



Minister for the Environment and Heritage

FOR APPROVAL by 25 August 2017

Concurrence on Land Management (Native Vegetation) Code

Purpose: To provide advice about the Minister for Primary Industries' request for concurrence on the Land Management (Native Vegetation) Code 2017 (Tab 1).

Analysis: The draft Land Management Code was developed by DPI and LLS in consultation with OEH. The code sets controls for clearing native vegetation on category 2 regulated lands and forms one part of the broader land management and biodiversity reforms.

Recommendations

Approve the Minister providing concurrence on the Land Management (Native Vegetation) Code under s60T of the Local Land Services Amendment Act 2016 (LLSA Act), noting the agreements made by Minister's offices, OEH and LLS set out in a letter to the Minister for Primary Industries at **Tab 6**

Approval

Approved:	Steve Hartley, A/ Executive Director, Policy	22/08/2017
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_____ Gabrielle Upton MP, Minister		_____ Date

Timeframes

The Government has committed to commencing the Land Management and Biodiversity Reforms on **25 August 2017**.

Key issues

Land management and biodiversity reforms

The land management and biodiversity reforms seek to move away from the current approach of managing all native vegetation to a standard set of rules at every property, and instead deliver a broader approach that provides greater flexibility at the property level. The reforms seek to balance this flexibility with clearer prioritisation mechanisms and incentives to maintain and manage important biodiversity values at local and bioregional scales.

The Code is the principal regulatory tool to regulate clearing of native vegetation on private landholdings and Crown Land in rural areas. Clearing using the Code is essentially not allowed in prescribed environmentally sensitive lands (see **Tab 2**). In other Category 2-regulated land,

the Code authorises land clearing of remnant native vegetation, provided that the clearing complies with the conditions of the Code (see details in **Tab 3**).

The Independent Biodiversity Legislation Review Panel (Independent Panel) acknowledged that introducing reforms which remove the requirement that any clearing must 'improve or maintain' environmental outcomes could cause some biodiversity losses at a site scale.

The Code's flexibility in enabling site scale native vegetation clearing (with safeguards) should be viewed in the context of the reforms as a whole. The reforms include a range of improved compliance and enforcement provisions and OEH will have carriage of regulatory functions. The Government has sharply increased public investment in biodiversity conservation on private land (\$240 million available for private landholders over 5 years, then \$70 million per year subject to performance reviews), and ensuring the Saving our Species program is adequately resourced (\$100 million available over 5 years).

At the statewide level the Government has ensured there are levers to suspend the Code if appropriate. The Minister for Primary Industries and Minister for Environment can issue a joint order to restrict issuing certificates under the Code, in relation to any area or for any period (s60ZA LLSA Act), at any time.

Statewide satellite monitoring of woody vegetation change continues. The legislation establishes a scientifically robust environmental monitoring framework to quantify significant environmental change at various scales, which OEH will administer.

Despite these controls, checks and balances, the Code has been widely criticised by environment groups, who believe it will cause substantial harm. OEH analysis does not forecast land clearing rates will escalate dramatically in the medium term, although there may be a significant spike in the first 1-2 years of the Code (see below). The Code is complex, presents environmental risks if exploited inappropriately by farmers, and it is possible that it will be difficult to enforce in some circumstances. This document sets out the risks, how they have been mitigated, and the residual risk. The residual risk has been addressed by agency and Ministerial level agreements relating to reporting, monitoring, review and if appropriate future amendment.

Minister's concurrence role

The Minister for Primary Industries is responsible for making the Code under s60T Local Land Services Amendment Act (LLS Act). The Minister may make the Code only with the concurrence of the Minister for the Environment. Both Ministers are required to have regard to the principles of 'ecologically sustainable development' ('ESD') in making and concurring on the Code (see **Tab 4** for further details).

Under the LLS Act, ESD requires integration of social, economic and environmental matters. In line with the Act, the Ministers concurrence must have regard to:

- *the precautionary principle*: if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
- *inter-generational equity*: the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations;
- *conservation of biological diversity and ecological integrity*: conservation of biological diversity and ecological integrity should be a fundamental consideration; and
- *improved valuation, pricing and incentive mechanisms*: environmental factors should be included in the valuation of assets and services.

