



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EPD:JBgl0606525

6 June 2025

Department of Planning, Housing and Infrastructure
4 Parramatta Square, 12 Darcy St
Parramatta NSW 2150

By email: greeningourcity@planning.nsw.gov.au

Dear Sir/Madam,

EXPLANATION OF INTENDED EFFECT: CHANGES TO DETER ILLEGAL TREE AND VEGETATION CLEARING

Thank you for the opportunity to provide feedback on the *Explanation of intended effect: Changes to deter illegal tree and vegetation clearing (EIE)*. The Law Society's Environmental Planning and Development Committee contributed to this submission.

Our feedback on relevant questions in the EIE is provided in the attached comments table. We also wish to make several additional comments as set out below.

Enforcement tools and other measures

We suggest broader consideration be given to other enforcement tools or measures to deter illegal tree and vegetation clearing. We support a wider range of enforcement tools being made available, such as the ability to enter into enforceable undertakings, and greater emphasis on orders to replant and maintain.

Planning certificates proposal

We have concerns about the proposal referred to on page 14 of the EIE, to change the requirements for planning certificates issued under section 10.7(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA**), to include details of proven illegal clearing on the land. As we understand it, the policy intent is to deter illegal clearing of land and the associated use of the complying development pathway to avoid lodging a development application.

We suggest a more targeted alternative approach to this issue may be to require the development consents or permits for any trees removed on the subject land, say within the last two years, to be provided to the certifier, prior to the issue of any complying development certificate (**CDC**), to evidence that any tree removal was authorised. In our view, the applicant for the CDC could provide the certifier with evidence of trees that were in existence on the site within the previous two years, and if a tree has been removed, evidence of lawful removal must be provided or the CDC cannot be issued. Evidence could be in the form of satellite photograph or survey plan. In other words, where clearing has occurred, evidence of lawfulness would be a pre-condition to the issue of a CDC under Division 4.5 of the EPA. This would better build in the requirement to obtain the required permits or development consents to clear vegetation early in the CDC process, rather than relying on

the more expensive pathway of challenging the validity of a CDC in the Land and Environment Court once the development is completed. We would be pleased to discuss this proposal with you, and we understand that it would require detailed further consideration by the Department and other stakeholders.

In our view, further consideration of the overall merit of the planning certificate proposal is also required, with regard to the following practical implications:

- the resourcing and lead time implications for implementation by councils;
- the impact and lead time for the conveyancing process, because of the role a planning certificate plays in the vendor disclosure regime under the *Conveyancing (Sale of Land) Regulation 2022*; and
- the meaning of “proven illegal clearing” which implies proof beyond a reasonable doubt, or whether other terms might be more appropriate such as “unauthorised clearing”.

Should this proposal proceed, we would be grateful to be kept informed as to its progress.

Any questions in relation to this letter should be directed to Gabrielle Lea, Senior Policy Lawyer, at gabrielle.lea@lawsociety.com.au or on (02) 9926 0375.

Yours sincerely,



Jennifer Ball
President

Attachment

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Law Society of NSW Feedback



No.	Question	Law Society comments
Chapter 2.2 Deter illegal clearing		
1.	Are the proposed tiered penalties appropriate? They would apply to illegal clearing on both public and private land.	<p>Generally, we support the proposed tiered penalties approach, subject to our comments in response to question 3. In our view, the current on-the-spot penalties are quite low, especially for significant clearing. The penalties need to be high enough such that they are not regarded as a “cost of doing business” as referred to on page 10 of the Explanation of intended effect (EIE).</p> <p>It may also be useful to review data, on an ongoing basis, as to the extent to which the penalties are reduced in Local Court appeals. In our members’ experience, penalty amounts are often lowered when appealed in Local Court proceedings. This is not to say that the penalties should be reduced, but that the extent to which they are enforced for the issued amount should also be monitored.</p>
2.	Do you support increasing the penalties for corporations to be triple those for individuals, rather than double?	Yes, it is appropriate that the penalties for corporations are triple those that apply for individuals to deter corporations from benefiting from wholesale clearing to obtain a more valuable development site.
3.	Are the criteria for the higher penalty tier appropriate and practical?	<p>We agree with the proposed criteria on page 11 of the EIE, however acknowledge there may be some potential practical issues in applying the criteria, including:</p> <ul style="list-style-type: none"> • Larger trees – proof will be challenging as aerial photos have limited utility, particularly in relation to height. Proving diameter will only be possible if sufficient remnants of the tree remain on site. • Larger areas – we suggest that the words “(other than trees)” should be removed from this criterion as this exclusion is unnecessary in our view. As drafted, this criterion could be open to abuse and result in technical arguments that the criterion is not met. • Repeat offenders – clarity should be provided where multiple incidents occur in the same clearing area. For example, if three small trees are removed from one area, clarity should be provided as to whether it would be open to a council to issue a higher penalty for the removal of the second and third tree as repeat offences. As referred to in the EIE on page 12, some councils already issue per-tree fines, so guidance will be of assistance. • Significant vegetation – the integrity and currency of data will be critical to the criterion operating as intended. Evidentiary difficulties may also be created when a biodiversity values

