DEFENDING THE ENVIRONMENT
ADVANCING THE LAW

Land Management (Native Vegetation) Code

This part of the submission comments on the proposed *Land Management (Native Vegetation) Code 2017* (**Code**).

For detailed analysis of the amendments made to the LLS Act in 2016, please refer to our previous submission.[1] We maintain our serious concerns with the deregulation of native vegetation clearing and emphasise the significant risk of policy failure in parts of the proposed Code.

Our key concerns have not been adequately addressed and include:

- the proposed Code exacerbates key threatening processes and extinction risks: it allows broadscale clearing, clearing of Endangered Ecological Communities (**EECs**), and hollow-bearing trees. The NSW *State of the Environment Report 2015* notes: 'The clearing of native vegetation and the associated destruction of habitat has been identified as one of the greatest threats to biodiversity in New South Wales.'
- self-assessable codes can be an appropriate regulatory option for genuinely low risk activities, however, the clearing that is proposed to be permitted under Code – particularly the Equity and Farm Plan codes – equates to broadscale clearing and is very high risk in terms of policy failure. Code settings have not been peer reviewed.
- clearing under the proposed code will not involve safeguards or a scientific method to maintain or improve biodiversity, soil and water quality or salinity.
- climate change and carbon storage impacts from vegetation clearing are ignored.
- set aside areas will not require ecological evaluation or equivalence, instead involving a set ratio that will often not actually meet a no net loss test.
- in terms of implementation, the code is complex to navigate. There are many exceptions, variations to exceptions, and Zone-specific requirements that can also be varied. LLS may vary rules or prescribe limits with discretion. There is little consistent guidance for exercising this discretion and therefore application of the Code may vary adversely across the state.
- there is missing information, for example, blank code schedules that provide critical definitions, notification requirements and environmental management actions.
- mapping of land excluded from codes (i.e., sensitive regulated land such as koala habitat) will not be comprehensive if the code commences as early as 25 August 2017.

Given these serious concerns the proposed Code needs to strengthened, particularly by setting clear limits where code clearing cannot occur. (We also make recommendations for strengthening the *Local Land Services (Land Management - Native Vegetation) Regulation*

[1] EDO NSW submissions on the biodiversity and land management legislation in 2016 are available at: http://www.edonsw.org.au/nsw_biodiversity_reform_package_2016

2017 to ensure this – see above).

This part of the submission comments and makes recommendations on each part of the code in turn:

- Preliminary
- Part 1 - Invasive Native Species
- Part 2 - Pasture Expansion
- Part 3 – Stock Fodder Harvesting
- Part 4 - Continuing Use
- Part 5 - Property Vegetation Plan Transition
- Part 6 - Equity
- Part 7 - Farm Plan
- Missing detail - schedules
- Other issues - Requirement for Commonwealth approvals

Preliminary

2 Commencement

This clause states that the code commences upon gazettal.

We recommend that the codes should not commence until the mapping process is completed to accurately and comprehensively identify regulated land. As noted in our comments on the proposed LLS regulation, the transitional arrangements for landholders to determine whether their land is regulated are not adequate, and run the risk of facilitating inappropriate and unlawful clearing in the short-term. This is of particular concern when some clearing can be 'notified' without LLS staff verifying the status of the proposed clearing. If clearing proceeds without certification, when the NV Regulatory Map that underpins the system has not been finalised or quality assured, it will be very difficult to prove illegal activity in hindsight.

3 Aims

The proposed aims of the draft Code are limited and procedural – to authorise clearing on regulated land, establish and manage set aside areas and authorise land re-categorisation.

We recommend the aims of the Codes should at a minimum reflect the additional aim inserted into the LLS Act by the LLS Amendment Act 2016, namely, 'to ensure the proper management of natural resources in the economic, social and environmental interests of the State, consistently with the principles of ecologically sustainable development…'.

