



THE LAW SOCIETY
OF NEW SOUTH WALES

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29 June 2017

Biodiversity Policy Branch
Policy Division
Office of Environment & Heritage
PO Box A290,
Sydney South 2000

By email: biodiversity.legislationreview@environment.nsw.gov.au

Dear Sir/Madam,

Land management and biodiversity conservation reforms

Thank you for the opportunity to comment on the draft Regulations and other key products to support the *Biodiversity Conservation Act 2016* and *Local Land Services Amendment Act 2016*. The Law Society's Environmental Planning and Development and Property Law Committees have contributed to this submission.

1. Overview

The NSW Government has indicated a commencement date of 25 August 2017 for the biodiversity and land clearing reforms.

The Law Society has serious concerns that the regulatory instruments exhibited disclose that there are a number of areas where detail has not yet been finalised or made public including, in particular, regulatory maps.

We strongly recommend delaying the commencement of the scheme until key instruments have been finalised, including complete and accurate mapping.

2. Draft Biodiversity Conservation Regulation 2017

Biodiversity offsets scheme

Part 6 of the Regulation sets out details about the Biodiversity Offsets Scheme ("BOS") that is established by the *Biodiversity Conservation Act 2016* ("BC Act"). We consider that the current proposed offsetting variation rules in the Regulation are of serious concern, as a threat to the integrity of and confidence in the BOS.

Offset rules under the biodiversity offsets scheme

Clause 6.2 sets out the biodiversity conservation measures potentially available to offset or compensate the impacts of development, clearing or biocertification proposals.

While we accept that like-for-like offsets have been legislated through the BC Act, we recommend that the other alternatives in clause 6.2 be either restricted or removed. We strongly recommend that the Regulation prescribes prerequisites and safeguards before the proponent is eligible to pay into the Biodiversity Conservation Fund ("BC Fund"). This option should only be available where the proponent has verified that like-for-like credits are available. If like-for-like credits are not available, then this signals that the proposal's impact is significant and, potentially, irreversible. A number of other options are still available for the proponent.¹

We support the submission of the Environmental Defenders Office New South Wales ("EDO NSW") in relation to the need to remove the variation rules from the Regulation:

EDO NSW has consistently argued that a like for like standard is 'absolutely fundamental' to offsets integrity. The central problem with variation rules is that they weaken rules which ensure offsets are ecologically equivalent, and that provide appropriate prices for scarce biodiversity credits....

However, if the Regulations continue to allow offset variations despite these concerns, we recommend limiting the circumstances when variation rules can apply, and strengthening the offset requirements where those variation rules do apply.²

BOS threshold

Clause 7.2 sets out how lot size and area of clearing are used to determine whether the proposed clearing meets the BOS threshold.

The proposed spatial thresholds for the area cleared depend on the minimum lot size applicable to the relevant land specified in the Local Environmental Plan ("LEP") that applies to the land. If the LEP does not specify a minimum lot size for the land, the actual size of the lot on which the clearing takes place will be the applicable minimal lot size.

We suggest that that the BOS threshold should not be linked to lot size only, as this does not reflect potential biodiversity impact. It does not take account of other factors, such as the presence of threatened species, the localism of biodiversity and the fact that not all land is mapped.

We support the EDO NSW recommendation that the BOS threshold should be a standard 0.25 ha regardless of lot size, noting that lot size does not reflect potential biological impact. This will also to assist to regulate the cumulative impacts of smaller scale clearing.³

Register of private land conservation agreements

In our submission on the earlier consultation package for the reforms, we noted that it appeared that less information is to be placed on public registers compared to the current regime, making it difficult for community members to monitor environmental

¹ EDO NSW *Submission on the NSW biodiversity and land management reforms: Draft regulations and products on public exhibition*, June 2017, 12.

² *Ibid* 14.

³ *Ibid* 18.

outcomes. We recommend that information in this register is at least equivalent to existing registers.

3. Draft Local Land Services Amendment (Land Management—Native Vegetation) Regulation 2017 (“Draft LLSA Regulation”):

3.1. Division 2 Native vegetation regulatory map

Transitional arrangements

As previously noted, the reform timeline states that the reforms will commence on 25 August 2017. The *Land management and the Native Vegetation Regulatory Map fact sheet* states that there will be targeted consultation on the draft map over the coming months and that the regulatory effect of the map is likely to commence in 2018.

The Law Society has serious concerns about the regulatory risk of commencing the new native vegetation management scheme before the maps have been finalised. There is a significant transitional period during which land categories will be self-determined and significant code based clearing may occur. It will be extremely difficult to verify, after the fact, if clearing was illegal, particularly if there is no oversight by Local Land Services (“LLS”) staff.

The Regulatory Provisions for the Native Vegetation Regulatory Map – Submission Guide states:

Transitional arrangements for the NVR Map

The NVR Map will commence after the other aspects of the reform package commence, to enable further stakeholder consultation on the NVR Map. Once the LLSA Act commences the following transitional arrangements will be in place (until the final NVR Map is made):

- If landholders wish to undertake any clearing on their land they will determine whether their vegetation is on regulated or unregulated land, using the criteria set out in the LLSA Act and the draft LLSA Regulation ... LLS can assist landholders to apply the criteria...