This brief includes OEH's advice on social, economic and environmental matters arising from the Code. This is also addressed in the attachment to Minister Blair's letter.

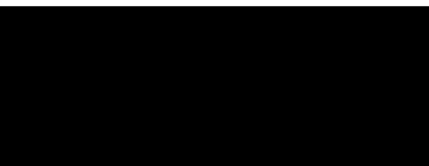
Potential vs likely clearing under the Code

WWF-Australia commissioned a report last year which estimated that over 8 million hectares of extant woody vegetation across NSW would potentially be *available* for clearing under the Equity part of the Code. This hypothetical study does not take into account the economic, climatic and regulatory constraints which drive land use change.

OEH has also developed a modelling tool to analyse land clearing trends, with the aim of estimating clearing that could occur as a result of adopting the Code. The modelling indicates that (see **Tab 5**):

- economic and climatic conditions, rather than regulatory settings, have historically been the main drivers for land clearing decisions in NSW
- in the absence of regulatory change, favourable commodity prices are likely to increase land clearing rates in NSW over the next 3 years; agricultural clearing is likely to return to long run clearing rates towards ~15,000 ha per annum over the period 2017-18 to 2019-20 (up from ~9,000 ha per annum in recent years)
- the regulatory changes in the Code may further increase agricultural clearing in NSW by between **8%** and **45%** annually. There may also be a spike in clearing in the first 2 years of the Code due to landholders' behavioural responses to regulatory change
- Land clearing is responsive to agricultural policy. For example, decisions around live export trade, dry land cropping or other major structural change in the agricultural sector are likely to have a significant effect on land clearing rates, so continued monitoring of policy settings will be required should such structural changes occur).

Risk table

Risk	Details of risk	Proposed risk mitigation strategies	Residual risk mgmt
Impact of clearing on threatened species	<p>Clearing under the Code may threaten the viability of certain threatened species at a property and local landscape scale.</p> <p>The risk is highest in overcleared landscapes where most clearing is likely to occur under the Code (Northern Tablelands, North-West, Central West and Western parts of NSW), particularly if there is limited uptake by farmers in these areas in the private land conservation funding schemes (BCIS and SOS) to conserve lands with biodiversity value on their property.</p>	<ol style="list-style-type: none"> 1. exclude additional core koala habitat from Code clearing, and work on travelling stock reserves clearing protocol (finalise by end 2017) 2. threatened species habitat will be a focus of funding under the BCIS 3. OEH to advise RLU CCs on monitoring information on changes in landscape extent in each biodiversity subregion 4. 12 month review of code and 3 year review of clearing caps 5. LLS to prepare outreach material to advise on benefits of retaining hollows in overcleared landscapes. 6. LLS only authorise activities in a set aside area if it promotes biodiversity outcomes; LLS set aside management guidelines to be consulted on with OEH. 7.  	<p>Moderate (on site and local landscape scale)</p> <p>Monitoring by Resources and Land Use CEOs committee ('RLU CCs')</p>

Risk	Details of risk	Proposed risk mitigation strategies	Residual risk mgmt
Impact of clearing on threatened ecological communities	The Code contains some restrictions on clearing vegetation in vulnerable ('VEC') and endangered ecological communities ('EEC'), which will not apply if LLS deems the vegetation to not be a 'functioning ecological community'. Clearing this vegetation could threaten the ongoing viability of certain VECs and EECs in overcleared landscapes	<ol style="list-style-type: none"> 1. LLS guidelines on whether a VEC is a 'functioning ecological community' must be consulted upon with OEH and approved by a qualified ecological sciences expert. 2. LLS to prepare guidelines for identifying VECs and EECs at a site level 	Moderate (on site and local landscape scale) OEH review of guidance and reporting to RLU CCs
Enforcement risks	Clearing of 'regrowth' under Division 1 of Part 4 cannot be monitored to trigger safeguards under the Code, as no LLS notification is required.	Letter to Minister Blair affirming the agreement by LLS to provide guidance to landholders that this provision only authorises clearing of vegetation that has regrown following a lawful clearing event, and to operationally collect the landholder interest in this provision via customer relationship management systems to better profile the risk and report to RLU CCs.	Low Monitoring by RLU CC,
Climate change impact	Land clearing can lead to increased carbon emissions, depending on a range of factors including local soil quality.	<ol style="list-style-type: none"> 1. The biodiversity reforms are complemented by the new NSW Climate Change Policy and associated funding package announced in 2016. 2. [REDACTED] 	Low
Soil and water quality impact	If clearing is poorly managed, it could lead to localised erosion and increased salinity, and impacts on local water quality.	<ol style="list-style-type: none"> 1. LLS guidelines on best practice to minimise soil erosion and salinity. 2. [REDACTED] 	Low

