# Submission on the draft Local Land Services Amendment Bill 2016

prepared by

**EDO NSW**

**June 2016**

## 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:

Biodiversity Reforms – Have Your Say
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## EDO NSW and the NSW Government's proposed land management and conservation package

EDO NSW has been making recommendations for strong biodiversity, native vegetation and land management laws since 1995. We were heavily involved in the development of the current Native Vegetation Act between 2002 and 2005.

EDO NSW met with the Independent Biodiversity Legislation Review Panel during their deliberations and produced *A Legal Assessment of NSW Biodiversity Legislation* to assist the panel.

We engaged with representatives of the Office of Environment & Heritage, Department of Primary Industries and Department of Planning during targeted stakeholder consultations prior to the public exhibition process. We raised a number of key concerns and made recommendations in these meetings based on our extensive expertise in NSW environmental law.

Unfortunately none of these fundamental concerns or recommendations were addressed in the package developed for public consultation.

During the public consultation period we have published our expert analysis on the reforms (see: http://www.edonsw.org.au/biodiversity_legislation_review). We have compared the strengths and weaknesses of current laws with strengths and weaknesses of the proposed laws.

Our conclusion is that the proposed laws are a retrograde step for NSW biodiversity and land management. While the proposed investment private land conservation is welcome, once this money runs out, we will be left with weak laws that offer no real protection for our unique threatened species and ecological communities and that will facilitate ongoing decline in biodiversity. Consequently, we cannot support the proposed package.

Through a series of workshops, seminars and forums, we have spoken to local communities, Landcare members, Local Land Services officers, local councils, ecological consultants, private land conservation agreement holders, Aboriginal people, conservationists, wildlife carers, and private individuals through our advice line. Areas covered include: Hunter, Greater Sydney, North Coast, Northern Tablelands, South East and Central West. We discussed concerns with over 600 people. With the exception of representatives of the NSW Farmers Association, no-one we spoke to stated that the proposed laws were an improvement on current laws. Almost all participants were seriously concerned at the implications of the new regime for biodiversity.

Extending on the analysis on our website, we make the following submissions.

- EDO NSW submission on the Local Land Services Amendment Bill 2016
- EDO NSW submission on the Biodiversity Conservation Bill 2016
- EDO NSW Technical submission on the Biodiversity Assessment Method and Mapping Method.

This is the first of our three submissions.

## Contents

## Executive Summary

EDO NSW is a community legal centre specialising in public interest environmental law. We welcome the opportunity to provide comment on the NSW Government's proposed laws for land management and biodiversity conservation.

This is the first of three submissions by EDO NSW.

This submission discusses the proposed Local Land Services Amendment Bill 2016 (**LLS Amendment Bill**) on rural land-clearing. We analyse the proposed provisions as compared to the current protections contained in the *Native Vegetation Act 2003* and its Environmental Outcomes Assessment Methodology (**EOAM**). This submission uses the current Act as a starting point for assessing the proposed changes.

Based on our expert analysis, we cannot support the proposed regime as it will lead to increased land clearing. Land clearing and habitat loss is the primary threat to biodiversity in NSW. Attempts to address biodiversity decline in the proposed Biodiversity Conservation Bill are likely to be undermined by the relaxed land clearing rules and the increased dependence on offsetting in the proposed system. (This is discussed further in our submission on the Biodiversity Conservation Bill.)

If the NSW Government decides to proceed with the LLS Amendment Bill despite the likely negative impacts on vegetation and biodiversity, then significant amendments need to be made to the LLS Amendment Bill.

Following recommendations on the proposed objects and functions clauses in this Bill, we make specific comment and recommendations on:

1. Land to which the new rules apply (Division 1)
2. Native vegetation regulatory map (Division 2)
3. Regulation of clearing in regulated rural areas (Division 3)
4. Allowable Activities for which no approval is required (Division 4 and Schedule 5A)
5. Clearing under Codes (Division 5)
6. Approval for clearing not under codes or allowable activities (Division 6)
7. Native vegetation compliance provisions (Division 7)
8. Miscellaneous (Division 8) – Reporting, public registers, regulations

For detailed technical analysis of the proposed Biodiversity Assessment Method (BAM), map method and offsets calculator, please refer to our **Technical Submission on the Biodiversity Assessment Method and Mapping Method.**

## Summary of Recommendations

**We do not support the repeal of the Native Vegetation Act, and cannot support the proposed LLS Amendment Bill as drafted. If the NSW Government decides to proceed with the Bill despite the likely negative impacts on vegetation and biodiversity, then significant amendments need to be made to the LLS Amendment Bill and any Codes.**

### Objects:

- In addition to strengthening the implementation of ESD principles in operational provisions of the LLS Amendment Bill, we recommend adding provisions to the Bill to expressly recognise ecosystem services and climate change – for example:
  - In making decisions under the Act, decision-makers are to ensure that land management activities appropriately protect biodiversity and ecosystem services (consistent with achieving Biodiversity Conservation Bill objects); and
  - In making decisions under the Act, the cumulative contribution of broadscale clearing to NSW's emissions of greenhouse gases should be recognised and considered, as well as the important role played by native vegetation as carbon sinks.

### Function:

- LLS need significant resourcing and broadened expertise if they are to undertake 'triple bottom line' assessment.
- LLS Strategic Plans should not be finalised until the full suite of LLS responsibilities has been clarified.
- Alternatively, the Strategic Plans should build in a formal review process when the new biodiversity legislation is passed.
- Strategies and performance indicators should be made SMART (specific, measurable, assignable (responsibilities), realistic and time-related),
- The clear role of LLSs in ensuring compliance with environment and natural resource management legislation should be better articulated.
- Amend the LLS Act (Part 4) to require state and local strategic plans to have regard to the aims of the BC Act, Key Threatening Processes and priorities identified in the Biodiversity Conservation Program and Biodiversity Investment Strategy.
- LLS role in compliance and enforcement needs to be clarified.

### Land to which the new rules apply (Division 1)

Excluded areas

- We strongly believe that the Map should be expanded to include an additional protected and sensitive areas category (either in Category 3 or a new Category 4 – in a different colour). At a minimum the current excluded land category should be expanded to cover existing protected areas.
- An expanded Category 3 or new Category 4 would include as a minimum:
  - Land subject to an in-perpetuity private land conservation agreement (including Conservation Agreements, biobanking agreements, Nature Conservation Trust agreements and Property Vegetation Plans) or obligation (i.e. those properties that have been identified as offsets in planning approvals but not yet converted to formal agreements); and
  - Land that is subject to a conservation measure that was the basis for other land being biodiversity certified; and
  - Land to which State Environmental Planning Policy No 26—Littoral Rainforest applies; and
  - Land to which State Environmental Planning Policy No 14—Coastal Wetlands applies; and
  - Land identified as core koala habitat in a plan of management made under State

Environmental Planning Policy No 44—Koala Habitat Protection; and
    - A declared Ramsar wetland and Nationally Important Wetlands as listed in the Directory of Important Wetlands; and
    - Land that has been mapped as containing critically endangered animals, plants or ecological communities and/or is listed under the federal EPBC Act 1999; and
    - Land that has been mapped as containing mangroves or coastal saltmarshes; and
    - Travelling Stock Routes that contain or are likely to contain areas of high environmental value; and
    - Land that is or was subject to remedial action to restore or protect the biodiversity values of the land under the Native Vegetation Act (e.g. following a breach).
- These areas would be excluded from Code-based clearing and subject to additional assessment conditions.
- Mapping - The regulations should require that the official databases supporting any conclusive presumptions about native plant species must be regularly reviewed and updated.

**Native vegetation regulatory map (Division 2)**

- Category 1 (blue) unregulated land –
    - Further consideration should be given to defining 'low conservation value grasslands' and demonstrating how the mapping process will accurately distinguish between high and low conservation value grasslands.
    - 'Biodiversity certified' land should only be included in Category 1 where the offset area has been protected in perpetuity. (As drafted, land that has been biodiversity certified is included in Category 1 with no requirement to verify the offset for that land.)
    - A process is needed to ensure illegally-cleared land is not mapped Category 1.
- Category 2 (yellow) land should focus on capturing landscapes and vegetation types that require strong regulation. In addition to the layers currently proposed for Category 2, this should include:
    - All threatened species and ecological communities not captured by the proposed Category 3 above (it is extremely concerning that the current Category 2 land only refers to critically endangered animals, plants or ecological communities); and
    - Over-cleared vegetation types – those vegetation types >70% cleared from their pre-European extent; and
    - Vegetation in over-cleared landscapes – those landscapes that are >70% cleared; and
    - Old growth forest and rainforest; and
    - Intermittently Closed and Open Lakes and Lagoons (ICOLLs); and
    - A 50m buffer zone around all SEPP Coastal Wetlands; and
    - All riparian zones (not limited to named streams) with an appropriate buffer zone; and
    - Sites of geological significance including karst landscapes.
- Re-categorisation - We recommend a requirement that bodies with local data (such as Councils) be consulted on mapping review processes. There must be controls to prevent pre-emptive clearing or degradation of yellow land before an application to re-categorise as blue is determined.