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		map has been revised upon request, and the penalty is contested after the map has been revised.
4.	Do the significant vegetation categories sufficiently cover relevant mapped areas or land and vegetation of higher biodiversity, environmental or social significance?	Yes, and it is appropriate that clearing significant vegetation carries a higher penalty in our view.
Chapter 2.3 A clearer compliance and enforcement framework		
5.	Would additional measures or information help reduce illegal tree clearing on public land?	<p>We support the proposals outlined at paragraph 2.3.2 to clarify how Chapter 2 of the <i>State Environmental Planning Policy (Biodiversity and Conservation) 2021 (BC SEPP)</i> applies to clearing on public land.</p> <p>We suggest that the development of better pathways for seeking the removal of a tree on public land may reduce illegal tree clearing. We note that there is no formal application process for seeking the removal of a tree on public land that may pose a safety risk. In our members' experience, the request is usually made by a letter to council, but may be refused on the basis that there is no imminent risk to person or property. There is no appeal right from such a request.</p> <p>We note that sometimes in coastal or harbour areas where illegal tree poisoning or clearing has occurred on public land, a council may erect signage about the illegal activities that have occurred with warnings as to the applicable penalties. Such warnings can operate as a deterrent for further illegal activities and play an educative role. However, these types of measures are ad hoc in nature and do not need to be formalised.</p>
6.	What guidance is needed in relation to issuing replanting orders and stop work orders?	<p>We support the proposals outlined at paragraph 2.3.3 of the EIE to clarify the scope of stop work and replanting orders.</p> <p>We suggest that using the terminology of "restoring works" to refer to an obligation for replanting vegetation may be confusing for community understanding as it is not intuitive and arguably not appropriate. We suggest that guidance and education supporting the use of development control orders for replanting orders and stop work orders will assist to address this issue.</p>

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		In relation to the issuing of replanting orders, we also suggest that to facilitate better access to this measure, consideration could be given to expanding the jurisdiction of the Local Court to also issue these types of orders as a sentencing option.
7.	What guidance is needed to support replanting mature trees of an appropriate size and species?	<p>In our members' experience, most councils already have this guidance in place. However, it may be useful to provide standardised guidance which councils could adopt as appropriate.</p> <p>Any guidance provided in relation to replanting needs to be flexible enough to account for the value of the type of tree being removed. The issue being addressed is biodiversity loss, and there needs to be appropriate flexibility in achieving this goal. Replanting obligations should not be regarded as part of a punitive process, but restoring the loss of biodiversity.</p>
9.	Are there any known technologies that could be used to improve compliance with the provisions of Chapter 2 of the BC SEPP?	<p>Existing technologies already being used to provide evidence of tree or vegetation removal include LiDAR (Light Detection and Ranging) and aerial photography. Greater use of these technologies may improve compliance.</p> <p>In our view, any technologies that are used should be publicly available to ensure landowners can understand the vegetation on their land. It is important there is no information imbalance between council and landowners.</p>
Chapter 2.4 Support legitimate removal of dead, dying and dangerous vegetation while removing loopholes		
10.	Do you support limiting the exemption from permit or approval requirements for dangerous vegetation to only vegetation that is an imminent risk?	Yes, this is an appropriate limitation in our members' experience. Without the limitation, the potential scope of the exemption is quite wide and generally not well understood.
11.	What are the risks or challenges associated with limiting the exemption to only vegetation that is an imminent risk?	<p>One challenge will be the need to obtain expert evidence from an arborist and the associated costs. A risk in narrowing the criteria for the exemption is that more illegal tree removal activity may result due to costs of compliance or difficulties in establishing imminent risk.</p> <p>The proposed guidance for councils on "imminent risk" will be useful in administering this change and may assist to reduce the burden on councils.</p>

