



NEW SOUTH WALES ABORIGINAL LAND COUNCIL

ABN 82 728 507 500

Native Vegetation Regulation Review
Conservation Policy and Strategy Section
Office of Environment and Heritage
Level 12, PO Box A290
Sydney South NSW 1232

Via email: native.vegetation@environment.nsw.gov.au

To the Native Vegetation Regulation Review,

RE: Draft Native Vegetation Regulation 2012, Draft Private Native Forestry Code of Practice, Environmental Outcomes Assessment Methodology and related policies

The New South Wales Aboriginal Land Council (NSWALC) welcomes the opportunity to make comment and provide input into the Draft Native Vegetation Regulation 2012 (Draft Regulation), Draft Private Native Forestry Code of Practice (Draft PNF Code), Environmental Outcomes Assessment Methodology (EOAM) and related policies.

The Aboriginal Land Rights system in NSW

NSWALC is the peak body representing Aboriginal peoples in NSW and with over 20,000 members, is the largest Aboriginal member based organisation in Australia. Established under the *Aboriginal Land Rights Act 1983 (NSW)* (ALRA), NSWALC is an independent, self-funded non-government organisation that has an elected governing council and the objective of fostering the aspirations and improving the lives of the Aboriginal peoples of NSW.

The preamble of the ALRA recognises that '*Land is of spiritual, social, cultural, and economic importance to Aboriginal peoples*'. The ALRA was established to facilitate the return of land in NSW to Aboriginal peoples through a process of lodging claims for unused Crown land.¹ When introducing the *Aboriginal Land Rights Bill 1983* into the NSW Parliament, the then Minister for Aboriginal Affairs, the Hon. Frank Walker identified that '*...land rights has a dual purpose – cultural and economic*'².

NSWALC provides support to the network of 120 autonomous Local Aboriginal Land Councils (LALCs) that exist in NSW. As elected bodies, Aboriginal Land Councils represent not only the interests of their members, but of the wider Aboriginal community. The network of Aboriginal Land Councils was established to acquire and manage land as an economic base for Aboriginal communities, as compensation for historic dispossession and in recognition of the ongoing disadvantage suffered by Aboriginal communities.

Pursuant to the ALRA, NSWALC has the following functions amongst others:

- The acquisition, control, and management of (and other dealings in) lands in accordance with the ALRA; including the claiming of unused Crown land;
- The protection and promotion of Aboriginal culture and heritage in NSW;
- The facilitation of business enterprises; and
- The provision of advice to the NSW Government of matters related to Aboriginal land rights.

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Recommendation 1: The interests of Aboriginal Land Councils and the Aboriginal community in NSW in the management, protection, and rehabilitation of native vegetation must be recognised in the Native Vegetation Regulation and related policies.

Crown land and Aboriginal Land Councils

Currently the Native Vegetation Regulation 2005 states that the definition of private native forestry means *"the management of native vegetation on privately owned land for the purpose of obtaining, on a sustainable basis, timber products (including sawlogs, veneer logs, poles, girders, piles and pulp logs)."*¹¹¹

The Draft Regulation proposes to expand the definition of private native forestry to:

"the management of native vegetation on privately owned land or Crown land that is not Crown-timber land within the meaning of the Forestry Act 1916 for the purpose of obtaining, on a sustainable basis, timber products (including sawlogs, veneer logs, poles, girders, piles and pulp logs)."(emphasis added)

In NSW Aboriginal Land Councils can make a claim to Crown land under section 36 of the ALRA. Aboriginal land claims are the sole form of compensation available under the ALRA to compensate Aboriginal people for the past dispossession of their lands. At present, there are over 26,000 undetermined claims to Crown land, many of which are several years old. NSWALC is working with Government to address this backlog, however, pending resolution of the backlog NSWALC wishes to ensure the rights under those undetermined land claims are protected.

The ALRA is a compensatory regime that empowers Aboriginal Land Councils to acquire land (by claim over Crown land or by purchase), deal with land and maintain and enhance Aboriginal culture, identity and heritage. NSWALC is concerned to ensure that emphasis is not placed on converting Crown land into forestry operations at the expense of Aboriginal people and land rights as this undermines the compensatory nature of the ALRA. Any proposals to allow private native forestry to occur on Crown land must first take into consideration whether there are any undetermined land claims over that land, so that those claims can be determined first and Aboriginal third party rights not affected by further dispossession.

Furthermore, the management of Crown lands in NSW must not undermine the ALRA and its purpose to provide land rights for Aboriginal persons in NSW, to vest lands in Aboriginal Land Councils as well as to provide a compensatory mechanism for dispossession while aiming to address issues of intergenerational equity.

Recommendation 2: That private native forestry or other land clearing activities on Crown land must not undermine the compensatory mechanisms of the ALRA.

Consultation with Aboriginal Peoples

NSWALC supports practical measures by government that seek to implement the United Nations Declaration on the Rights of Indigenous Peoples, which was endorsed by the Australian Government on 3 April 2009. This includes mechanisms to support Aboriginal peoples' management of lands, waters and natural resources. The following excerpts from the United Nations Declaration on the Rights of Indigenous Peoples identify the inherent rights of Aboriginal peoples in relation to lands, waters, natural resources and Traditional Ecological Knowledge.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 29

Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation, protection, without discrimination.