**Regulation of clearing in regulated areas (Division 3)**

- Compliance roles should be clarified and fully resourced. OEH should retain the primary compliance and enforcement role, and a new compliance policy should be developed and consulted upon.

**Allowable Activities (Division 4 and Schedule 5A)**

- Expanded buffer distances are not justified. Current buffer distances should be retained with a more strict 'minimum extent necessary' limit applied.

- We recommend landholders keep a log book of all allowable activity clearing. The Government should publish a template logbook for allowable activity clearing.

**Clearing under Codes (Division 5)**

- Do not proceed with the codes that allow significant clearing and cumulative impacts, namely the Systems Efficiency (paddock tree) code, the Equity code and the Farm Planning code.
- Do not proceed with the unnecessary grazing efficiency code.
- Only genuinely low risk clearing activities should be permitted under codes.
- Endangered ecological communities are by definition communities at very high risk of extinction, so it is completely inappropriate and contrary to the logic of codes to allow code-based clearing of EECs.
- The LLS Amendment Bill needs to clearly set out vegetation or areas where code clearing is not permitted. A new section should be inserted in Division 5 to clearly state that code clearing cannot be undertaken in the following:
    - Critically endangered ecological communities
    - Vulnerable and Endangered ecological communities
    - Ramsar wetlands (internationally-protected) and SEPP 14 wetlands
    - Littoral rainforest (SEPP 26)
    - Potential Koala habitat (SEPP 44) (not just core koala habitat)
    - Sites managed under the site-managed species initiative of SOS Program
    - Declared areas of outstanding biodiversity areas (and where declaration is pending).
    - The coastal zone – for example: any area mapped under the new coastal SEPP as environmentally sensitive.
    - Steep or highly eroded land
    - Within 100 m of a watercourse
- Fully drafted codes and accompanying documentation should be made available and consulted upon before any code is established (beyond the minimum 4 weeks' consultation). Independent, scientific peer-review of any proposed Codes and any set-aside mechanisms should also be published before any such measures are established. Peer-reviews should consider whether Codes or set-asides may exacerbate listed Key Threatening Processes.
- All Codes must require notification, if not certification, without exemptions (clause 60V). This need not be an onerous task, with a pro-forma form available to landholders (including online). This record keeping could benefit landholders for compliance purposes and enable the LLS to keep track of the cumulative impacts of code-based clearing in an area.
- There needs to be random and risk-based auditing systems to ensure that the code-based clearing has not gone beyond the scope intended, that set-asides are clearly identified, and any set-aside areas involving revegetation have been planted.
- We do not support code variations (and suggest deleting clause 60Y).
- The native vegetation framework under the LLS Bill, including proposed Codes, must be subject to independent review by the NSW Scientific Committee or new Biodiversity Commission to ensure the framework will not exacerbate KTPs.

**Approval for clearing not under codes of allowable activities (Division 6)**

- Serious *or* irreversible impacts must be defined in the regulation and BAM to include:
    - any adverse effect on the following:
        - Critically endangered species and ecological communities (i.e. those at extreme risk of extinction);
        - Areas of Outstanding Biodiversity Value; and
        - Nationally and Internationally Important Wetlands (i.e. Ramsar wetlands and/or those listed in Commonwealth Directory of Important Wetlands).
    - Any significant effect (as determined by a species impact statement, or equivalent

BAM process) on the following:
    - Endangered species and ecological communities, including Vulnerable species and ecological communities; and
    - Important rivers and biodiversity corridors.
- The words "is of the opinion that" should be deleted from clause 60BB. Serious or irreversible impacts must be an objective and scientific assessment, not a subjective opinion of the Minister. If a clear test of such impacts is met, then clearing must be refused for all development – including major projects.
- There needs to be clear criteria and a transparent process for how the Minister may determine that a modification "will not increase the impact on biodiversity values" and therefore will not require a further BDAR in clause 60EE(2).

**Native vegetation compliance provisions (Division 7)**

- We recommend a clearer separation of duties, so that OEH/EPA undertakes comprehensive compliance activities and LLSs focus on extension, incentives and cooperative work with farmers.
- Once compliance and enforcement roles have been clarified, a very clear compliance policy should be developed and publicly consulted upon.
- The LLS Amendment Bill should be amended to explicitly extend the Land and Environment Court's powers to make further orders in civil and criminal proceedings.
- In relation to remediation orders, the LLS Amendment Bill should include further detail to:
    - Provide that remediation orders should run with the land and be recorded on title;
    - Mandate that remediation take place on the cleared area;
    - Provide that remediation orders are to be for an adequate period of time; and
    - Provide that orders are placed on a public register for transparency and accountability purposes.

**Miscellaneous (Division 8)**

- The proposed reporting is inadequate to accurately assess whether the new rules are working effectively. We recommend that the NSW Government should establish a comprehensive system of monitoring and environmental accounting to accompany the new regime. See part 5 of our **Technical Submission on the Biodiversity Assessment Method and Mapping Method** where we specifically recommend that the NSW Government should:
    - Adopt a set of clear, ambitious, statewide environmental and natural resource management (NRM) goals and targets. These should be translated and given effect in regional land use plans and LLS plans, supported by planning and NRM agencies.
    - Invest in a program to identify and gather data on 'ecosystem services' (benefits to humans provided by nature) – such as a State Ecosystems Assessment – and report on and raise awareness of the importance of ecosystem services for NSW;
    - Establish state and regional 'environmental accounts' to assess progress against ecological baselines and targets. These accounts should assess the extent, condition and trends in environmental assets including biodiversity, native vegetation, carbon storage, soil and water quality.
- There is a significant amount of detail that is to be contained in future regulations. The NSW Government should ensure adequate time is given to consult upon the critical elements of the regulation. This should involve further rural and regional workshops.

Our **Technical Submission on the Biodiversity Assessment Method and Mapping Method** makes a number of detailed recommendations for how the BAM needs to be strengthened if it is to accurately assess biodiversity impacts.

# Introduction

## The current regime and the rationale for reform

The current *Native Vegetation Act* was introduced to address systemic failures in managing land clearing. Its predecessors – a state environmental planning policy introduced overnight in 1995 (SEPP 46), followed by the *Native Vegetation Conservation Act 1997* – both failed to prevent inappropriate clearing by allowing broad and cumulative exemptions, and poor enforcement. This failure was recognised by the Audit Office of NSW and others.[1] In 2001, *clearing of native vegetation* was listed as a Key Threatening Process to NSW biodiversity.

The *Native Vegetation Act* was developed in close consultation with farmers and conservationists in response to failures of previous regulatory regimes to prevent inappropriate land clearing.

A clear foundation and object of the current Act is to 'ban broadscale clearing unless it maintains or improves environmental outcomes.' The Act is also underpinned by a scientific Environmental Outcomes Assessment Methodology (**EOAM**) that ensures not just biodiversity, but soil, salinity and water impacts of clearing are scientifically assessed.

The introduction of the Act was also accompanied by a significant investment for private land conservation through property vegetation plans (**PVPs**). A $430 million package was made available to catchment management authorities (**CMAs**) to assist farmers in repairing the landscape. A minimum of $120 million was earmarked to help farmers maintain or improve native vegetation for biodiversity, water quality, soil and salinity outcomes for four years following the introduction of the Act.

The public register shows that between 2005 and 2015, over 1,000 PVPs were put in place across NSW. The Act allows farmers to do whatever they like with regrowth vegetation and to undertake routine farming or agricultural management activities (**RAMAs**) without approval. But importantly, it does sometimes refuse inappropriate clearing.

The public register statistics from 2005-2015 show:

- 1,088 PVPs were established
- Clearing area: 13,222.53ha of native vegetation were approved to be cleared
- Offset area: 83,133.89ha were established as onsite offsets
- INS area: 4,451,570.59ha were managed for invasive native species
- Paddock tree count: 69,987 paddock trees were approved to be cleared (of a total area of 7,174.74 ha).

Since the Act came into force, land clearing has reduced from up to 21,500 ha per year to 11,000 ha per year. The NSW *State of the Environment 2015* (**SOE**) reports over 2,588,000 ha of 'new restoration or revegetation' since 2005 – via 'incentives, wildlife refuges or retained and improved as a condition to clear under PVPs'. The SOE report continues: 'the total area of land being conserved, restored or undergoing improved management is substantially greater than the area approved for clearing' (although it is often too early to see this translate to changes in extent or condition).[2]

[1] See: *Performance audit: regulating the clearing of native vegetation,* Audit Office of New South Wales, 2002 for a summary of the failures of the previous regime. Robyn L Bartel, Compliance and complicity: An assessment of the success of land clearance legislation in NSW, (2003) 20 EPLJ 81.
[2] NSW Environment Protection Authority, *State of the Environment 2015*, 2016, Table 13.4 pp 118-19.

In December 2010, a 'comprehensive review' of CMAs by the Natural Resources Commission 'concluded that the NSW model for natural resource management is achieving significant success in supporting private landholders to more sustainably manage their land…'. However, '…we are not going to turn the tide of landscape degradation until we harmonise other government plans, programs and regulatory settings so that they all support each other.'