4 Definitions and Interpretation

Public consultation on the draft Code is significantly hindered by the lack of definitions. The Dictionary at the end of the Code (referred in clause 4) is blank. Examples of key terms, and what they may include or exclude, are as follows: 'treatment area' (relevant to determining the boundaries, size and impact of clearing, e.g. clause 46); 'likely to minimise soil and groundcover disturbance and land degradation'; cumulative impacts (in the context of treatment area restrictions); mulga species; boundaries for measuring estuaries and wetlands; Endangered Ecological Community (and whether this is intended to exclude

Vulnerable ECs); 'primary use of the land' (landholding restrictions, e.g. clause 78) and 'area' of set asides (see clause 109).

5 Structure of this Code

While this clause provides some orientation to users, the Code would benefit from a contents page and a summary of where each Part applies (e.g. by holding size and State division).

6 Land to which this code applies

This clause states that the Code applies to all the rural areas of the state (i.e., excluding urban areas, national parks etc). Section 60A of the LLS Act provides that the regulation can qualify this application.

We recommend that this clause be extended to exclude certain areas from code clearing. This is discussed further below and in our comments on the LLS Regulation.

7 Unauthorised clearing of native vegetation

This clause sets out where code clearing is not permitted, including on sensitive regulated land, old growth forest on regulated land, critically endangered ecological communities etc.

We strongly support excluding sensitive and important areas and communities from code based clearing. We recommend that this clause be extended to include:

- all endangered ecological communities (these are unique communities of species at *very high risk of extinction in the near future* and are not suitable for code clearing)
- all vulnerable ecological communities (at *high risk of extinction in the medium-term*)
- the coastal zone
- all small holdings (defined elsewhere as less than 10ha; in Western Division, 40 ha)
- travelling stock reserves
- a broader definition of koala habitat (beyond the five Plans of Management approved by councils under SEPP 44, noting 2016 proposals to expand the SEPP definition).

We agree that PNF clearing should be dealt with separately and not included under this code.

8 Clearing under authority of this code not to harm threatened animal species

Given that the proposed Code allows self-assessed clearing of mature trees that could contain hollows, we support the recognition that clearing can harm threatened species. However, this clause will only be effective if a landholder is aware the animal is present in a hollow and *knows* that the clearing will harm the animal. Any obligation could be discharged by claiming no knowledge. This is an example of the risk of self-assessable clearing. We recommend amending clause 8 to include where the landholder knew 'or ought reasonably to know' that the clearing was likely to harm the animal.

Similarly, we are concerned about the note stating that any other harm to a threatened species that occurs under Code clearing is not an offence. This could seriously undermine the purpose and objectives of the *Biodiversity Conservation Act 2016*.

9 Re-categorisation of land

As discussed below, we are concerned about the ability of the equity and farm plan codes to convert significant areas of land from regulated to unregulated. For this reason, we do not support the Equity or Farm Plan code and recommend those parts be deleted.

10 Notification of intended clearing of native vegetation and 11 Certification of intended clearing of native vegetation

We support the requirements for notification and certification set out in these clauses. However, public consultation is hampered by the lack of notification requirements (Schedule 3 – *Notification Requirements* is left blank).

There is also some confusion regarding certification requirements. Clause 11 (2) states that "Applications for a mandatory code compliant certificate for intended clearing of native vegetation must be made in accordance with Schedule 4 to this Code." However, schedule 4 is currently titled "Set aside area management strategies" and no detail at all is provided. This needs to be clarified.

We note that notification and voluntary code compliant certificates have effect for 15 years (where no re-categorisation of land is involved). We **recommend** a shorter timeframe to ensure the cumulative impacts of code clearing in LLS areas is monitored and continually assessed (including what 'sleeper' notifications and certificates are yet to be activated). (See also our recommendation to clarify clause 126 of the proposed LLS Regulation to address this). We note that the Act already provides some protection for landholders by noting that a certificate continues to have effect if the clearing has been substantially carried out (LLS Amendment Act s. 60Y(8)).

