Environmental Defenders Office

Local Land Services Amendment (Miscellaneous) Bill 2020
Summary of Key Concerns

Introduction

The NSW Government has introduced the **Local Land Services Amendment (Miscellaneous) Bill 2020** (**the Bill**)**.** The Bill proposes changes to both the native vegetation regulatory framework in Part 5A of the *Local Land Services Act 2013* (**LLS Act**) and the private native forestry (**PNF**) framework in Part 5B of the LLS Act. Several proposed changes to Part 5A of the LLS Act relate to the interaction between Part 5A and *State Environmental Planning Policy (Koala Habitat) 2019* (Koala SEPP).

As anticipated, in conjunction with the introduction of the Bill, the NSW Government has also amended the Koala SEPP and finalised the Koala Habitat Protection Guideline.

This Briefing Note outlines EDO's concerns regarding:

1. The intent and timing of the Bill;
2. Specific changes proposed by the Bill; and
3. Amendments to the Koala SEPP (**SEPP amendments**) and final Koala Habitat Protection Guideline (**Guideline**).

In our view, the changes proposed by the Bill will remove important protections for koala habitat and will further facilitate excessive and inappropriate land clearing. **We do not support the Bill.**

1. Overarching concerns with the intent and timing of the Bill

EDO does not support the intent and timing of this Bill. The Bill has been introduced following a well-publicised dispute within the coalition about the operation of the Koala SEPP, despite consultation on an Explanation of Intended Effects for a revised SEPP and despite the Koala SEPP already having been in operation for a number of months (it commenced on 1 March 2020). The policy settings underpinning the Bill are inconsistent with recommendations made by the NSW Audit Office, Natural Resources Commission and NSW Upper House Inquiry; and also the original recommendations of Independent Biodiversity Review Panel. The Bill also pre-empts the outcomes of government reviews currently in progress. Specifically:

- **The Bill pre-empts the three-year review of the land management framework**

On introducing the land management framework to the NSW Parliament, the then Minister for the Environment, the Hon. Mark Speakman SC MP, said that in addition to the standard five-yearly reviews required by the legislation "*this Government will also conduct a review of the new laws, supporting policies, programs and funding within three years of implementation*".[1] Part 5A of the

[1] New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 November 2016 (Mr Mark Speakman, Minister for the Environment, Minister for Heritage, and Assistant Minister for Planning), available at https://www.parliament.nsw.gov.au/bill/files/3357/2R%20Biodiversity%20and%20cognate%20bill.pdf

LLS Act has been in operation for three years. The Government should hold off on amendments to the LLS Act until it completes and publicly releases the findings of the three-year review that it has committed to.

- **The Bill pre-empts the outcomes of the PNF Review**

The Bill proposes significant changes to the PNF framework, including preventing local environment plans from requiring development consent for PNF, and doubling the duration allowed for PNF plans (from 15 years to 30 years). These are significant changes and should not be implemented until the outcomes of the PNF Review are finalised. Further, these changes do not relate to the stated reason for the Bill – the interaction between the land clearing rules under LLS Act and the Koala SEPP.

- **The policy settings underpinning the Bill are inconsistent with broader findings of the NSW Audit Office, Natural Resources Commission and Upper House Parliamentary Inquiry.**

Various reports and analysis have highlighted the regulatory failure of the land management framework under the LLS Act. Notably:

- A 2019 review by the Audit Office of NSW (**Audit Office**) concluded that the new land management framework may not be responding adequately to environmental risks whilst permitting landholders to improve agricultural activities and identified significant delays in compliance and enforcement activity to address unlawful clearing.[2]

- A review of the land management framework, conducted in early 2019 by the Natural Resources Commission (**NRC Report**) found that clearing rates have increased almost 13-fold – from an annual average rate of 2,703ha a year under the old laws to 37,745ha under the new laws and that biodiversity in 9 out of 11 regions is now at risk.[3]