This review found the current system worked well – until, that is, funding cuts to CMAs after the initial four-year investment caused delays in land clearing approvals and making property vegetation plans. A 2012 internal Government report warned of a 'risk to service delivery' – as CMAs were struggling to deliver PVPs and related functions due to a 40% staffing cut.[3]

This doesn't mean the current laws are not effective, merely that the system has not been resourced to work effectively. As the NRC review above notes, this resourcing failure has been compounded by a lack of integration with the land-use planning and approval system.

## New proposals

We have serious concerns about regulation of clearing under the proposed regime. On land categorised as regulated (the yellow map category), there are no clear environmental baselines, aims or targets. There is no ban on broadscale clearing, no mandatory soil, water and salinity assessment, and no 'maintain-or-improve' standard to ensure environmental outcomes – either at the site scale or at the landscape scale. Significant clearing and cumulative impacts can occur on these areas under the proposed codes.

The proposed regime therefore significantly loosens the environmental checks and balances that exist in the current system: it is less stringent, less evidence-based, less accountable. The new system is therefore likely to result in significant clearing increases in NSW.

The proposed LLS Amendment Bill would replace the *Native Vegetation Act* and assessment methodology with:

- New objects that are less clear, to accompany objects of the existing Local Land Services Act (**LLS Act**).
- Four new self-assessable codes (for 'management', 'efficiency', 'equity' and 'farm planning'). These allow significant amounts of clearing, even in endangered ecological communities (EECs), which are at very high risk of medium-term extinction.[4] The codes assume that landholders have ecological expertise to determine their own code-based clearing; increase compliance risks; and allow landholders to set aside areas that might be managed or replanted to justify clearing elsewhere on the property.
- An expanded range of Allowable Activities (an expanded version of RAMAs).
- Discretionary clearing approvals administered by LLSs. However, it is likely that a significant amount of clearing will be accomplished under the codes and allowable activity exemptions, without requiring LLS assessment.

## The effect of the reforms: increased land clearing

The NSW Government has been unable to estimate how much land clearing will occur under the new, more relaxed system, and in particular under the new self-assessable codes. The proposed legislation includes updated offences and penalties, but there is no indication who will undertake compliance and enforcement responsibilities.

[3] *Native Vegetation Service Delivery in a New Operational Environment* (2012) cited in *Biodiversity Legislation Review - OEH Paper 5: Conservation in Development Assessment Processes* (2014) p 78.
[4] As defined under both the *Threatened Species Conservation Act* and Biodiversity Conservation Bill.

We believe the proposed reforms are likely to lead to a significant increase in land clearing, and consequently a reduction in native vegetation and biodiversity in NSW. No one can perfectly predict the future, but Queensland provides clear evidence of what can happen when clearing laws are relaxed. Government figures show there was a huge pulse of 296,000ha of land clearing in 2013-14 after Queensland's land clearing laws were relaxed.[5]

There is nothing in the proposed NSW reform package to prevent similar clearing occurring here. Farmers may be required to set aside areas for conservation or revegetation, or may access an expanded offsets market, but the bottom line is that there will be increased clearing at the site scale, with significant cumulative impacts.

By contrast we believe a more effective reform could be built around the following 7 aspects:

- Clear, consistent overarching goals – such as to 'maintain or improve environmental outcomes' or 'no net loss or better' (for biodiversity, soil and water quality, salinity and carbon management);
- A single, robust scientific methodology to avoid and mitigate impacts, with like for like offsetting available only as a last resort (instead of weak standards as in the BAM);
- Increased long term funds for private conservation, including priority funding for 'red light' areas;
- Invest in a state-wide ecosystems assessment and build a comprehensive system of regional environmental accounts (to measure outcomes and prioritise regional funds);
- Require coordinated planning under natural resource, biodiversity and planning laws;
- Establish an Environment/Biodiversity Commissioner to advise and oversee progress; and
- Embed climate change readiness – by requiring decision-makers to take preventative and precautionary measures; consider species adaptation and resilience needs; and track ecosystem services (for example: gain from carbon management, loss from clearing).

We therefore do not support the repeal of the Native Vegetation Act, and cannot support the proposed amendment Bill.

If the NSW Government decides to proceed with the Bill despite the likely negative impacts on vegetation and biodiversity, then significant amendments need to be made to the LLS Amendment Bill. We make specific comment and recommendations in relation to each Division below.

[5] Queensland Department of Science, Information Technology and Innovation, *Land cover change in Queensland 2012–13 and 2013–14: a Statewide Landcover and Trees Study (SLATS) report*, 2015, Brisbane.

## Local Land Services Amendment Bill - Schedule 1

### Objects

*Ecologically sustainable development (ESD)*

Clause [1] amends the objects of the LLS Act to insert a reference to natural resource management consistent with the principles of ecologically sustainable development (**ESD**). While we welcome the recognition of ESD in the objects, the provisions in the Bill do not effectively implement ESD principles in decision-making.

EDO NSW has undertaken analysis of the extent to which the proposed regime is consistent with ESD principles. While the proposed regime zealously embraces the principle that market mechanisms may be used, it fails to ensure that biodiversity is a *fundamental* consideration. There are no effective 'red lights' to prevent serious *or* irreversible impacts as required by the precautionary principle. And the removal of mandatory soil, salinity, water assessment for clearing is not consistent with 'maintaining or enhancing' landscape health and productivity for future generations to achieve intergenerational equity.

The whole package is about removing regulatory controls and relying almost entirely on a market to provide desired environmental outcomes, under the guise of 'reducing red tape'. The proposed offsets scheme is such a market mechanism, and incentive structures are potentially funded through the proposed private land conservation scheme. However, there is a lack of a clearly established environmental goal and there is no evidence that the proposed market will actually deliver the intended biodiversity outcomes.

*Ecosystem services*

ESD principles also require that "environmental factors should be included in the valuation of assets and services". The proposed scheme does not attempt to effectively and comprehensively value ecosystem services that biodiversity provides - despite an object in the Biodiversity Conservation Bill that suggests this. For example, the value of native vegetation ensuring stable soils, reduced salinity, cleaner water, and the pollination and pest control services provided by local biodiversity. Paddock trees are simply seen as a financial burden on farmers for obstructing certain farm machinery and activities such as centre pivot irrigation, rather than having any asset value. The proposed scheme allows broadscale clearing of paddock trees with no consent required.

Our full analysis of how the new regime fails to implement the principles of ESD is available on our website.[6]

We recommend adding provisions to the LLS Amendment Bill to expressly recognise ecosystem services. This is consistent with proposed Biodiversity Conservation Bill objects.[7] For example:

> *In making decisions under the Act, decision-makers are to ensure that land management activities appropriately protect biodiversity and ecosystem services;*

The LLS Amendment Bill should require this and other new objects to be given effect in key decisions such as Code-making and discretionary development approvals.

[6] http://www.edonsw.org.au/2016_nsw_biodiversity_reforms_offsets_and_ecologically_sustainable_development
[7] Biodiversity Conservation Bill 2016, clause 1.3(d).

*Climate change*

In addition to strengthening the implementation of ESD principles in operational provisions of the LLS Amendment Bill, we recommend adding an object to the Bill recognising the impacts of climate change.

In 2000, *Anthropogenic Climate Change* was listed as a Key Threatening Process to NSW biodiversity. A new and specific object would recognise the important interaction between vegetation management and climate change.

In our 2009 discussion paper, *Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis*, EDO NSW commented on the emergence of climate change as 'a key additional threat to biodiversity [and] a further major challenge to biodiversity conservation in NSW.'[8] There are essentially two arguments for including climate change in the objects of the LLS Act. Both of these stem from the inextricable link between retaining native vegetation and the ability to mitigate and adapt to the impacts of climate change.

First, climate change is predicted to have an irreversible and potentially devastating effect on Australia's biodiversity.[9] OEH reports identify it as the 'most pervasive threat' to NSW vegetation classes.[10] Impacts are likely to include reductions in the geographic range of species, changes to the timing of species' lifecycle events, changes in the location of species' habitats, increased risk of extinction for species that are already vulnerable, and changes in the structure and composition of ecosystems and communities.[11] More broadly, it is expected that climate change will become the first or second greatest driver of global biodiversity loss over the next century.[12] EDO NSW submits that climate change must now be explicitly incorporated into all environmental management decisions, particularly those regarding the retention of native vegetation under the LLS Act.

Second, native vegetation serves the crucial function of carbon storage. Deforestation causes the emission of a significant percentage of NSW's total greenhouse gas emissions. Reports have demonstrated that intact natural forests and wetlands constitute a significant standing stock of carbon that should be protected from carbon emitting land-use activities'.[13] Moreover, Australia's intact natural forests have been found to have a larger carbon storage capacity than has been previously recognised.[14] The LLS Act must therefore recognise this important role.