12 Power for LLS to refuse certificate

We strongly support the role of LLS in assessing the cumulative impacts of all clearing are not adverse to biodiversity values, and the ability to refuse a mandatory code compliant certificate if they are. A key problem of the previous *Native Vegetation Conservation Act 1997* was the ability to 'stack' clearing exemptions to authorise broadscale clearing.[2] We therefore strongly support the note that states:

> **Note**: The intention of this clause is to prevent "stacking", that is, the inappropriate application of clearing under multiple parts of this code that would lead to adverse impacts on biodiversity. It is not intended to restrict the legitimate application of more than one part of this code on a particular property.

However, we are concerned that the cumulative impact (under clause 12(1)(b)) is in the subjective opinion of the LLS. It is unclear how this important safeguard will be consistently and meaningfully applied. Further guidance – including objective criteria and thresholds – is needed on this. Clear guidance on cumulative impacts will assist in managing landholder expectations and providing confidence to LLS staff in decision-making.

We also recommend this power be amended and extended to *notified* clearing (for example Part 2 – Pasture expansion, Division 1), to prevent land-clearing by notification where LLS has a reasonable belief that the Code cannot be complied with. If clause 12 remains limited to 'certificate'-based clearing then LLS can only respond to improper 'notifiable' clearing after the damage has been done.

[2] 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.

It may also be confusing that clause 12(2) states "nothing in this clause prevents clearing under more than one Part or Division of this Code on the same area of land." There needs to be careful analysis of how this clause is used by LLS as the scheme is implemented.

13 Establishment of set aside areas

We strongly support there being a public register of set aside areas, and recommend that the detail available be comparable with current native vegetation registers. This is discussed further below and in our comments on the LLS Regulation.

While clause 13 requires the certificate to identify the location and management obligations for the set aside area, public consultation is hampered by the lack of management strategies that are presumably to be set out at Schedule 4 (left blank).

14 Prohibition on clearing native vegetation in set aside areas

We support a clear and enforceable prohibition on clearing set aside areas. However, this clause notes the exception is clearing needed to manage the area (1(a)). It needs to be clarified what kind of clearing this includes.

15 Buffer distances for wetlands and streams

The provisions regarding buffer distances from water courses are confusing in the Code. We recommend that it would be more user-friendly to set a clear minimum buffer distance in the LLS Regulation and set out the relevant distances (if more than the minimum) clearly in each part of the Code. Furthermore, the buffers should be mandatory and consistently applied, i.e., not merely a matter for the LLS to have regard to.

We note that in rural areas, clearing in areas of mapped 'protected riparian areas' will require NV Panel approval after a BAM report, and the code does not apply to *mapped* protected riparian areas.[3] However, for other streams (not on the Sensitive Values Map), the proposed Code says LLS may prescribe a buffer, having regard to DPI guidance.

This clause gives LLS discretion to prescribe a distance from wetlands and streams:

- but only sometimes – where mandatory certificates are required and the Code refers to streams (e.g. INS code clause 31);
- in exercising this discretion, LLS is to have regard to buffer distances in DPI "Guidelines for riparian corridors on waterfront land";[4]
- LLS may disregard 1st and 2nd order streams with no defined channel and banks; and

[3] LLSA Act: 'Sensitive values map' may include 'protected riparian areas' (60F(2)(c)); LLSA Act: 'Allowable activities' are more limited in 'protected riparian areas' (Schedule 5A, clause 35)

[4] Table 1 of the Office of Water (DPI) document titled "Guidelines for riparian corridors on waterfront land":

Watercourse type	**VRZ width (each side of watercourse)**	**Total RC width**
1st order	10m	20m + channel width
2nd order	20m	40m + channel width
3rd order	30m	60m + channel width
4th order and greater (includes estuaries, wetlands and any parts of rivers influenced by tidal waters)	40m	80m + channel width

Note: where a watercourse does not exhibit the features of a defined channel with bed and banks, the Office of Water may determine that the watercourse is not waterfront land for the purposes of the Water Management Act.

- however, a note for the public exhibition draft states: This clause may be changed to restrict clearing within a certain distance of an estuary, wetland or incised watercourse.