Environmental risks and their relationship to safeguards

Most parts of the Code include limits and safeguards such as notification, certification and set asides which will work to minimise clearing and secure vegetation in the landscape, while still providing farmers with a greater level of autonomy. The table above summarises the risks and how they are proposed to be mitigated. Social and economic factors are discussed in the 'issues' section).

In OEH's view, the current version of the Code has some provisions which will not be formally monitored and/or are difficult to enforce (including clearing caps). LLS have agreed to various administrative measures which will reduce these risks, including reporting to RLU CCs which presents an avenue to amend the code if these risks emerge.

Whilst OEH anticipates most farmers will use these provisions minimally, a few might exploit them inappropriately, or invoke them after the fact for clearing which exceeds the government's intention. If unchecked, such clearing could destroy habitats, cause soil and water quality impacts, and/or undermine the integrity of the regulatory system among those who are staying within the intended limits.

While the real experience of the Code may demonstrate that such risks are localised, it is important to ensure the framework enables them to be addressed prior to commencement of the Code. These risks are likely to be most significant in the Far West, North West, Central West and Northern Tablelands.

[REDACTED] and OEH will provide regular advice to the Minister against this commitment with a view to ensuring clearing is adequately managed or if a review of Code settings is required

Highest risk clearing under the Code

The Code enables clearing for three main purposes on private regulated land;

- *farm management* (for farming efficiency and promoting native pastures);
- *farm expansion* (for pasture expansion or converting grazing land to cropping land)
- *continuing use* (clearing consistent with previous practices on site).

LLS have agreed to administrative arrangements which will reduce these risks, and enable them to be monitored by RLU CC and managed if needed.

The risks of the *farm management* parts of the Code (Invasive Native Species (Part 2) and Pasture Expansion – Thinning (Part 3)) can be managed, provided cleared areas cannot be converted to cropping. The Code settings also do not substantially differ from existing lawful types of 'management' clearing. Clearing under these parts are lower risk as the Code requires significant amounts of native vegetation to be retained in the 'cleared' area. This is important to retain biodiversity and ensure clearing is undertaken sustainably.

The *farm expansion* parts of the Code (Mosaic Thinning (Part 3 Division 3), Equity (Part 5) and Farm Plan (Part 6)) enable significant areas of land to be cleared and generally enable all native vegetation to be cleared in a clearing area. Whilst there are some caps on clearing under separate Divisions, cumulative clearing across a property is not capped, and LLS has publicly promoted that different Divisions of the Code are designed to be used together across a property. The measures set out in **Tab 6** are designed to mitigate the risk of 'broad-scale clearing' under these Divisions.

The *continuing use* part of the Code (Part 4) contains no caps on clearing (although clearing of vegetation can generally only occur in areas which were previously cleared), nor limitations on clearing in some sensitive environmental areas such as threatened ecological communities. The risks of *continuing use* clearing under Divisions 2 and 3 of Continuing Use can be mitigated through the proposed exchange of letters [REDACTED]

[REDACTED] and requiring robust records of prior land management activities to be provided by landholders prior to LLS certification.

The enforcement risks with Division 1 of Continuing Use (Part 4) can be sufficiently mitigated by the measures set out in **Tab 6**.