Inserting a climate change objective into the Act – and giving effect to it in key decision-making processes – would improve educative and practical functions. It would highlight

[8] 'Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis', June 2009, Environmental Defender's Office (NSW), p 6.
[9] See for example, Australia's *State of the Environment 2011*, 'Headlines', which include:
• *Earth is warming, and it is likely that we are already seeing the effects of climate change in Australia. As the driest inhabitable continent, Australia is particularly vulnerable to climate change.*
• *Our unique biodiversity is in decline, and new approaches will be needed to prevent accelerating decline in many species.*
[10] *Biodiversity Legislation Review - OEH paper 1 - Objects*, 'Appendix G: Trends in other pressures to natural ecosystems (using vegetation communities as a surrogate for natural ecosystems)', p 64.
[11] 'Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis', June 2009, Environmental Defender's Office (NSW), p 9.
[12] Heller & Zavaleta (2009) 'Biodiversity management in the face of climate change: A review of 22 years of recommendations' Biological Conservation 142 14-32, in 'Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis', June 2009, Environmental Defender's Office (NSW), p 8.
[13] Mackey et al (2008) 'Green Carbon: The role of natural forests in carbon storage', produced by the Australian National University, Fenner School of Environment and Society, p 7.
[14] Ibid, p 6.

upfront the importance of conserving native vegetation as a means of mitigating climate change impacts. It may also expand funding opportunities to restore degraded ecosystems.

EDO NSW therefore submits that a new object should be inserted to expressly recognise climate change. A clause to operationalise the new object should require:

> *In making decisions under the Act, the cumulative contribution of broadscale clearing to NSW's emissions of greenhouse gases should be recognised and considered, as well as the important role played by native vegetation as carbon sinks*

## Functions of Local Land Services

Clause [2] adds the new role for LLS in native vegetation management to nine existing functions under the LLS Act. We recognise the essential role of regional NRM bodies in working with landholders, but we are concerned about the ability and capacity to undertake the new role – in terms of resources and expertise. As noted, Government reports suggest that by 2012 CMA offices had lost 40% of relevant staff. This was followed by the merging of multiple agencies and functions to create LLS in 2013.

Under the proposed LLS Amendment Bill, LLS will be responsible for a range of functions ranging from receiving notifications of code clearing and certifying some types of code clearing to conducting clearing approval using the new Biodiversity Assessment Method (**BAM**) and undertaking triple bottom line assessments. LLS officers are not all planners, ecologists, economists or sociologists. Significant expertise will be required to carry out the new range of functions.

Significant resourcing investment will be needed to ensure there are enough LLS officers to administer the new scheme. Amounts of resourcing are unclear from the exhibition materials, discussions with LLS staff at recent consultation meetings, or from the recent NSW budget.

The role of LLS in compliance and enforcement is also unclear. This is discussed further below.

Finally, we are concerned about the lack of integrated and effective NRM strategic planning to take into account the new role and functions.

*LLS strategic plans*

The independent panel recommended ensuring that state and LLS 'biodiversity objectives and priorities' are integrated in the planning system. However, nothing in the Biodiversity Conservation Bill or LLS Amendment Bill requires specific biodiversity goals or targets to be set or integrated across legislation.

In June 2016, the Local Land Services released a State Strategic Plan and 11 Local Strategic Plans (2016-2021) in accordance with the LLS Act.[15] The State plan includes 4 high-level aims, most relevantly:

- *Resilient communities in productive, healthy landscapes; and*
- *'Healthy, diverse and connected natural environments'.*

[15] Under the current LLS Act (s. 36), a State strategic plan is to set the vision, priorities and overarching strategy for LLS, with a focus on appropriate economic, social and environmental outcomes.

We have only conducted a preliminary analysis of the state and local LLS strategic plans. Some local plans positively identify Aboriginal engagement and land management practices (for example, North Coast). However, it is not clear whether goals of Regional Plans under the Planning Act align, and there is still no legislative requirement to integrate these systems.

While LLS has adopted a Monitoring, Evaluation, Reporting and Improvement Framework, specific indicators are not available during the biodiversity law consultation period.[16] It is important that clear targets and indicators are created under the LLS Act and strategic plans.

We therefore reiterate our previous recommendations on LLS strategic planning for conservation. In summary:[17]

- LLS Strategic Plans should not be finalised until the full suite of LLS responsibilities has been clarified.
- Alternatively, the Strategic Plans should build in a formal review process when the new biodiversity legislation is passed.
- Strategies and performance indicators should be made SMART (specific, measurable, assignable (responsibilities), realistic and time-related),
- The clear role of LLSs in ensuring compliance with environment and natural resource management legislation should be better articulated.

In addition, we strongly recommend that the Planning Act (Part 3) be amended as part of these reforms, to integrate state and LLS goals and priorities for biodiversity protection.

## LLS Amendment Bill - Part 5A - Native vegetation land management

This submission responds to the proposed divisions of the new Part 5A Native vegetation land management.

### Land to which the new rules apply (Division 1)

*Application of the new part - Excluded land*

Clause 60A sets out that the new native vegetation rules will not apply to urban areas, national park estate and other conservation areas, state forestry land. These are the “grey” areas on the new native vegetation regulatory map.

We strongly recommend that the Map should be expanded to include an additional protected and sensitive areas category (either in Category 3 or a new Category 4 – in a different colour). At a minimum the current excluded land category should be expanded to cover existing protected areas.[18]

The problem with mapping sensitive areas as ‘yellow’, as proposed, is that this may create false expectations that high conservation value lands and protected areas can be cleared.

An expanded Category 3 (or new Category 4) would include as a minimum:

- Land subject to an in-perpetuity private land conservation agreement (including Conservation Agreements, biobanking agreements, Nature Conservation Trust agreements and Property Vegetation Plans) or obligation (i.e. those properties that have

[16] Local Land Services, *State Strategic Plan* 2016-2026, p. 18.
[17] See EDO NSW submissions on LLS Strategic Planning, and the Travelling Stock Route framework:
[18] See also, Report of the Independent Biodiversity Legislation Review Panel, Figure 2, p27-28.

been identified as offsets in planning approvals but not yet converted to formal agreements); and
- Land that is subject to a conservation measure that was the basis for other land being biodiversity certified; and
- Land to which State Environmental Planning Policy No 26—Littoral Rainforest applies; and
- Land to which State Environmental Planning Policy No 14—Coastal Wetlands applies; and
- Land identified as potential or core koala habitat in a plan of management made under State Environmental Planning Policy No 44—Koala Habitat Protection; and
- A declared Ramsar wetland and Nationally Important Wetlands as listed in the Directory of Important Wetlands; and
- Land that has been mapped as containing critically endangered animals, plants or ecological communities and/or is listed under the EPBC Act; and
- Land that has been mapped as containing mangroves or coastal saltmarshes; and
- Travelling Stock Routes that have been identified as containing (or are likely to contain) areas of high environmental value; and
- Land that is or was subject to remedial action to restore or protect the biodiversity values of the land under the Native Vegetation Act 2003 (e.g. following a breach).

These areas would be excluded from Code based clearing and subject to additional assessment conditions. Some such areas would also need separate protection against serious or irreversible impacts.

In relation to the currently proposed Excluded Land (other exclusions), it should be made clear that land reserved under the *National Parks and Wildlife Act 1974* or acquired by the Minister for the Environment under Part 11 of that Act includes nature reserves and indigenous protected areas. It is unclear why the zoning for national park reserves is not included in the list of excluded zones. Further clarification is also required on what would constitute "land dedicated or reserved for a similar public purpose under the *Crown Lands Act 1989*", for example will State Parks be included. It is also important to note that a number of areas of Crown Land, such as Travelling Stock Routes, may not have been reserved for a public purpose related to environmental protection, but they strongly perform that function today. As noted above, these areas should also be included in Excluded Land.

Issues with mapping are discussed further below and in our **Technical Submission on the Biodiversity Assessment Method and Mapping Method.**

*Definitions of "native vegetation and clearing"*

Clause 60B defines native vegetation. Although the terms "remnant" and "regrowth" are no longer used, these categories are recognised through the mapping process identifying post 1990 clearing. The accuracy of mapping – particularly for unauthorised clearing since 1990 will be crucial for the integrity of the scheme – this is discussed further below. The clause refers to "conclusive presumptions" that may be made regarding native species. The regulations should require that the official databases supporting any presumptions must be regularly reviewed and updated.

## Native vegetation regulatory map (Division 2)

For further analysis, please refer to our **Technical Submission on the Biodiversity Assessment Method and Mapping Method.**

*Exempt land (previously cleared) land - Category 1*

The proposed unregulated land (Category 1 - blue) category includes areas containing low conservation value grasslands. No definition of low conservation value grasslands is provided and it is unclear how the mapping process will accurately distinguish between high and low conservation value grasslands. Such categorisation should consider the ecosystem services and biodiversity restoration potential of grasslands. Furthermore, land that has been biodiversity certified has been included in Category 1 with no requirement for the offset for that land to be verified. Biodiversity certified land should only be included where the offset area has been protected in perpetuity.

In this context, we note that appropriate protection of critically endangered animals, plants or ecological communities is wholly dependent adequate mapping (i.e. areas that have not been mapped are not automatically regulated). Agricultural land, which in this framework is likely to be classified as Category 1 or low value grassland, provides habitat for a number of threatened grassland-dependent fauna species, which are only likely to be detected by relevant experts and can be difficult to detect. The effectiveness of the Map therefore requires comprehensive, ecologically defensible mapping which has not been completed to date. This undermines the ability for the Map to function as an appropriate regulatory tool. The use of annual reviews and discretionary reviews available to the Chief Executive of OEH will be vital to ensure adequate protection for threatened species when new information becomes available.