The application of this clause is unduly discretionary and difficult to navigate. We therefore recommend including clear minimum buffer distances expressed in each relevant part of the Code (e.g. as it is in the stock fodder code – 20 m – clause 56(b)), and a clear minimum distance excluding codes from riparian areas set out in the LLS Regulation.

16 Management of set aside areas

This clause requires a landholder to "make reasonable efforts to manage the set aside area in a manner expected to promote vegetation integrity in the set aside area." We recommend strengthening this to require the landholder to ensure that vegetation integrity is maintained and improved. This should explicitly define integrity to include extent, quality and diversity.

We strongly support the basic record keeping requirements as these will assist landholders in showing due diligence.

Sub-clause 5 refers to evidence obtained through an LLS monitoring and evaluation program. It is unclear whether this can include evidence or concerns raised from other parties.

Again, it is difficult to comment in the absence of detail in Schedule 4. The schedule must set out clear minimum standards. The *Land Management (Native Vegetation) Code Fact sheet* states: "Local Land Services will work with landholders on a case-by-case basis to identify the management interventions likely to deliver the best possible environmental outcomes in a set aside area." This suggests there will not be a list of minimum requirements for management (as currently exist for PVP and biobank arrangements). The Schedule needs to be completed and exhibited so it is clear what the minimum requirements will be and what additional requirements may need to be tailored to a particular area.

We do not support the potential for the expanded range of allowable activities being used cumulatively in set aside areas.

17 Identification of threatened ecological communities

This clause relates to identifying threatened ecological communities for the purpose of calculating set aside requirements. We do not accept that code-based clearing and set asides (or discounting) are an appropriate management response to deal with extinction risk.

We strongly recommend deleting clauses that facilitate the application of code clearing to threatened ecological communities (**TECs**). It is highly inappropriate to use a code based tool to allow them to be cleared. Any potential clearing of an EEC or vulnerable ecological community should be assessed fully, based on scientific method and transparent evaluation.

Taking into account surrounding land use (17(2)(d)) could promote poor management or set a perverse incentive to increase clearing around EECs to reduce their viability.

The intent of clause 17(3) is also unclear. It could imply that impacts of 'notified' clearing on threatened ecological communities can be ignored. Rather, the Codes should be excluded where these communities exist. This is another reason to enable LLS to prevent notified clearing where there is a reasonable suspicion the Code cannot be complied with (cl. 12).

If provisions for clearing EECs remain in the final Code, then guidelines should be made for specific EECs in each LLS area as a matter of priority. The *Land Management (Native Vegetation) Code Fact sheet* notes that "guidelines will be developed to support implementation, including species lists and how to measure/calculate percentages." Assumptions about viability in the absence of guidelines (17(5) could be potentially problematic given species lists are not definitive. It is also unclear what qualifications will be required by the LLS officer to determine this (in contrast to accredited BAM assessors).

In relation to the treatment of TECs, the *Land Management (Native Vegetation) Code Fact sheet* states: "A set aside discount will also be available where a landholder elects to set aside land of strategic landscape value." As discussed in our comments above, there is a lack of detail about proposed strategic landscape mapping and how it will be developed and applied. We do not support discounting of set aside areas, and we recommend further consultation on strategic landscape value mapping.

The discretion for LLS to determine loading and discounts will lead to inconsistent application of the new rules. The Code must not commence until the guidance documents are complete.

Finally in relation to the preliminary Part we reiterate our concerns that the Code will exacerbate key threatening processes under the BC Act such as the loss of hollow bearing trees. While there are requirements to retain very large trees (e.g. cl. 43, diameter >90cm) there is no standard requirement to survey for or retain hollow bearing trees, or to support hollow recruitment by appropriate retention of smaller trees. We recommend all Codes be reviewed against key threatening processes and include safeguards that respond to them.

Part 1 - Invasive Native Species

This part of the Code permits, by several treatment methods, clearing of native vegetation on Category 2 - regulated land that has been identified as an Invasive Native Species (**INS**), and permits certain agricultural activities in treatment areas.