- A NSW Parliamentary Upper House inquiry into koala populations and habitat in NSW inquired into, amongst other things, the impacts on koalas and koala habitat from the 2016 land management reforms.[4] The Committee's report found it is clear that frameworks regulating clearing on private land play a vital role in koala habitat protection and therefore in preventing the extinction of the koala in NSW and must be strengthened. In that context, the Committee made a number of recommendations for strengthening the land management framework under the Local Land Services Act 2013 (LLS Act), namely:
  - Recommendation 33: That the NSW Government amend the Local Land Services Act 2013 to reinstate legal thresholds so that its application improves or maintains environmental outcomes and protects native vegetation of high conservation value.
  - Recommendation 34: That the NSW Government review the impact on koala habitat of the application of regulated land and self-assessment frameworks under the Local Land Services Act 2013.

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

[3] Natural Resources Commission, *Final Advice on Land Management and Biodiversity Conservation Reforms*, July 2019, available at https://www.nrc.nsw.gov.au/land-mngt

[4] NSW Legislative Council Portfolio Committee No. 7 – Planning and Environment *Koala populations and habitat in New South Wales*, June 2020, available at https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2536#tab-reportsandgovernmentresponses

- Recommendation 35: That the NSW Government adopt all of the recommendations made by the Natural Resources Commission in its 2019 Report on Land Management.

- **The policy settings underpinning the Bill are inconsistent with the original recommendations of Independent Biodiversity Review Panel.**

The Bill seeks to decouple the rules for farmers despite the recommendation of the Independent Biodiversity Legislation Review Panel to "*level the playing field for agricultural development and land management activities*" by "*treating all forms of development in a consistent and fair way, by integrating the assessment and approval of all forms of agricultural development that involve clearing of native vegetation into the Environmental Planning and Assessment Act 1979*".[5]

2. Specific concerns regarding the changes proposed by the Bill

EDO has identified the following key concerns with the Bill:

- **Proposed 'allowable activity land' will undermine E-zones**

The Bill introduces the concept of 'allowable activity land' – being land that has been rezoned from rural zoning to environmental zoning (E2, E3 and/or E4).[6] There are subsequent amendments to operationalise this new concept [e.g. Bill, Sch 1[3],[6],[7],[9],[11]]. In particular, 'allowable activities' (those identified in Schedule 5A of the LLS Act and that can be carried out without any approval or other authority) will be able to be carried out on both 'rural regulated land'[7] (as is currently the case) and 'allowable activity land'.

This proposed change expands the range of land that allowable activities can be carried out on – by providing that allowable activities can be carried out in certain E-zones. We do not support this change. E-zones are intended to provide protection to land that is suitably identified as warranting protection due to its environmental values. Clearing should not be allowed to go ahead in these zones unchecked. We note that E-zones do not prohibit clearing from occurring. Rather, any clearing would need to be appropriately authorised (clearing in E-zones is regulated under the *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017* (**Vegetation in Non-Rural Areas SEPP**).

We are also concerned that this proposed change is not restricted in its application. For example, it does not provide a timeframe in which rezoning has to have occurred. Would historical rezoning (e.g. prior to the commencement of the framework) trigger the 'allowable activity land' definition? It is also unclear if the primary production use that triggers 'allowable activity land' definition has to be an existing use under the previous rural zoning that is continued or whether it can be a (permitted) new use.

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[5] Independent Biodiversity Legislation Review Panel, *A review of biodiversity legislation in NSW Final Report,* December 2014, available at https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Biodiversity/review-biodiversity-legislation-nsw-final-report-2014.pdf

[6] LLS Amendment (Miscellaneous) Bill – Sch 1 [2] - '*allowable activity land'* means a landholding— (a) that is in an area of the State to which this Part applies, and (b) that is or was wholly or partly in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU5 Village or Zone RU6 Transition, and (c) the whole or a part of which has been rezoned as Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living, and (d) that is used for primary production.

[7] '*Regulated rural area'* means any area of the State to which Part 5A of the LLS Act applies, that is category 2-regulated land.