*Regulated land - Category 2*

In relation to regulated land (Category 2 - yellow), as noted, there are no clear environmental baselines, aims or targets. Unlike the current Act, there is no ban on broadscale clearing, no mandatory soil, water and salinity assessment, and no 'maintain-or-improve' standard to ensure environmental outcomes – either at the site scale or at the landscape scale (e.g. based on regional environmental accounts).[19] Provisions are less stringent, less evidence-based, less accountable, and are likely to result in significant clearing increases in NSW.

Category 2 (yellow) land should focus on capturing landscapes and vegetation types that require strong regulation. In addition to the layers currently proposed for Category 2, this should include:

- All threatened species and ecological communities not captured by the proposed Category 3 above (it is extremely concerning that the current Category 2 land only refers to critically endangered animals, plants or ecological communities); and
- Over-cleared vegetation types – those vegetation types >70% cleared from their pre-European extent; and
- Vegetation in over-cleared landscapes – those landscapes that are >70% cleared; and
- Old growth forest and rainforest; and
- Intermittently Closed and Open Lakes and Lagoons (ICOLLs); and
- A 50m buffer zone around all SEPP Coastal Wetlands; and
- All riparian zones (not limited to named streams) with an appropriate buffer zone; and
- Sites of geological significance including karst landscapes.

NRM experts at a workshop we attended in the Central Tablelands noted the significant diversity of plant community types in that region, but also that the ecology is poorly

[19] See for example Wentworth Group of Concerned Scientists, *Accounting for Nature* (2012); and *Accounting for Nature - Quick Guide* (2013) at www.wentworthgroup.org.au.

understood. This emphasises the need for more comprehensive investment if mapping data is to be reliable, such as a State Ecosystems Assessment.

*Re-categorisation of land*

Clause 60J sets out when and how land can be re-categorised. While we support the ability to add environmentally sensitive areas to exempt or excluded land categories for environmental conservation purposes, we are concerned about the conversion of yellow to blue for three reasons. First, the amount of clearing permitted under codes (particularly for equity and farm planning) will enable large amounts of single properties to be converted from yellow to blue. Second, the internal landholder appeal and review process lacks transparency. We predict that some property mapping boundaries will be hotly contested and it is unclear whether any third party can provide any input (Clause 60K (5) states the regulations *may* provide for notification and consultation for affected persons or bodies). Third, it is discretionary whether a regulation will do anything to prevent pre-emptive clearing when a re-categorisation is pending ((7) "may").

We recommend it may be appropriate for bodies with local data (such as Councils) to be consulted on review processes.

## Regulation of clearing in regulated areas (Division 3)

*Unauthorised and authorised clearing*

We support offence provisions and significant penalties to act as a deterrent to illegal clearing. However, the extent of clearing that will be permitted under expanded allowable activities and the codes will mean that there are a range of options for justifying large amounts of clearing without official approval. This is reminiscent of the situation we had in NSW before the Native Vegetation Act was brought in - its predecessors – a state environmental planning policy introduced overnight in 1995 - SEPP 46, followed by the Native Vegetation Conservation Act in 1997 – both failed to prevent inappropriate clearing by allowing broad and cumulative exemptions, combined with poor enforcement. This failure was recognised by the NSW audit office and others.[20]

We are also concerned that there has been no clear commitment as to what agency will undertake compliance and enforcement, and what resources will be allocated to ensure there are enough on-ground officers to do compliance effectively. We recommend that compliance roles should be clarified and fully resourced. OEH should retain the primary compliance and enforcement role, and a new compliance policy should be developed and consulted upon.

## Allowable Activities (Division 4 and Schedule 5A)

*Current RAMAs*

Under the current regulatory arrangements, landholders have been able to undertake routine agricultural management activities (**RAMAs**) without requiring consent. The public register shows only 4 applications for RAMA distances to be expanded, (for a realignment and upgrade of access road, to provide central grain storage and wet weather access, to reduce infrastructure damage from wind, and allow for stock movement), so it can be assumed that the current distances have been workable.

[20] See: *Performance audit: regulating the clearing of native vegetation,* Audit Office of New South Wales, 2002 for a summary of the failures of the previous regime. See further: Robyn L Bartel, "Compliance and complicity: An assessment of the success of land clearance legislation in NSW", (2003) 20 EPLJ 81.

Under the previous native vegetation regime, it was abuse of the clearing exemptions that led to excessive broadscale clearing in NSW.[21] For this reason, it is imperative that the NV Act is structured in a way that avoids previous failures.

EDO NSW had major concerns regarding the continued incremental expansion of RAMAs under the current NV Act. The Wentworth Group Blueprint that was a catalyst for the introduction of the NV Act, recommended that the new native vegetation regime contain only three limited exemptions, namely clearing for, 'the construction of a dwelling; carrying out routine farm activities, such as collecting firewood for personal use, fencing material and reducing bushfire hazards; and vegetation management in accordance with a certified PVP.'[22] However, the NV Act contained 9 very broad categories of RAMAs, some of which go beyond what would reasonably be understood as 'routine' parts of agricultural management, such as infrastructure projects undertaken by councils which are clearly not routine agricultural or management activities.[23] The list of RAMAs was further expanded in 2013.

The current buffer distances available are very generous, and in fact, can allow farmers to incrementally change the land use of their properties. The generous buffer zones for RAMAs in the current regulation, effectively allow for clearing to take place in order to facilitate land use *change*, rather than merely to continue or maintain an existing farming practice. In our experience, the (expanding) definitions of RAMAs create significant potential for landowners seeking to gradually transform the use of their land to activities that require an 'open paddock' landscape (such as grazing). It is difficult to review the appropriateness of RAMAs without taking these buffer zones into account.

It is difficult to tell how much clearing occurs under existing rules. The *Regulatory Impact Statement* (**RIS**) produced for the *Review of the Native Vegetation Regulation* in 2012 stated that "*it is very difficult to determine the number of times that clearing is undertaken under a RAMA. The Native Vegetation Report card does not report on activities exempted or excluded from the Act*".[24] It will be impossible to tell how much clearing occurs under an expanded list of allowable activities.

The test that RAMA clearing must be "to the minimum extent necessary" has not been tested, and to our knowledge is not monitored, so there is no way of knowing whether the limit is complied with.

Finally, the difficulties of undertaking enforcement and compliance under the current Act are inextricably linked to the way in which RAMAs are designed. On the ground, it has been observed that authorised officers responsible for administering the enforcement provisions of the Act, upon entering land, have difficulty determining whether certain clearing that has occurred was in fact undertaken within the exceptions permitted by the definition of RAMAs in section 11.[25] (This is considered further under 'Compliance and Enforcement' below.)

In light of the above, EDO NSW submits that the operation of the RAMA provisions is not achieving the current Act's objectives. The proposed expansion will exacerbate these problems.

[21] Robyn L Bartel, Compliance and complicity: An assessment of the success of land clearance legislation in NSW, (2003) 20 EPLJ 81.
[22] *A new model for landscape conservation in NSW*, Wentworth Group of Concerned Scientists, 2 February 2003, p 5.
[23] Section 1(1)(i), NV Act 2003.
[24] Regulatory Impact Statement, 2012, p11.
[25] Source: EDO Community legal advice line and CMA interviews.

*Proposed allowable activities*

The new regime sets out a similar list of activities - rebadged as "allowable activities" - but proposes to expand the associated clearing allowances.

The LLS Amendment Bill proposes to expand allowable activities, particularly in terms of buffer distances that may be cleared, however, the rationale for further expanding the distances is unclear and not supported by evidence. Schedule 1, clause 30 provides maximum distances for clearing around rural infrastructure of 40 m in the Western zone, 30 metres in the Central zone and 15 metres in the Coastal zone, with a 12m limit on small holdings or temporary fences. For clearing near electricity transmission infrastructure, the proposed LLS Amendment Bill has doubled the maximum clearing distances. Sustainable grazing remains undefined and potentially unlimited.

Clause 9 of the LLS Amendment Bill allows the Local Land Services to increase maximum clearing distances if it is satisfied that it is for a legitimate purpose, the increase is reasonable in the circumstances, and the environmental impact would be "minor". This is a lower threshold than before. Under the NV Regulation, only the Minister was able to increase clearing distances or areas and they had to be satisfied that the increase is **necessary** in the circumstances.

There is a risk in expanding the distances of increasing cumulative impacts of minor clearing. As noted, the NSW Government has been unable to estimate how much clearing has occurred under RAMAs (as recognised in their own RIS as noted above). This unmeasurable category will now increase.

To address this concern, EDO NSW has previously recommended that landholders keep a log of all RAMA clearing undertaken. This would benefit the landholder as they would have a clear record of allowable activity clearing should they receive a compliance query.[26]

We recommend current buffer distances are retained with a more strict minimum extent necessary limit applied. We recommend landholders keep a log book of all allowable activity clearing.

## Clearing under Codes (Division 5)

EDO NSW has serious concerns about the scale of clearing that would be permitted under the proposed codes on 'Regulated Land (Yellow - Category 2)'. We note that the clearing will require either notification or certification with the Local Land Services (LLS), however the LLS cannot refuse clearing applications that are consistent with Codes. Some of the code clearing proposed represents a return to broadscale land clearing.