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13.	Do you think requiring people to get a qualified arborist to certify that vegetation is dead or dying before clearing it would improve outcomes? Can you see any risks or challenges associated with this approach?	Yes, this broadly reflects current practice and is appropriate. We note that it is preferable to have the certification made by the arborist before clearing, as proposed, as it is quite difficult and often not possible for the arborist to certify after the tree has been removed. The main challenge is the high costs associated with using an arborist and the difficulty in finding an available arborist.
14.	Do you think making people get a permit or approval before clearing dying or dead vegetation would improve outcomes? Can you see any risks or challenges associated with this approach?	While this approach may improve outcomes, gaining a permit may create undue delay which is problematic where there is an imminent risk. A streamlined approach and timeliness of response would be critical for such an approach.
15.	An alternative to removing the exemption for dead vegetation would be to limit the exemption so it only applies if the council or Native Vegetation Panel is satisfied that the vegetation has not been poisoned or otherwise illegally killed. In this case, we would add a definition of 'dead'. Would you prefer this approach?	In our view, the key issue that arises is not with the removal of dead trees, but the removal of healthy trees. It is also often difficult to determine that a tree has been poisoned or illegally killed. We prefer the proposal to require an arborist to certify that vegetation is dead or dying as the basis for removal.
Chapter 2.5 Encourage people to keep and replace vegetation		
16.	Does the list of proposed factors support an appropriate merit-based approach to assessing a request to clear existing trees?	We do not think it is necessary to list the factors that councils must consider when assessing applications for tree clearing. In our members' experience, councils have their own policies and are experienced in considering the relevant factors. Should such a list be developed, it must contain factors relevant to the tree remaining, as well as the tree being removed. The list on page 20 of the EIE broadly addresses factors in relation to the tree remaining.
17.	If the landowner cannot plant a replacement tree on the site, what alternative approaches could be implemented?	It would be unusual that a landowner cannot plant a replacement tree on the site, and this should always be the preferred course of action. There may be limitations as to the types of replacement tree that might be suitable, but nonetheless, the replanting of some form of vegetation on site should be pursued if possible. Where circumstances negate this option, requiring the landowner to contribute to offsite tree replacement is a suitable alternative.

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18.	Should requirements be specified for replacement trees (e.g. mature trees of an appropriate size and species)?	In our members' experience, councils already provide adequate guidance.
Chapter 2.7 Support a clearer framework: non-regulatory measures		
19.	Which of the guidance materials or templates would most help you use the provisions of Chapter 2 of the BC SEPP?	We support the preparation of guidance material to assist landowners to navigate the BC SEPP and tree permit legislation. We support the guidance material being made available in plain English and community languages as proposed in paragraph 2.7.1 of the EIE.
21.	We will release guidance material and templates in stages, based on urgency and priority. Which guidance and/or templates would you like us to release first?	In our view, guidance in relation to navigating the BC SEPP and tree permit legislation should be a priority, as these areas are not well understood.
22.	What types of innovative joint management arrangements should be explored to prevent unlawful tree clearing and preserve biodiversity and mature trees?	Local solutions developed by councils and local residents can play an important role in balancing amenity, preserving biodiversity and reducing unlawful clearing. For example, in the coastal town of Vincentia, there was an issue with tree poisoning to enhance residents' views. A compromise solution was reached which involved maintaining a lower level of shrubbery, which provided necessary separation of the road from parkland, but also improved residents' views. Although the relevant land was public, not private, it is a useful example of the benefit of community consultation by council to achieve a workable solution.