We submit that the criteria are not clear and that there is a high risk that substantial clearing based on self-assessment of whether land is regulated is likely to lead to significant amounts of clearing. This arrangement assumes that landholders have the ecological expertise to determine whether their vegetation is on regulated or unregulated land.

If commencement does proceed without finalisation of accurate mapping, we strongly endorse the recommendation of EDO NSW that all levels of code based clearing require LLS certification, not only notification, during the transitional period.⁴

3.2. Division 3 Clearing native vegetation under land management (native vegetation) code

Clause 127 – Certificates issued by Local Land Services under codes

We suggest that the details of whether or not a parcel of land is affected by a set aside area could be included in the standard search a purchaser can obtain from the LLS. This may be intended to be included in the certificate but it is not clear from the

⁴ Ibid 27.

Draft LLSA Regulation. Currently this search provides details as to rates, chemical residue and animal health.

Clause 130 – Public register of set aside areas

We suggest that the information included in the register should be expanded to include the details of the clearing itself. Presumably the obligation to set aside does not arise if the land owner chooses not to proceed with the clearing, so it is important that this information be provided in the register. In the event that the property is transferred, it would be very useful if the register contained both the details of the proposed clearing and the details of the area to be set aside.

We also suggest that the Draft LLSA Regulation should clarify who is responsible for arranging the entry on the set aside areas register. We anticipate that the LLS would be responsible for initiating the entry to the register, not the landowner, but this should be clarified.

Additionally, clarification should be provided as to when an entry must be made to the register. Ideally this should occur as soon as a mandatory code compliance certificate issues which requires a set aside area. This would avoid any potential gaps in time where a purchaser might search the register and not find details of the set aside area.

4. Draft Environmental Planning and Assessment Amendment (Biodiversity Conservation) Regulation 2017

Items [15] and [16] Schedule 4, clauses 10 and 10A (s149 certificate)

We support the inclusion of two new items, namely clause 10, Biodiversity stewardship sites, and clause 10A, Native vegetation clearing set asides, in Schedule 4, which prescribes the information to be included in a section 149 planning certificate.

We note in relation to clause 10A, there are 2 'triggers' for a council to include information relating to native vegetation clearing set asides:

- if the council has been notified of the existence of the set aside by Local Land Services; or
- it is registered in the public register under that section.

Given the second 'trigger' will presumably require a council officer to search the register in every case, we reiterate that it will be necessary to ensure that the register is accurate, comprehensive and public.

5. Explanation of Intended Effect for the State Environmental Planning Policy (Vegetation) 2017 ("Vegetation SEPP")

The new Vegetation SEPP will assess proposals to clear native vegetation in urban areas and environmental zones state-wide. It will require clearing to be assessed using the biodiversity assessment method ("the BAM") or a local council's development control plan, depending on the size and location of the clearing.

The Government is exhibiting an Explanation of Intended Effect only. There is no draft State Environmental Planning Policy ("SEPP") on exhibition, so all relevant

details are not available for public consultation at this stage. We would welcome the opportunity to comment on the draft SEPP.

We note the intention that clearing allowed under existing SEPPs will still continue once the Vegetation SEPP is adopted. Current policy settings in SEPPs and LEPs will continue to allow tree removal in certain circumstances, including under the exempt and complying development codes SEPPs. We take this opportunity to reiterate our concern that the Government continues to expand the categories of complying development before resolving ongoing problems with private certifiers. This expansion includes a draft Medium Density Housing Code and the current consultation on a Greenfields Development SEPP.

The effect of the expansion of complying development is that areas that may otherwise trigger the BOS threshold due to the cumulative size of clearing will be allowed as complying development. This issue should be addressed in the Vegetation SEPP.

We also note that there will be a new Coastal Management SEPP. The interaction of the newly mapped coastal zones and the biodiversity provisions will also need to be clarified.

6. Land Management (Native Vegetation) Code

We maintain our serious concerns that self-assessable codes can only be an appropriate regulatory option for low-risk activities. Clearing under the proposed code will not involve safeguards or a scientific method to maintain or improve biodiversity, soil and water quality or salinity.

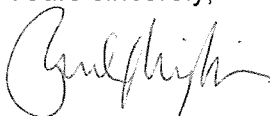
We strongly support the establishment of a public register of set aside areas, and suggest that the detail available be equivalent to that in current native vegetation registers.

Clause 2 provides that the Code commences upon gazettal. We are concerned about the missing details provided in blank codes schedules that purport to set out important information such as management interventions in set aside areas. This missing information, together with the mapping process to accurately and comprehensively identify regulated land, should be provided before the scheme commences.

As noted in our comments on the proposed LLS Regulation, there is a significant transitional period during which land categories will be self-determined. During this transitional period, there is the risk that significant code based clearing which is inappropriate and unlawful will occur, particularly if there is no oversight by LLS staff.

Please do not hesitate to contact Liza Booth, Principal Policy Lawyer, on (02) 9926 0202 or by email at liza.booth@lawsociety.com.au if you would like to discuss this in more detail.

Yours sincerely,



Pauline Wright
President