A comparison of the current INS code with what is proposed shows an expansion of what can be cleared as INS. For example, for management burning, the new code allows for more clearing of INS as clause 21(1) outlines that there are nil treatment area restrictions, while the old code states that no more than 80% of the INS extent on the landholding may be cleared. The old code had the same limit for all other clearing types (individual plant clearing of INS, clearing at paddock scale with minimal disturbance, clearing at paddock scale with temporary disturbance). In comparison, the new code outlines that for these clearing types, for each 1000 hectares treatment area, 10% of the area must not be cleared unless authorized. The new codes thus allow greater clearing, either having no restrictions, or up to 90%, as opposed to the 80% allowed prior.

It is not clear what the justification for expanding the code is. Under the current code an enormous area was subject to INS clearing – the public register states 4,389,190.06 ha was treated between 2005 and 2015, and 388,757.62 between 2015 and 2017 (a total of **4,777,947.68 ha**).[5] Significant concerns have been raised regarding the impacts of this type of clearing from experts such as Phil Gibbons.[6]

[5] See public register INS treatment area totals available at: http://www.environment.nsw.gov.au/vegetation/approvedclearing.htm.

[6] 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.

We therefore recommend at least maintaining the previous limit of INS permitted on 80% of a property rather than being increased to 90%. And given the extent of this clearing, there should be publically available data on the extent of INS clearing for each LLS and state-wide (equivalent to information currently on the register for INS).

We support the continued application that clearing under this part must be to "the minimum extent necessary." Further guidance on what this means in practice would assist landholders. We also welcome consideration of cumulative impacts (cl. 26), although this is not defined, and may be contradicted by the reduced property vegetation limits noted above.

Regarding clearing of individual plants (Division 2), it is unclear what is meant by the note to clause 27: ***Note for public exhibition draft:*** *This clause may be changed to deal with any clearing of non-invasive native species which is permitted by this Division*. This should be clarified as it is not appropriate that this code authorise clearing of non-invasive native species.

For management burning we support requirements for nil soil disturbance, no land degradation and that clearing must not result in the introduction of non-native vegetation.

For paddock clearing we support requirements for minimum soil and groundwater disturbance and to avoid introduction of non-native vegetation.

Part 2 - Pasture Expansion

This part of the Code permits a range of clearing of woody native vegetation on Category 2-regulated land, in particular to encourage groundcover growth in treatment areas for grazing purposes (i.e., thinning).

The NSW *State of the Environment Report 2015* (Theme 13) notes that despite some improvement in land management, pressures on native vegetation condition *are likely to persist due to the long-term effects of fragmentation following clearing*, coupled with invasive species and climate change.

The thinning code under the *Native Vegetation Act 2003* mandated that all thinned vegetation must retain a stem density for each hectare not less than 75% of the benchmark density (specified in Appendix 1). The benchmark stem density ranged from 150-300 stems per hectare. Further, thinning was not permitted in various vegetation formations (e.g. rainforests).

In comparison, the new proposed code has different thinning allowances depending upon whether it is uniform or mosaic thinning. For uniform thinning (notification), the new code states that the removing of native trees and shrubs from a treatment area must be done so that the density of the remaining native trees and shrubs in the treatment area is at least 225 stems per hectare.

For uniform thinning (certification), the new code states that thinning must be done in such a way that the remaining vegetation in the treatment area is at least the minimum stem density for the Keith vegetation formation (ranges from 75-150 stems per hectare). Further, if the vegetation comprises part of an EEC, the density of the vegetation must be at least the minimum stem density for the Keith vegetation formation (ranges from 115-225 stems per hectare). There is also discretion for LLS to vary minimum stem density, but the thresholds for this are not defined clearly (clause 43(5).

With regards to mosaic thinning of woody vegetation (certification), the new code states that native vegetation must be removed so that the canopy cover of the remaining native over-story in the treatment area comprises of at least 30% of the total treatment area and retained native vegetation are in patches of at least 5 hectares evenly distributed throughout the treatment area. The treatment area restrictions do not specify the time frame for the 30% treatment maximum (clause 51(1)). Furthermore "retained native vegetation patches" is not defined in clause 52(2) – does this mean set aside areas?