Many of the types of activities addressed by the proposed codes are already permitted under the current Act. The need for expanded codes has not been justified. We have previously made detailed comment on the problems with code-based clearing.[27]

The potential scale of clearing under the codes is huge. Notwithstanding this fact, there is no clear confirmed limit to the number of notifications allowed under certain clearing types under the proposed codes, and the proposed notification requirements lack critical details. The implication of this is that significant areas can be progressively cleared simply by submitting multiple notifications. Misuse of the codes would potentially be a reintroduction of

[26] See EDO NSW, *Submission on the Draft Landholder Guides and Draft Orders to implement self-assessable codes under the Native Vegetation Regulation 2013*, May 2014.
[27] See EDO NSW, *Submission on the Draft Landholder Guides and Draft Orders to implement self-assessable codes under the Native Vegetation Regulation 2013*, May 2014.

broadscale clearing in NSW. This would also undermine the confidence of landholders seeking to be responsible stewards of their land.

The potential for misapplication of the codes is high in the absence of technical input. The effective implementation of the codes requires a high degree of technical knowledge that many landholders may not possess. This applies to the level of species and vegetation community identification required, the best practice management approaches for invasive native species and the identification of habitat features in paddock trees, to use some examples. We understand that a number of issues arose during previous field trials of similar proposed codes, for example, in relation to accurately identifying tree species on site.[28]

EDO NSW reiterates our concerns about the potential impacts on threatened species that would arise from landholders being unable to accurately identify these species. By removing the need for external assessment, the risk of threatened species being cleared is greatly increased. Even training offered by the LLS is not a prerequisite to self-assessed clearing. The previous suggestion that providing photographs of threatened species will address this problem is impractical and high risk. Without a genetic analysis, many species can only be identified at certain times of year, for example when they are in flower, and many species consist of individuals with differing morphology. Comparing a tree or shrub to a single image of species is an inadequate identification technique. It is unclear what requirements will be set out in the codes as proposed code provisions are not on public exhibition.

There is inadequate evidence to justify the need for codes, as significant clearing is already permitted. For example, in relation to INS clearing EDO NSW noted in 2012:

> *The management of INS under the current scheme has permitted the clearing of a significant amount of woody vegetation in NSW. This is supported by the map of PVPs provided by OEH, which shows 3.3m ha of INS clearing out of a total of 4.2m ha under PVP (including 714,000ha under incentive PVPs). The mean annual loss of woody native vegetation in NSW from 2006-2010 was 87,740ha. Comparison of the five years before the implementation of the NV Act (2000-2004) with the five years post the implementation of the NV Act (2006-2010) shows there has been a 20% increase in the total loss of total native woody vegetation in NSW AND a 5% drop in the total amount of native vegetation cleared for the first time.* [29]

The current system has therefore permitted extensive clearing of INS. The need for an INS self-assessable code is therefore unclear. If lack of awareness or understanding is the issue, this can obviously be addressed in other ways.

EDO NSW submits that instead of experimenting with self-assessable codes, the NSW Government should improve the current PVP process, applying the EOAM. This involves providing better resources and staff for LLS so that PVPs can be drawn up with expert advice in a timely manner. It was never intended that PVPs would take months to negotiate. Increasing resources to better administer the Act would mean that thinning and INS PVPs could be put in place much faster, whilst not compromising the environmental objectives of the regulatory regime.

If the NSW Government decides to pursue a set of code-based clearing options, it should be limited.

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[28] Feedback received from a community representative who attended an OEH field trial during the previous code development process.

[29] Analysis of the Land clearing rates from the Commonwealth Department of Climate Change and Energy Efficiency by Dr Phil Gibbons. See: National Greenhouse Gas Inventory - Kyoto Protocol Accounting Framework: http://ageis.climatechange.gov.au/QueryAppendixTable.aspx. The full EDO NSW submission is available at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/349/attachments/original/1380680437/120824native_vegetation_regulation.pdf?1380680437 (24th August 2012).

Our primary recommendation is that only genuinely low risk clearing activities should be permitted under codes. To achieve this, the LLS Amendment Bill needs to clearly set out vegetation or areas where code clearing is not permitted, and not proceed to establish the codes that allow significant clearing, namely the systems efficiency code, the equity code and the farm planning code.

Codes are only ever appropriate for genuinely low risk activities. Endangered ecological communities are by definition communities at risk, so it is completely inappropriate and contrary to the logic of codes to allow code-based clearing of EECs.

A new section should be inserted in Division 5 to clearly state that code clearing cannot be undertaken in the following:

- Critically endangered ecological communities
- Vulnerable and Endangered ecological communities
- RAMSAR wetlands and SEPP 14 wetlands
- Littoral rainforest (SEPP 26)
- Potential Koala habitat (SEPP 44) (not just core koala habitat)
- Sites managed under the site-managed species initiative of SOS Program
- Declared areas of outstanding biodiversity areas (and where declaration is pending).
- The coastal zone – for example, any area mapped under the new coastal SEPP as environmentally sensitive.
- Steep or highly eroded land
- Within 100 m of a watercourse

It is indicated that some of these exclusions are intended to be identified in the codes, but we submit there needs to be a clear and expanded list in the new Act.

It is proposed that certain code applications will result in land being converted from yellow to blue (unregulated land). This conversion by repeated application of codes could facilitate significant land use change and pave the way to future subdivisions of land. This is contrary to the Independent Panel recommendation that clearing resulting in a change of land use must be properly assessed under planning laws.

There are also liability implications for farmers. Clause 60R should also include a note that if clearing involves a species or community that is federally listed, then approval under the EPBC Act may still be required. It is important for landholders to be aware that relaxed clearing rules in NSW do not mean that they avoid liability under federal environmental law.

*Preparation and concurrence*

We strongly support low risk management codes being developed with concurrence from the Minster for the Environment (clause 60S(2)).

We note that clause 60S(3) requires the Minister to have regard to the principles of ESD, and the notes summarises this as integrating social, environmental and economic considerations. As discussed above, there are specific principles of ESD that should be considered – for example that biodiversity conservation is a fundamental consideration.

Changes to codes should be consulted on publicly (clause 60T). There could be a streamlined process for minor changes, but ‘minor’ needs to be defined and landholders and communities still need to be made aware of changes that are more than merely correcting errors.

*Content*

The LLS Amendment Bill sets out the content that may be covered by a code (clause 60U), and the public exhibition materials give an indication of likely code applications and rules. However, without seeing actual draft codes it is difficult to comment on their content. Fully drafted codes and accompanying documentation should be made available and consulted upon before any code is established.

*Notification*

We submit that all codes must require notification, if not certification (clause 60V). This need not be an onerous task, with a pro-forma form available to landholders. This could benefit landholders in terms of record keeping and enable the LLS to keep track of the cumulative impacts of code clearing in an area. This is important given the goal of the new regime to achieve overall biodiversity outcomes at a regional or state scale.

*Certification*

The public exhibition materials do not indicate what kind of auditing (if any) will occur to follow up when a code compliant certificate is issued. There needs to be random auditing system to ensure that the code-based clearing has not gone beyond the scope intended and any set-aside areas involving revegetation have been planted. Currently certification can occur a year before set asides need to be established, so there needs to be a system of checking this has been done or required management is underway.

*Code variations*

The proposed codes allow such a broad range of clearing that it is difficult to imagine why further variation and expansion would be needed. We therefore do not support code variations (and suggest deleting clause 60Y). If a landholder wants to undertake clearing that does not fall under a code, then that clearing should be assessed by the LLS.

*Set aside areas*

We support the current system whereby a PVP is developed that scientifically calculates an appropriate on-site offset using the EOAM, and provides for its management in perpetuity.

In contrast, the proposed 'set aside' scheme side-steps any qualitative ecological assessment by focusing on simplified area based ratios. It is very clear even to someone who is not an ecologist, that 3 ha of planted seedlings is not equivalent to 1 ha of remnant vegetation in terms of biodiversity values. The set aside provisions in clause 60Z do not take into account condition, with the exception of noting if an EEC is involved. As recommended above, EEC must be removed from code-based clearing. The set aside baseline ratios proposed for all 3 set aside types (intensive remnant management, moderate remnant management, and revegetation) ecologically equate to a net loss of biodiversity.

Set asides may be registered on title and be managed for conservation into the future, but they can still be subject to clearing applications (under Division 6) and can be further cleared under the allowable activities provisions (clause 60Z(4)(b). We submit that the regulation should require registration on title and future clearing should be highly restricted.

As noted above, set asides need to not be established for 12 months following clearing, and it is unclear who will check whether the set asides are established and managed.

We also consider that independent scientific review is needed of the set-aside mechanisms, and proposed Codes under the LLS Amendment Bill. These peer-reviews should be published prior to further consultation. We note this has occurred for the draft Biodiversity Assessment Method. That peer-review raises significant issues that must still be addressed.

*Proposed codes*

We make specific comments in relation to the proposed codes below.

We reiterate that each code should have an upfront statement making it very clear to landholders which areas and types of vegetation *cannot* be cleared under a code.