It is also unclear what is meant by 'timber-getting for commercial purposes' in the changes proposed to section 60D of the LLS Act (Bill, Sch 1 [2]), as this term is not defined. This term should be clearly defined, and it should not extend to private native forestry as this is regulated separately under Part 5B of the LLS Act.

- **Freezes the inclusion of newly identified koala habitat in category 2 regulated land mapping**

The LLS Act provides that certain land must be designated category-2 regulated land. Clearing on this land may require authorisation under the LLS Act (e.g. via the Land Management Code or approval from the Native Vegetation Panel). Currently, it is a requirement for land identified as koala habitat in a Koala Plan of Management (**PoM**) made under *State Environmental Planning Policy No 44—Koala Habitat Protection* (SEPP 44).

The Bill proposes to remove this requirement (see Bill, Sch. 1 [4]). As drafted, the Bill will retain the requirement for land to be designated category 2 regulated land only if it is (i) identified as core koala habitat within the meaning of the repealed Koala Habitat SEPP (ii) subject to a PoM approved on or before 6 October 2020 under the repealed Koala Habitat SEPP and in force on 6 October 2020, and (iii) located in the local government areas of Ballina, Coffs Harbour, Kempsey, Lismore or Port Stephens. It will not require land identified under the new Koala SEPP to be designated category 2 regulated land.

This essentially 'freezes in time' the identification of koala habitat identified for the purpose of designating category 2 regulated land. It means that any future identification of koala habitat will not be required to be designated category 2-regulated land. It will also prevent any koala habitat from being identified category 2 – sensitive regulated land (see cl 108(2)(b) of the *Local Land Services Regulation 2018* (LLS Regulation).

We do not support this change. It essentially means that land clearing on koala habitat (except that already identified) in rural areas will not be regulated. Many councils are still to develop and finalise plans of management identifying koala habitat (this was a requirement under the former SEPP 44 that continue under the new Koala SEPP 2019). This is not an appropriate policy setting given that the koala is listed as a threatened species in NSW and loss, modification and fragmentation of habitat is a key threat to the koala;[8] and a recent NSW Parliamentary Inquiry found that without effective intervention, koalas will become extinct in NSW by 2050.[9]

- **Limitation on planning instruments requiring consent for clearing only**

The Bill proposes to remove the ability for a State environmental planning policy or part of a local environmental plan that adopts a mandatory provision of a standard instrument under the Environmental Planning and Assessment Act 1979 to require development consent or other authorisation only for the clearing of native vegetation in an area of the State to which Part 5A applies. The intention behind this proposed change is unclear – for example, it is unclear exactly what type of clearing is expected to benefit from this change or what 'other authorisations' would be captured by this change. We suggest that further clarification on the purpose of this change is required.

[8] See https://www.environment.nsw.gov.au/threatenedspeciesapp/profile.aspx?id=10616

[9] NSW Legislative Council Portfolio Committee No. 7 – Planning and Environment *Koala populations and habitat in New South Wales*, June 2020, op. cit.

- **Defences for clearing in regulated rural areas**

Section 60N of the LLS Act provides that a person who clears native vegetation in a regulated rural area is guilty of an offence unless:

a) the clearing is for an allowable activity authorised under Division 4 and Schedule 5A,
b) that the clearing is authorised by a land management (native vegetation) code under Division 5,
c) that the clearing is authorised by an approval of the Panel under Division 6,
d) that the clearing is authorised under section 60O (Clearing authorised under other legislation etc),
e) that the clearing is the carrying out of a forestry operation authorised under Part 5B (Private native forestry

The Bill proposes to add that clearing authorised under State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 is also a defence for the purpose of section 60N of the LLS Act (see Bill, Sch. 1 [8]). This is a consequential amendment that follows the introduction of the concept of 'allowable activity land'.

- **Changes to Part 5B of the LLS Act – PNF**

As outlined above, the Bill proposes changes to the PNF framework, including:

- preventing local environment plans from requiring development consent for PNF (see Bill, Sch. 1 [14]);[10]and
- doubling the duration allowed for PNF plans from 15 years to 30 years (see Bill, Sch. 1 [18]).