The new code appears to be less stringent than the old one. For example, the old code outlines that thinning within 30m of a waterbody must only be undertaken by clearing individual vegetation with no disturbance to soil and groundcover. In contrast, the new code focuses on minimising soil and groundcover disturbance, instead of avoiding it altogether. As noted above, it would be clearer to state in the code what the clear enforceable minimum riparian buffer distances are.

We support requirement that thinning must be done "in a manner that *will* minimise soil and groundcover disturbance and land degradation" (clause 42(1), rather than the weaker wording in clause 47(1) and 52(3) "in a manner *that is likely to* minimise…" (emphasis added).

Part 3 - Stock Fodder Harvesting

This part of the Code permits clearing of certain native vegetation species on Category 2-regulated land in prescribed parts of the State for the purposes of harvesting stock fodder.

We support the clear 20 metre buffer specified in clause 56(b). Clarification is needed on the appropriate measurement of distances from estuaries, wetlands and watercourses.

Clarification is also needed with reference to timeframes. For example: 'Clearing must not exceed 50% of the total area of mulga species on the landholding within a 10 year period' (clause 57). How is this period measured in practice? What is the limit or obligation in year 11, or year 19?

Part 4 - Continuing Use

This part of the Code permits continuation of a farming or vegetation management practice that was undertaken prior to commencement of the *Local Land Services Amendment Act 2016*; permits certain agricultural activities in treatment areas; and in prescribed circumstances authorises re-categorisation of mapped land.

Division 1 Managing woody native regrowth in managed native pastures could be strengthened by requiring any clearing "to be done in a manner that minimises soil and groundcover disturbance" instead of "likely to minimise" (clause 62(2)).

The public exhibition note states: "It is not intended that this Division will allow the clearing of new growth or natural growth from intact patches of remnant vegetation that have no previous clearing history." This should be stated in the code, i.e., "This division does not authorise the clearing of …etc", rather than a note.

In *Division 2 Continuation of rotational practices undertaken prior to 1990*, it is unclear what degree of variation is covered by "substantially consistent" in clause 67(1). This should be clarified. It is also unclear why Division 2 does not include requirements to prevent long-term groundcover decline or land degradation (cf Method and clearing conditions, Division 1)

Also, the code allows permanent re-categorisation of land to Category 1 exempt land, but the clause does not specific the circumstances when this could happen (clause 68 Note).

Part 5 - Property Vegetation Plan Transition

This part of the Code provides for extinguishment of a Property Vegetation Plan (**PVP**) made under the *Native Vegetation Act 2003* and in prescribed circumstances provides for establishment of set aside areas on Category 2- regulated land.

Division 1 Extinguishing a property vegetation plan that provides for invasive native species, thinning, regrowth identification or continuing use allows an LLS to vary a PVP, including any offset area and condition (clause 70). We do not support any varying that would allow a previous offset area to now be cleared. The Code should expressly prevent this.

Division 2 Extinguishing a partially exercised property vegetation plan for paddock tree clearing or broadscale clearing provides that offsets that have been established under a PVP become Category 2 regulated land (clause 74(3)). Category 2 land can be cleared under the codes or with approval. Again, we note that areas set aside as offsets should not be able to be cleared. The Code must expressly prevent this.

Also in Division 2, there is discretion in how the offset area may be converted to a set aside area under the new scheme (clause 75). The averaging of previous offset ratios (clause 75(1)(a)), the discretionary decreasing of offset ratios (clause 75(2)); and the "same or similar" expansion of like for like requirement are not supported, ecologically or by EDO NSW.

The Note for this division states "Set aside areas are to be situated in the same location as the offset or offsets under the property vegetation plan." This requirement should be in the clauses of the code and not in a note.

It should also be noted that PVP offset areas that are converted to set aside areas will be on the register of set aside areas. As PVPs will no longer be on title and there will not be equivalent registers to the current system, it is important that the set aside register is accurate, comprehensive and public.