It is essential that in any future legislative or policy development in relation to the use and management of Crown lands, recognition is provided regarding the past and ongoing efforts of Aboriginal communities in land management and conservation activities.

Recommendation 3: Aboriginal peoples must be acknowledged as the Traditional Custodians of land and waters who possess valuable Traditional Ecological Knowledge and are key stakeholders in the management of Crown lands.

Protecting Aboriginal culture and heritage and cultural knowledge

Of major concern are proposals outlined in the Draft Regulation and Draft PNF Code to significantly expand the range of activities that can take place without requiring any assessments or approval processes, including new activities to be considered 'Routine Agricultural Management Activities' (RAMAs). Additions to the range of activities proposed to be Included in RAMA that will allow clearing to occur without approvals includes:

- Construction or maintenance of a permanent boundary fence, to include up to 10 metres clearing either side;
- Clearing of native vegetation for the purpose of the construction or maintenance of rural infrastructure on the land;
- Ecological fire management;
- Construction or maintenance of shearing or machinery sheds, ground tanks, dam or stock yards or similar utilities – up to 5 hectares; and
- Construction or maintenance of airstrips "distances and area sufficient".

The broad range of activities that proposed to be permitted under a RAMA without any approval processes have the potential to negatively impact on a range of important Aboriginal heritage sites, including scar trees. Furthermore, no guidance is provided to land owners in regards to how native vegetation they are proposing to clear on land that contains Aboriginal Cultural Heritage. It is important to note that in NSW it is an offence to 'harm' Aboriginal cultural heritage with fines up to \$275,000 for an individual.

Recommendation 4: The expansion of the range of activities that can occur without any assessment or monitoring, particularly as such activities can have significant impacts on Aboriginal culture and heritage are not supported.

Furthermore, proposals outlined in the EOAM aiming to “streamline assessment processes”, including proposals to allow clearing on up to 10 ha of land without proper assessments, are of concern, again failing to include Aboriginal heritage as a key assessment criteria. Additionally, while some assessment criteria are factored into the assessment processes for water quality, aquatic biodiversity and salinity, no criteria are proposed to be included to assess Aboriginal heritage.

Recommendation 5: Aboriginal heritage should be included in assessments for determining whether broad scale clearing activities and other activities proposed under the Native Vegetation Act can proceed. The Environmental Outcomes Assessment Methodology (EOAM) should consider and assess Aboriginal cultural values.

Clause 4.1 of the Draft PNF Code relates to the protection of landscape features of environmental and cultural significance. This clause outlines that land owners must exercise ‘due diligence’ and follow the procedures outlined in the *Due Diligence Code of Practice for Aboriginal objects*. As NSWALC has previously highlighted, this procedures document is severely deficient in its ability to appropriately identify Aboriginal heritage and ensure that harm to Aboriginal ‘objects’ is avoided.

Recommendation 6: That an additional requirement is included in Clause 4.1 of the PNF Code that the following groups with responsibility for Aboriginal heritage must be contacted prior to forestry operations taking place:

- Relevant Local Aboriginal Land Councils – contact details available on the NSWALC website under the ‘Land Councils’ tab www.alc.org.au
- Native Title holders and registered claimants, – contact the National Native Title Tribunal at www.nntt.gov.au
- NTSCORP Limited, and
- Aboriginal Owners on the Register of Aboriginal Owners – refer to the Office of the Registrar Aboriginal Land Rights Act 1983 <http://www.oralra.nsw.gov.au/index.html>

Environmental Outcomes Assessment Methodology

The proposed changes to the Environmental Outcomes Assessment Methodology (EOAM) reduce assessment requirements and aim to speed up assessment processes for the clearing of native vegetation. NSWALC is concerned that the reduced assessment requirements are designed to meet expediency goals, rather than Aboriginal culture and heritage or environmental goals.

The proposed changes to the EOAM facilitate the clearing of ‘small clumps’ and scattered paddocks. ‘Small clumps’ of native vegetation are between 0.25 and 10 hectares in size. It is evident that it is possible through the proposed changes to clear multiple ‘small clumps’ of native vegetation. As a result, the broad scale clearing of significantly more land could potentially qualify for streamlined assessment and the destruction of considerable areas of native vegetation.

In addition, the proposed changes to the EOAM potentially allows for the trading of biobanking credits which in turn facilitates more clearing and more offsetting.

In 2011, the Office of Environment and Heritage (OEH) proposed amendments to the Biobanking Assessment Methodology that included:

- A simplified assessment of ecosystem credit threatened species through the deletion of the threatened species sub-zone provision and the species association with site attributes equation;
- A simplified credit profile for ecosystem credits;
- The broadening of offset rules for ecosystem credits by allowing trading with the impacted vegetation type from the adjoining Catchment Management Authority sub-regions;
- The removal of the minimum number of plot/transect requirements in favour of the requirements stipulated in the Native Vegetation Interim Type Standard; and
- Changes to the red flag variation criteria.