- **Management codes**

As noted above, significant clearing has occurred under the current system for thinning, management of invasive native scrub.[30] The limits on these activities (and the species that can be cleared or thinned) should not be further expanded. As previously submitted, we do not support paddock scale treatments that amount to broadscale clearing.[31]

- **Efficiency codes**

Under the current system, we have seen a significant increase in the number of paddock trees cleared over the last 18 months. The rationale for further relaxing the rules in unclear and not clearly justified by the information provided for the proposed "efficiency" codes.

Does the aggregate clearing cap of 2% per property, apply per application of the code? How many times can the code be used per annum? It is possible that some codes may be used concurrently or cumulatively. This could have significant cumulative impacts, not just on the property in question, but for landscape health in the relevant catchment.

Given the scientifically recognised ecosystem values provided by paddock trees (not just for biodiversity habitat and hollows, but for stock shade, soil stability etc), we do not support the removal of paddock trees under codes. Instead of recognising these values, the proposed system focuses on machine access/manoeuvrability and diesel fuel costs. As noted above, in the discussion of principles of ESD, proper pricing of assets such as paddock trees is absent from the proposed regime. Furthermore, the removal of paddock trees will exacerbate a Key Threatening Process identified in the proposed Biodiversity Conservation Bill relating to "loss of hollow bearing trees."

In relation to the "grazing efficiency code" there is no justification given for the need for this code. It is unclear why grazing cannot occur around single trees, and in fact, stock may benefit from shade provided. The code information suggests that there will be a requirement to retain remnant tree cover on 30% of the treatment area (p19), recognising the benefit of trees in grazing areas. There is not the same rationale of the need for large cultivation machinery to be required in areas used only for grazing. It is also unclear why clearing of small clumps and trees would not require changes to the regulatory map, when elsewhere in the exhibition materials it is indicated that small clumps and some trees will be identified as yellow on the map. Given the unclear justification and internal contradictions we recommend that the grazing code is not progressed.

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[30] Analysis of the Land clearing rates from the Commonwealth Department of Climate Change and Energy Efficiency by Dr Phil Gibbons. See: National Greenhouse Gas Inventory - Kyoto Protocol Accounting Framework: http://ageis.climatechange.gov.au/QueryAppendixTable.aspx.

[31] See EDO NSW, *Submission on the Draft Landholder Guides and Draft Orders to implement self-assessable codes under the Native Vegetation Regulation 2013*, May 2014.

Similarly, the “system efficiency code” is vague and no clear justification for it is provided in the public exhibition materials. The description provided as to allow “clearing of vegetation to enable more efficiency farm management” (*sic*) p19. “System” is undefined. This unclear code should not be progressed further.

- **Equity code**

The “equity” code allows a huge amount of clearing every 3 years – up to 25% or 500 ha.

As noted, if the aim of the new regime is to provide equity to rural landholders who have their land use constrained by the presence of native vegetation compared to urban developers or miners, this code is not the answer. (Further analysis of “equity” and the reform package is published on our website).[32] Again the proposed spatial area ratios (where if a property has more vegetation set aside ratios are lower) are not based on condition or any ecological assessment. The equity code could potentially facilitate land degradation in catchments from significant clearing, undermining landscape health and equity with neighbouring landholders who may be impacted. The high risk, non-scientific equity code proposal must be abandoned. If a landholder wishes to clear this amount of vegetation an LLS assessment must be required.

- **Farm plan code**

Farm planning to create or improve cores and corridors is a sound objective and should be achieved through private land conservation incentive funding. The proposed code is not the appropriate mechanism to do this.

The proposed code allows 25% of vegetation to be cleared in exchange for planting elsewhere. It is not ecologically possible to “redistribute” remnant vegetation without a significant time lag. Seedlings simply cannot replace the biodiversity values provided by a remnant tree with hollows. Set asides may be different vegetation and biodiversity outcomes are only maximised as far as practicable (p22 – code summary document). This vague code would facilitate a net loss of vegetation for uncertain gains in the future, and should be abandoned. Farm planning to plant corridors and connect patches of vegetation should be facilitated with private land conservation funding and not used to justify further extensive code clearing.

## Approval for clearing not under codes of allowable activities (Division 6)

*Discretionary approvals replace ‘maintain or improve’ standard*

Division 6 of Part 5A outlines an assessment and approval process for clearing that does not fall under one of the proposed codes. It applies to activities that do not require consent – such as extensive agriculture.[33] This division expands the ability for rural landholders to justify clearing by having access to an expanded offsets market (by applying the BAM). This includes the new option to pay into the fund in lieu of finding a direct offset. On top of this it gives LLS discretion to reduce offset credits (or payment) for socio-economic reasons.

[32] See: http://www.edonsw.org.au/2016_nsw_biodiversity_reforms_2016_equity

[33] If consent is required for the land use in the relevant zone, the Planning Act would apply. *Extensive agriculture* is defined in the Standard Instrument LEP to include commercial cropping, grazing, beekeeping and pasture-based dairies. We note the Review Panel (2014, p. 26) recommended that LEPs be amended to require consent for extensive agriculture (and intensification of land-use), as part of its proposal to deal with agricultural land use change in the Planning Act.

The LLS Amendment Bill's model for discretionary clearing approval is different to the model proposed by the Review Panel. However, either model would replace the current 'maintain or improve' test – which safeguards rural land and biodiversity against broadscale clearing – with wider discretionary approvals (under either the LLS Act or Planning Act).

Clause 60BB provides that the Minister for Primary Industries can approve clearing under this part. We understand the power will be delegated to LLS under the Act. Our concerns about LLS resourcing and expertise to carry out these new functions are noted above.

In considering the clearing application, the LLS must 'take into consideration' whether clearing may cause or increase various adverse land and water impacts (clause 60BB(5)(b)). There is no consistent method prescribed in the LLS Amendment Bill, and importantly, no actual requirement to avoid those impacts (only to consider them). By contrast, the Native Vegetation Act applies a consistent scientific method to ensure these factors are protected (the EOAM). There is also no indication whether impacts such as soil erosion, salination or acidification would in some circumstances be prescribed as serious/irreversible impacts.

We welcome the requirement that the Minister's considerations must be "in accordance with the principles of ESD" (clause 60BB(5), but note the actual principles of ESD require more than just a 'triple bottom line' trade off.

We welcome the requirement that applications must be refused if the proposed clearing is likely to have serious and irreversible impacts on biodiversity values (clause 60BB(6)). However, this needs to be strengthened. As noted in all 3 submissions, there should be a clear list of these impacts set out in the regulation and the BAM. As noted in our **Technical Submission on the Biodiversity Assessment Method and the Mapping Method**:

We recommend that a clear statement of what constitutes **serious *or* irreversible impacts** should be set out in the BAM and the regulation. To accurately reflect the ESD definition, the test must be serious "or" irreversible impacts, not "and". The list of relevant impacts should include:

- Any adverse effect on the following:
  - Critically endangered species and ecological communities (i.e. those at extreme risk of extinction);
  - Areas of Outstanding Biodiversity Value; and
  - Nationally and Internationally Important Wetlands (i.e. Ramsar wetlands and/or those listed in Commonwealth Directory of Important Wetlands).

- Any significant effect (as determined by a species impact statement, or equivalent BAM process) on the following:
  - Endangered species and ecological communities, including Vulnerable species and ecological communities; and
  - Important rivers and biodiversity corridors.

In the absence of a dedicated legislative framework for Aboriginal culture and heritage, consideration must also be given to how areas of culturally significant biodiversity could be protected, in full consultation with Aboriginal peoples of NSW.

Furthermore, the words "is of the opinion that" should be deleted. There needs to be an objective and scientific assessment of S&II as it should not be a subjective opinion of the Minister. If a clear test of such impacts is met, then clearing must be refused for all projects including major projects.

*Biodiversity Assessment Report & retiring credits*

Clause 60BB and 60CC require clearing to be accompanied by Biodiversity development assessment reports (BDAR) summarising assessment of the new BAM. We note that BDARs will be shared with OEH for the purpose of updating databases and administering the accreditation scheme, but not for concurrence purposes (clause 60CC – consultation note).

Our **Technical Submission on the Biodiversity Assessment Method and the Mapping Method** makes a number of detailed recommendations for how the BAM needs to be strengthened if it is to accurately assess biodiversity impacts.

In addition to the concerns we have with the proposed BAM and option to pay in lieu of finding an offset (as noted in clause 60CC(3) note),we have serious concerns with the ability to further discount offset requirements in clause 60CC(4). This clause provides that the Minister may discount how many biodiversity credits are needed on social, economic or environmental grounds. This subjective decision has the potential to undermine any scientific credibility of the clearing assessment. While the clause notes that the Minister must give reasons for discounting, but it is unclear if these will be published or challengeable. This clause should be deleted.

We agree that no clearing should occur until credits have been retired (clause 60CC(6)), but this requirement can be circumvented with a payment to the fund. That is, the LLS Amendment Bill does not stipulate that clearing must wait until the trust has spent the relevant payment form a landholder on an appropriate offset. As noted, we oppose the direct 'pay-to-clear' option, as it accelerates loss and weakens like-for-like offsetting. However, at a minimum, an additional requirement to prevent any clearing (after payment) until offsets are found would strengthen the scheme; and reduce the risk of serious or irreversible loss where offsets can't be found.