These are significant changes and should not be implemented until the outcomes of the PNF Review are finalised.

3. Amendments to the Koala SEPP

The Koala SEPP commenced on 1 March 2020, following a review and repeal of the former *State Environmental Planning Policy 44 -Koala Habitat Protection* (**SEPP 44**). On 16 October 2020 the NSW Government gazetted *State Environmental Planning Policy (Koala Habitat Protection) Amendment (Miscellaneous) 2020* which makes changes to the Koala SEPP.[11] Key changes are summarised below:

- **Removes all references to the Koala Development Application Map**

The Koala Development Application Map was introduced following the review of SEPP 44, to address the problematic definition and application of the concept of 'potential koala habitat'. The Koala Development Application Map identified areas where development applications would need to be assessed in accordance with cl. 9 of the Koala SEPP. The Government has now abandoned this new mechanism. Consequential amendments throughout the SEPP have been made to put this into effect.

[10] Currently, development controls in Local Environment Plans may require proponents to obtain development consent for PNF in addition to a PNF Plan approval under Part 5B of the LLS Act.
[11] See https://legacy.legislation.nsw.gov.au/EPIs/2020-618.pdf

- **Development assessment process - clause 9**

Clause 9 of the Koala SEPP outlines the process for councils in assessing and determining development applications in circumstances where there is no approved Koala PoM in place. Prior to the most recent changes, clause 9 only applied to land identified on the Koala Development Application Map, and with an area of at least 1 hectare. However, the abandonment of the Koala Development Application Map, means that clause 9 will apply to all land subject of the SEPP (being land in each of the local government areas in Schedule 1 of the Koala SEPP). That is, rather than the Koala Development Application Map providing an upfront assessment to identify land that would be subject to assessment in accordance with clause 9, each application will need to be assessed in accordance with clause 9.

Clause 9 now requires councils to determine whether an application will have no or low impact on koalas or koala habitat or a higher level of impact on koalas or koala habitat, on a case-by-case basis. For applications that are likely to have a higher level of impact on koalas or koala habitat, the council is required to consider a koala assessment report prepared in accordance with the Koala Habitat Protection Guideline.

The changes also include a new provision that explicitly states that a council may grant development consent if information prepared in accordance with the Guideline demonstrates that the land subject to the application does not include any trees with a diameter at breast height over bark of more than 10cm or includes only horticultural or agricultural trees. This provision reflects a policy decision that these trees are not valued as koala habitat. We note there is no definition of horticultural or agricultural trees.

- **Revised definition of 'core koala habitat'**

The definition of 'core koala habitat' has been revised, as follows:

Repealed definition	New definition
core koala habitat means – a) an area of land where koalas are present, or b) an area of land— i. which has been assessed by a suitably qualified and experienced person in accordance with the Guideline as being highly suitable koala habitat, and ii. where koalas have been recorded as being present in the previous 18 years.	***core koala habitat*** means – a) an area of land which has been assessed by a suitably qualified and experienced person in accordance with the Guideline as being highly suitable koala habitat and where koalas are recorded as being present at the time of assessment of the land as highly suitable koala habitat, or b) an area of land which has been assessed by a suitably qualified and experienced person in accordance with the Guideline as being highly suitable koala habitat and where koalas have been recorded as being present in the previous 18 years.

- **Consultation with Chief Executive Officer of Local Land Services**

The SEPP amendments include a new requirement for councils to consult with the Chief Executive Officer of Local Land Services when developing a Koala PoM. Previously the council was only required to consult with a Public Service employee designated by the Minister for Energy and Environment. We note that there is an existing requirement for the Planning Secretary to provide the Chief Executive Officer of Local Land Services (and Public Service employee designated by the Minister for Energy and Environment) a copy of the draft PoM before it is approved by the Planning Secretary.

Given the context of these reforms, we are concerned that this amendment will allow the interests of landholders to disproportionality influence the development of koala plans of management, and lead to important areas of core koala habitat, that warrant adequate protection under the SEPP, being excluded from koala plans of management due to landholder concerns. We note that land holders do have the opportunity to comment on a draft Koala PoM during the public consultation process required under the Koala SEPP.