These proposed amendments were concerning as they relax the 'maintain or improve' biodiversity values principle. As a result the attributes of credit profiles are relaxed leading to an offsetting system that is not 'like for like'. The proposed changes to the EOAM to bring it in line with proposed changes to the Biobanking Assessment Methodology facilitates wider offsetting that allows for the trading between vegetation forms and is not 'like for like'. As such, NSWALC is concerned that this does not meet objectives of conserving and protecting native vegetation.

Provisions of the *Native Vegetation Act 2003* (NSW) are designed to meet conservation and native vegetation protection outcomes. Objects of the legislation include to 'protect native vegetation of high conservation value having regard to its contribution to such matters as water quality, biodiversity, or the prevention of salinity or land degradation.'^{iv} In addition, Goal 22 of the NSW 2021 State Plan asserts the NSW Government's commitments to 'protect our natural environment' and 'protect and conserve land, biodiversity and native vegetation including an average of 300,000 hectares per year of private land being improved'. The clearing of any large areas of native vegetation is contradictory to the policy intent of the legislation, the intent of offsetting to maintain or improve native vegetation and Goal 22 of NSW 2021. The 'streamlined' EOAM approach is potentially a retrograde step in native vegetation management permitting increased clearing of native vegetation to the detriment of Aboriginal cultural site protection and practices as well as the natural environment.

Recommendation 7: The proposed changes to the Environmental Outcomes Assessment Methodology should not be designed to meet expediency goals to the detriment of Aboriginal culture and heritage and environmental protection goals. Provisions within the Environmental Outcomes Assessment Methodology should maintain rigorous 'like for like' provisions in relation to credit profiles and should not mimic the Biobanking Assessment Methodology.

Compliance and monitoring

Proposals outlined in the Draft Regulation, Draft PNF Code and EOAM provide for a range of new activities related to clearing native vegetation to proceed with no or minimal assessment and approval processes. Given the range of proposals to increase self-assessment or undergo only minimal assessment, it is concerning that no proposals are detailed to provide for rigorous monitoring and compliance processes to ensure that land owners are meeting the set criteria and to discourage illegal clearing.

Low levels of compliance and monitoring activities are of concern particularly as the NSW Annual Report on Native Vegetation 2010^v states that there have been significant areas of land cleared in NSW, including lands cleared without meeting proper approval processes or undertaken illegally. Furthermore, Annual Reports published by the OEH demonstrate that there is a very low number of compliance related activities given the high rates of illegally cleared native vegetation in NSW.

The 2010-11 OEH Annual Report^{vi} states that during the reporting period, under native vegetation legislation the OEH:

- Commenced 5 prosecutions,
- Issued 36 penalty notices,
- Issued 32 directions to remediate 3,095 hectares of illegally cleared land,
- Issued 262 warning and advisory letters, and
- Concluded 2 prosecutions (totaling fines of \$112,650)

Recommendation 8: That rigorous compliance and monitoring activities are undertaken to promote the ecologically sustainable use of native vegetation.

Proposed Bill to repeal Native Vegetation Act

It is noted that on 14 August 2012 the Shooters and Fishers Party introduced a Notice of Motion in the Legislative Council to introduce a Bill to repeal the Native Vegetation Act. The interests of the NSW Aboriginal community in the management and preservation of native vegetation in NSW must be captured in NSW Government legislation and policy.

Again, I thank you for the opportunity to provide comment to the Draft Regulation and associated policies. I trust that genuine consideration will be given to our comments and that a response to the issues we have raised will be forthcoming.

If you have any questions regarding this letter, please do not hesitate to contact the Policy and Research Unit on 02 9689 4444.

Yours sincerely,



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NSW Aboriginal Land Council

Date: 23-8-12

ⁱ Section 36 of the *Aboriginal Land Rights Act* further outlines claimable Crown lands in NSW

ⁱⁱ The Hon. Frank Walker, NSW Parliament Hansard, Legislative Assembly, 24 March 1983, at 5090, available at: [http://www.parliament.nsw.gov.au/Prod/parliament/hanstrans.nsf/V3ByKey/LA19830324/\\$file/473LA046.PDF](http://www.parliament.nsw.gov.au/Prod/parliament/hanstrans.nsf/V3ByKey/LA19830324/$file/473LA046.PDF)

ⁱⁱⁱ Clause 3, *Native Vegetation Regulation 2005*,
<http://www.legislation.nsw.gov.au/maintop/view/inforce/subordleg+729+2005+cd+0+N>

^{iv} *Native Vegetation Act 2003* (NSW), s 3 (c)

^v NSW Annual Report on Native Vegetation 2010

<http://www.environment.nsw.gov.au/vegetation/reports.htm>

^{vi} OEH Annual Report contained within the Department of Premier and Cabinet Annual Report, p.57, available at:

http://www.dpc.nsw.gov.au/data/assets/pdf_file/0013/133420/Department_of_Premier_and_Cabinet_Annual_Report_2010-11.pdf