We consider that appeal rights against approval decisions (currently proposed for landholders only, clause 60FF) should be extended to interested persons such as local councils. This should include a right for interested persons to join proceedings where a landholder appeals a refusal.

*Modifications*

It is not clear how the Minister may determine that a modification "will not increase the impact on biodiversity values" and therefore will not require a further BDAR in clause 60EE(2).There needs to be clear criteria and a transparent process for this.

*Urban clearing SEPP*

Clause 60HH refers to the proposed SEPP that will regulate clearing in urban and other areas. We make comment on this proposal in our **Submission on the Biodiversity Conservation Bill**.

However, the note in the LLS Amendment Bill (p22) suggests that "the provisions of this Division will be modified so as to omit the requirement that the removal of trees or other vegetation is for an agricultural purpose that does not require consent, so as to provide additional matters for consideration by the Minister and to make other consequential changes." In all the workshops and sessions that EDO NSW has been involved in during the consultation period, concerns were raised about the uncertain management of this process in urban areas. This note fails to clarify the potential role and scope of LLS and or local councils assessment and approval under this Division.

## Native vegetation compliance provisions (Division 7)

EDO NSW strongly supports comprehensive and clear compliance and enforcement provisions, including innovative orders and penalties that create an effective deterrent.

In 2002, the Auditor-General undertook an audit of compliance and enforcement of native vegetation laws in NSW. Two pertinent findings were:

- *information on clearing of native vegetation was inadequate to regulate effectively*
- *no system was in place to monitor and report on regulation of native vegetation.*[34]

In 2006, the Auditor General undertook a follow up audit of compliance and enforcement of native vegetation laws in NSW. It concluded that the relevant department had made progress, but that the department then had to "establish a record of enforcement actions that are numerous, visible and successful" in order to implement the ban on broadscale clearing introduced by the NV Act.[35] Further, the report concluded that if adequate monitoring and reporting is not put in place, it will be impossible to regulate effectively.

The emphasis of the compliance approach under the current Act has been on 'extension' work by CMAs (now Local Land Services), rather than on strict enforcement of the Act. We recognise that the vast majority of landholders do the right thing and do not deliberately breach legislation. We also recognise that there is a need to improve communication with landholders to ensure there is a better understanding of the purpose and ambit of the laws.

The new rules propose to greatly expand the clearing activities that can be done without any assessment, reporting or monitoring or process for measuring outcomes. Overall, compliance activities will be made more difficult with the new allowable activities and self-assessable codes, for example, it will be harder to determine exempt paddock scale clearing using satellites. It will be difficult to tell whether the new laws are better understood and whether they are being complied with.

EDO NSW recommends that given the significant expansion of clearing activities that do not require assessment, the trade-off must be that some simple but effective record keeping requirements are imposed on landholders. This is essential in order to determine if the revised scheme is inadvertently facilitating a return to broadscale clearing and has benefits for diligent landholders who are applying the new rules correctly.

Landholders could be assisted in this task so that it is not onerous. OEH or LLS should develop user-friendly 1 page forms that could be filled out by landholders that record basic information. The information required should include: date, location, type of clearing activity, relevant allowable activity etc. It is in the interest of landholders to keep a basic record to assist them in responding to any compliance inquiries, and it is essential for the functioning and ongoing implementation and review of the Act.

To do "extension" and education work properly, LLSs will need a significant increase in resources and staff with communications expertise. This is in addition to the increased resources needed to train and skill up an increased number of field staff to work with landholders explaining the new regime and for example, assessing set asides for certification.

[34] *Performance audit: regulating the clearing of native vegetation .* The Audit Office of New South Wales, 2002.
[35] *Performance audit: regulating the clearing of native vegetation: Follow-up of 2002 performance audit* The Audit Office of New South Wales, July 2006, p3.

Our biggest concern about the compliance and enforcement of the proposed regime is that there is no indication of who will undertake compliance actions.

Division 7 of the LLS Amendment Bill indicates a role for LLS in some instances, but there needs to be a clear role for OEH/EPA.

We submit that OEH/EPA must maintain a clear compliance role, including a compliance presence in rural communities in order for the native vegetation offence provisions to maintain a deterrence factor.[36] Patchy implementation of the current laws to date indicates that LLSs officers are put in an extremely difficult position and understandably prefer to focus on cooperative work with landholders in their local community, rather than be required to do compliance work. Yet there is a need for both extension *and* enforcement. We therefore recommend a clearer **separation of duties**, so that OEH/EPA undertakes comprehensive compliance activities and LLSs focus on extension, incentives and cooperative work with farmers.

The issues surrounding enforcement under the NV Act are seemingly related to a lack of political will to support OEH and other delegated authorities to prosecute and initiate proceedings, rather than a reluctance by the Land and Environment Court to impose penalties. We have previously submitted that the absence of a broad range of specific orders available under pollution and planning laws intensifies the failure of the NV Act to deter offenders.[37]

We recommend that the LLS Amendment Bill should be amended to explicitly extend the Land and Environment Court's powers to make further orders in civil and criminal proceedings. All of the orders available to the Court under pollution laws (Part 8.3 of the POEO Act) and the power to make orders as the court thinks fit (as available under section 124(1) of the Planning Act), should be inserted into the LLS Amendment Bill.

In relation to remediation orders, the LLS Amendment Bill should include further detail to:

- Provide that remediation orders should run with the land and be recorded on title;[38]
- Mandate that remediation take place on the cleared area;
- Provide that remediation orders are to be for an adequate period of time; and
- Provide that orders are placed on a public register for transparency and accountability purposes.

We strongly support clause 60RR that provides for open standing to bring proceedings to remedy or restrain a breach of the Part or regulations. This is an essential accountability feature of environmental legislation.

Clause 60SS refers to compliance arrangements between LLS and the Environment Agency Head. We recommend that once compliance and enforcement roles have been clarified, a very clear compliance policy should be developed and publicly consulted upon.

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[36] For a discussion of the importance of deterrence in an effective compliance regime, please see our previous submission: *Submission to the NSW Department of Environment and Climate Change (DECC) on the Draft Native Vegetation Compliance and Enforcement Strategy*, 6th February 2009.

[37] Under Part 8.3 of the POEO Act, various powers are available to the court, including 'penalty-for-profit' orders, where the offender has to pay a penalty amount relative to the profit gained by the commission of an offence under the Act, orders requiring adverse publicity statements regarding the offence to be published, orders requiring restoration work on other affected properties,[37] costs orders for damage caused, or an order requiring a company to provide financial assurance for restoration works directed. See sections 245-250, *Protection of the Environment Operations Act 1997*.

[38] For example, this occurs for carbon maintenance obligations under the Carbon Farming Initiative.

## Miscellaneous (Division 8)

*Reporting*

Division 8 provides for reporting under the new regime. Clause 60UU requires annual public reports of estimated "overall rate" of clearing under allowable activities and codes, based on satellite imagery. While we welcome reporting on allowable activities and codes, aggregated overall totals may not give accurate information about which areas these types of clearing are used the most. This will be essential for assessing cumulative impacts of unassessed clearing.

The proposed reporting is inadequate to accurately assess whether the new rules are working effectively. We recommend that the NSW Government should establish a comprehensive system of monitoring and environmental accounting to accompany the new regime. This is also addressed in Part 5 of our **Technical Submission on the Biodiversity Assessment Method and Mapping Method**, where we recommendation that the NSW Government should:

- Adopt a set of clear, ambitious, state-wide environmental and natural resource management (**NRM**) goals and targets. These should be translated and given effect in regional plans, supported by NRM agencies.
- Invest in a program to identify and gather data on 'ecosystem services' (benefits to humans provided by nature) – such as a State Ecosystems Assessment – and report on and raise awareness of the importance of ecosystem services for NSW;
- Establish state and regional 'environmental accounts' to assess progress against ecological baselines and targets. These accounts should assess the extent, condition and trends in environmental assets including biodiversity, native vegetation, carbon storage, soil and water quality.

*Public information registers*

We strongly support retaining the level of detail that is currently available on the native vegetation public registers.[39]

Under the proposed regime, the information on public registers is to be published in aggregate totals for notices and certificates (clause 60VV). There is a significant reduction in detail compared with current registers.

Public registers provided for in the LLS Amendment Bill should include:
- For notices given under clause 60V, copies of the notices (rather than aggregate data).
- For certificates given under clause 60W, copies of certificates (rather than aggregate data).
- Copies of approvals (and any modifications of approvals) issued by LLS under Division 6.
- Copies of applications for approvals (including applications that have been refused and the reasons for refusal) made to the LLS under Division 6.

Broad discretion to restrict access to information on public registers should be removed. Rather, public registers must not to include information the disclosure of which would contravene the *Privacy and Personal Information Protection Act 1998*.

[39] See: http://www.environment.nsw.gov.au/vegetation/publicregister.htm.

*Regulation*

There is a significant amount of detail that is to be contained in future regulations. As detailed in all 3 submissions, critical details such as the definition of serious and irreversible impacts, offset rules, and BAM thresholds are critically important and should be consulted on in detail before being gazetted.

EDO NSW was extensively involved in the development of the current regulations – a process that involved 2 years of consultation and technical tool development. The NSW Government should ensure adequate time is given to consult upon the critical elements of the regulation. This should involve further rural and regional workshops.