies to two listed CEECs, the changes risk opening the floodgates to other CEECs being subject to similar provisions. We note that while a similar provision is already in place for vulnerable and endangered communities (see clause 19 of the Land Management Code), it is also not supported for the same reason that it undermines the threatened species and ecological communities listing process. Self-assessable codes must only apply to genuinely low-risk clearing activities. CEECs are at high risk of extinction and therefore Codes are an inappropriate regulatory tool. Any clearing of CEECs should be subject to robust environmental assessment by the NV Panel.

In summary, we recognise the rationale for the CEEC Regulation insofar that we understand it is aimed at regulating allowable activities on land containing Monaro and Werriwa CEECs as if they were category 2 - sensitive land. However we have broader concerns regarding the management of Monaro and Werriwa CEECs, including changes to the Land Management Code, as well as deficiencies in the NVR Map, including the failure to promptly map newly listed CEECs or to finalise the remainder of the mapping for category 2 - regulated land or category 1 – unregulated land.

CONCLUSION

While the amendments made by the Allowable Activities Regulation may appear minor when considered in isolation, they reflect the overarching trend to weaken environmental protections and facilitate land clearing. Further, given significant increases in land clearing rates across NSW and findings from the NSW Audit Office that that the processes in place to support the Framework are weak, the Parliament should be cautious of accepting changes to the Land Management Framework that facilitate further land clearing. To that end, we recommend that the Allowable Activities Regulation be disallowed.

We understand the rationale of the CEEC Regulation insofar that we understand it is aimed at regulating allowable activities on land containing Monaro and Werriwa CEECs as if they were category 2 - sensitive land. However we note our broader concerns regarding deficiencies in the NVR Map, changes to the Land Management Code relating to Monaro and Werriwa CEECs, and the treatment of EECs more broadly.

Thank you for considering our submission and recommendations. Please do not hesitate to contact **Cerin Loane, Senior Policy and Law Reform Solicitor**, on (02) 9262 6989 should you require any further information.