- **Subsequent plans of management**

The SEPP amendments introduce a new provision (cl 14A) relating to subsequent plans of management. This amendment makes it clear that plans of management can be amended or replaced (removing any doubt on this issue). However there is some ambiguity in the drafting. Clause 14A(1) provides that an approved PoM can be amended or replaced by a subsequent PoM prepared and approved and accordance with this Part (being Part 3 – which includes requirements for public exhibition). However, clause 14A(2) provides that the subsequent PoM must be exhibited in accordance with the Part if the council is requested to do so by the Planning Secretary. It is unclear what effect clause 14A(2) has given that public exhibition is required under clause 14A(1).

- **Conditional approval**

The SEPP amendments introduce new provisions (clause 14(3A) and (3B)), that provide that the Planning Secretary may provide approval to a Koala PoM, conditional on amendments requested by the Planning Secretary being made. This does not give the Planning Secretary power to make approve amendments in his/her own right. Rather it would allow plans of management to be taken to be approved once those amendments are made (by the council) without the need to go back to the Planning Secretary.

- **Availability of maps**

The unamended Koala SEPP contained a note at the end of clause 7 which read: "The maps adopted by this Policy are to be made available on the NSW planning portal". The recent SEPP amendments change this note to read: "The maps adopted by this Policy are to be deposited in the head office of the Department of Planning, Industry and Environment and made available for public access". This is a step backwards in terms of access and transparency. The only map still in operation under the amended SEPP is the Site Investigation Area for Koala Plans of Management Map**,** which is intended to identify land that can identified in a Koala PoM developed by a local council. While this map has less immediate relevance for individual landholders than the Koala Development Application Map, it is still an operational map and has been made available online prior to the recent SEPP amendments. There is no reason why this map should not continue to be made available online.

- **Koala Habitat Protection Guideline**

The Guideline was initially released in draft form when the Koala SEPP commenced on 1 March 2020, but has since been finalised. There have been significant changes between the draft and final versions of the Guidelines, reflecting the scope of changes proposed by the Bill and made by the SEPP amendments.

We note the following key concerns:

- **References to the Koala Development Application Map have been removed:** The Guideline has had to be substantially revised due to the abandonment of the Koala Development Application Map.

- **'Stop the clock process':** The Guideline includes a 'stop the clock' mechanism that will allow landholders to request an additional 60 days to object to proposed core koala habitat on their land. Council must comply with the request. This is in addition to the 90 day consultation period provide by the Koala SEPP (recent amendments extended the original timeframe from 28 days to 90 days). Council must also conduct an on-ground survey at their own expense if requested by the landholder. This process would allow landholders to significantly delay finalisation of a PoM. It is also disproportional to other public consultation processes that affect private land (e.g. planning proposals for rezoning or major project applications that will impact on neighbouring land and communities). The requirement for councils to conduct on-ground surveys at their own cost may also impede poorly-resourced councils from finalising Koala PoMs. Rather the Government should instead be incentivising councils to complete those important plans (the failure for councils to prepare Koala PoM is a key flaw of the former and current SEPP).

- **Tier 1 assessment pathways:** The process for identifying that a development application is Tier 1 is not robust; site inspection is not mandatory (aerial photography analysis is enough) and there is no guidance on how a council is to determine if there is no or low impact on koalas.

- **Ongoing concerns:** A number of earlier concerns with the draft Guideline identified by EDO during the earlier public consultation period remain.[12] These include the arbitrary threshold of 1 hectare for triggering assessment under the SEPP, the use of compensatory measures and inadequate legislation processes for making and amending, and reviewing the Guideline.

For further information, please contact Environmental Defenders Office on (02) 9262 6989.

[12] EDO, *Submission to the Draft Koala Habitat Protection Guidelines*, March 2020, available at https://www.edo.org.au/publication/nsw-koala-habitat-protection-guideline/