Clearing in environmentally sensitive land

The *Local Land Services Regulation 2017* prohibits clearing under the Code in a range of environmentally sensitive lands (see **Tab 2**). Environmental groups and other stakeholders continue to express significant concern on the potential for clearing authorised by the Code to compromise environmentally sensitive land not listed in **Tab 2**.

Clearing under the *farm expansion* and to a lesser extent *continuing use* part of the Code risk the following impacts, particularly at a property and local landscape scale in areas where most clearing is likely to occur under the Code:

- removing key habitat for threatened species, including koala habitat (less than 1% of identified koala habitat in NSW is protected from clearing under the Code)
- increasing vulnerability of threatened ecological communities (including in the last remaining tracts of remnant vegetation in already overcleared and vulnerable landscapes, such as travelling stock reserves and hollow bearing trees).
- landholders not managing set asides and retained vegetation to promote biodiversity and protect remaining habitat to offset the impacts of the clearing.

The Code does not formally require any assessment that proposed clearing and any associated offsets 'improves or maintains' environmental outcomes (including biodiversity, water and soil quality), although some provisions of the code (such as requirements to retain vegetation stem density requirements) have been designed to address these risks. Code restrictions on clearing vegetation in threatened ecological communities will also only apply if LLS is of the opinion that the vegetation is in a 'functioning' ecological community.

There are no specific requirements in the Code to ensure that at least 30% remnant vegetation remains on a landscape scale and that hollow bearing trees are retained after equity or farm plan clearing. Where less than 30% habitat or woodland remains in a landscape, the rate of species loss greatly accelerates. Hollows in trees are also critical to the survival of some threatened species who rely on hollows for food and habitat.

The measures proposed in the exchange of letters at **Tab 6**, including scheduled Code reviews and that LLS provide outreach services to promote best land management practices, are designed to substantially mitigate potential adverse environmental impacts of clearing under the Code. The biodiversity and land management reforms are also complemented by the new NSW Climate Change Policy and associated funding package announced in 2016.

Potential economic and social benefits of Code

Potential economic and social benefits of the Code include enabling landholders to increase production on their landholding, with more available land for pasture or cropping.

Given the forecasted land clearing rates from OEH modelling do not indicate a dramatic escalation of clearing rates in the medium term, it is unlikely that there will be increased production that would have significant benefit for local communities across the State. Rather, the main benefits are likely to be private benefits for large farming operations which broadscale clear under the Code. Some benefits are likely to flow through to local communities in areas such as Moree/Walgett or Northern Tablelands where more extensive clearing may occur.

Next steps

Following Ministerial concurrence, the Code will be published on the NSW legislation website.

Supporting analysis

Further reasons

Not applicable

Cabinet / ERC recommendations and decisions

Legislative consequences

Not applicable

Financial impact

Not applicable

Consultation

A draft version of the Code was publicly exhibited by LLS from 10 May to 21 June 2017, together with the other supporting documents for the Land Management and Biodiversity Reforms. Approximately 85% of the 8,924 submissions received commented on the Code.

The majority of campaign submissions were not supportive of the broadscale clearing permitted under the Equity and Farm Plan parts of the Code, due to potential habitat loss and impacts of clearing on climate change. There were also concerns about the cumulative impact of clearing, particularly on hollow bearing trees, travelling stock reserves and threatened ecological communities.

Significant concern was expressed in public submissions regarding the potential impact of clearing under the Code on koala habitat; many stakeholders have recommended commencement of the Code be delayed until completion of the statewide koala maps and the final native vegetation map

Some farming stakeholders expressed support for the code-based approach to regulating clearing, and requested further flexibility in the drafting of the Code.

Tabs

Tab	Title
1	<i>Land Management (Native Vegetation) Code 2017</i> and request for concurrence
2	Restrictions on clearing in environmentally sensitive areas
3	Details of clearing authorised under the <i>Land Management (Native Vegetation) Code</i>
4	Principles of ecologically sustainable development and objects of <i>Local Land Services Act 2016</i>
5	OEH forecast land clearing report
6	Proposed letter from Minister Upton and Minister Blair
6a	Exchange of letters between Minister Speakman and Minister Blair dated 14 September 2016
6b	Procedures and guidance