Part 6 - Equity

This part of the Code permits significant clearing of native vegetation on Category 2-regulated land; provides for re-categorisation of areas cleared of native vegetation in accordance with the Part; and provides for establishment of set aside areas on Category 2-regulated land, i.e. in areas containing remnant vegetation.

We do not support this code as the scale of the clearing potentially permitted is so significant that it equates to broadscale land clearing. Any clearing of this scale should be properly assessed by the NV Panel and not allowable under a code.

The code is confusing, highly discretionary, and extremely risky. Set aside requirements are riddled with exceptions and discretions. For example, our concerns include:

- *Division 1 Removing native vegetation from paddock tree areas - 79 Treatment area restrictions* – allows 1 tree per 50 ha every year (clause 76(2)). No set aside is required for this clearing, and it can be used with 'notification' only (clause 77).

Previous rules allowing a number of individual trees to be cleared per year undermined vegetation management by providing an exemption with cumulative impacts to be overused.[7] The division can be used even where there is only 11% of vegetated (yellow) land left (i.e., 89% unregulated land clause 78(1)); there is LLS discretion to apply this code in the environmentally sensitive coastal zone (clause 78(3)); the division has no mandatory buffer distances clearly set out (clause 79(1)); there is no requirement to avoid substantive adverse impacts or land degradation; and there is no requirement to survey for or retain hollow bearing trees.

- *Division 2 Removing native vegetation from small areas* – allows for clearing of small patches (e.g.. one small area – between 1-4 ha depending on what division – for each 250 ha in any 12 month period (clause 82)). We refer to our previous submissions on the use of codes to remove small patches of vegetation. The implications of this are significant as the removal of small patches can undermine the connectivity of vegetation across the landscape.[8] It is unclear what the timeframe or process for LLS to decide the 10% landholding restriction in clause 84(1) is; it is unclear how the treatment area restrictions will be interpreted in 85(1)(c) (a problematic example of cumulative impacts, and of exceptions to exceptions); and the set aside area requirements in 88(2) would not meet a "no net loss" test. Set aside requirements are uncertain, complex and contradictory (see 88(3) and 88(6)). Again the discretion for LLS to reduce set aside requirements by 50% has no clear justification or decision-making criteria (clause 88(4)). While it is positive to see recognition of the like-for-like concept in clause 88(6) – that TECs must be set aside by the same TEC – we do not support this code being applied to any TEC.

- *Division 3 Removing native vegetation from regulated rural areas (regulated land set aside area)* – in the first three years of the code *allows* (a) clearing of 25% of the estimated total area from which native vegetation may be removed under this Division up to a cumulative maximum of 625 hectares, or (b) the total area from which native vegetation may be removed up to 100 hectares (clause 89). This equates to broadscale clearing. There are no erosion or land degradation conditions. The estimated total area from which native vegetation may be removed under this Division is determined by LLS. Although the set aside area requirements are scaled (i.e., the set aside ratio increases if EECs are cleared or where a property has less regulated land left), we do not support this code being applied to *any* TECs as it is an inappropriate regulatory tool for a category of listed communities at high risk of extinction. Again, we note that the 50% reduction in set aside requirements in clause 95(7) is completely arbitrary, makes no sense ecologically, and completely undermines the set aside requirements set out in clause 95(2). The 50% discount is highly discretionary for 'strategic landscape importance' also. When LLS determines the importance of a proposed set aside area, there is no requirement to have regard to bioregional plans or threat status (clause 95(9)). While it is positive to see recognition of the like-for-like concept in clause 95(10) – that TECs must be set aside by the same TEC – we do not support this code being applied to any TEC.

We therefore recommend deleting clauses relating to the Equity code – i.e., **delete Part 6.** If our recommendation is not accepted, serious efforts must be made to address our concerns.

[7] 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.

[8] 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, available at: http://www.edonsw.org.au/native_plants_animals_policy

<u>Part 7</u> - Farm Plan

This part of the Code permits clearing of native vegetation on Category 2- regulated land; provides for re-categorisation of areas cleared of native vegetation in accordance with the Part; provides for establishment of set aside areas on Category 1-exempt land (i.e., involving planting/revegetation of cleared land); and provides for re-categorisation of set aside areas established in accordance with the Part.

Similar to the equity code discussed above, we do not support this code as the scale of the clearing potentially permitted is so significant that it equates to broadscale land clearing. Furthermore, it is not possible to replace biodiversity values of remnant or mature vegetation with planted seedlings in the short term. This code fails the no net loss test. Any clearing of this scale should be properly assessed by the NV Panel and not allowable under a code.

Our serious concerns include:

- *Division 1 Removing native vegetation from paddock tree areas (exempt land set aside area)* – It is ecologically nonsensical to assume that biodiversity values of remnant native vegetation can be replaced with revegetation after 12 months (clause 102(5)). The corresponding delay in removing vegetation is not actually linked to the successful establishment of the set aside (in compliance with clause 102), but only to a 12-month period (e.g. clauses 97, 101, 104, 108). We note that the BAM requires hollows for hollows when offsetting.[9] Division 1 is not subject to a landholding restriction, i.e. it could apply even where there is less than 10% regulated land left, and there is still discretion to apply it in the coastal zone (clause 98). While EECs are excluded (cl. 99) it appears the Farm Plan Code could apply to vulnerable ecological communities. Set aside requirements are poorly calculated and expressed (102(2)).

- *Division 2 Removing native vegetation from regulated rural areas (exempt land set aside area)* – allows clearing regulated vegetation in exchange for a set aside that involves planting new vegetation on cleared (unregulated) land. It is not limited to 'paddock tree areas' (Division 1). This can include clearing 25% of the regulated land on a property (clause 103). The only saving grace of this code is that it does not apply to EECs (clause 106(d)), but in the absence of definitions we cannot verify whether vulnerable ECs can still be cleared under this Part. As we have consistently recommended, no code clearing of EECs or vulnerable ECs should be permitted. Delaying clearing for 12 months while revegetation is established can be overridden for vague discretionary reasons (clause 108(1) Note), and in any event as observed, it is ecologically nonsensical to assume that biodiversity values of remnant native vegetation can be replaced with revegetation after 12 months (clause 109(5)). Again the proposed set aside requirements (e.g. in clause 109 (2)(a)) fail a "no net loss" test.

We therefore recommend deleting clauses relating to the Farm plan code – i.e., **delete Part 7.** If our recommendation is not accepted, serious efforts must be made to address these concerns. This should include scientific peer review of the Code and set aside requirements.

[9] Although we note our concerns on the variation rules in the Regulation that allow the use of artificial hollows.

Missing detail

We note that the following detail is not provided for consultation:

- *Schedule 1 Invasive native species list*
- *Schedule 2 Description of Keith Vegetation Formations*[10]
- *Schedule 3 Notification Requirements*
- *Schedule 4 Set Aside Area Management Strategies*
- *Dictionary*

As noted throughout, this information is important for understanding how the Code will work and should be exhibited for comment before the Code commences.

Other issues

The significant clearing permitted under the Code – particularly the Equity and Farm Plan provisions – combined with the ability to clear EECs under codes makes liability under Commonwealth laws a real possibility for NSW farmers.

We note the *Land Management (Native Vegetation) Code Fact sheet* states:

> ***Requirement for Commonwealth approvals***
> *Actions that are likely to have a significant impact on a matter of environmental significance require approval under the Environment Protection and Biodiversity Conservation Act 1999. Where LLS considers that proposed clearing may require Commonwealth approval, LLS will only certify the clearing after being reasonable satisfied by the landowner that Commonwealth approval is unnecessary or alternatively, that Commonwealth approval has been given.*

We recommend that LLS do not certify clearing unless there is clear confirmation that Commonwealth approval is not required or has been given. Extension and outreach information will be needed for rural landholders so they are clear on their potential liability.

[10] We note this information is available elsewhere, but should be provided in the Schedule for ease of reference.