Submission No 60

INQUIRY INTO LOCAL LAND SERVICES AMENDMENT (MISCELLANEOUS) BILL 2020

Organisation: Timber NSW

Date Received: 26 February 2021

TIMBER NSW

Submission to Portfolio Committee No.7 Planning and Environment

Legislative Council NSW

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Inquiry into the Local Land Services Amendment (Miscellaneous) Bill 2020 (the Bill)

Timber NSW has effectively represented the NSW timber and forest products industry officially since 1906. Not surprisingly, Timber NSW's member companies and family enterprises, some who have been in forestry for nearly 150 years have significant and extensive experience in the management of forests, their ecosystems and their fauna and flora.

Timber NSW is an advocate of ecologically sustainable forest management which allows forests to be managed for multiple uses and values including timber.

Timber NSW is a strong supporter of the Local Land Services Amendment (Miscellaneous) Bill. The Bill contains a suite of important measures that address long-standing shortcomings in the existing legislation.

The Bill states the objects of this Bill to be:

a) to remove the application of *State Environmental Planning Policy (Koala Habitat Protection) 2019* to land to which Parts 5A and 5B of the *Local Land Services Act 2013* (***the Act***) apply, while preserving the application of *State Environmental Planning Policy No 44—Koala Habitat Protection* to certain core koala habitats in the local government areas of Ballina, Coffs Harbour, Kempsey, Lismore and Port Stephens,

(b) to remove requirements imposed by other legislation, including the requirement for development consent under the *Environmental Planning and Assessment Act 1979*, in relation to carrying out private native forestry that is authorised by a private native forestry plan under Part 5B of the Act,

(c) to extend the maximum duration of private native forestry plans made under Part 5B of the Act to 30 years,

(d) to require the Minister for Agriculture and Western New South Wales to consult with the Minister administering Part 7A of the *Fisheries Management Act 1994* and the Minister administering the *Forestry Act 2012* before making a private native forestry code of practice,

(e) to allow native vegetation clearing in certain circumstances on land that is used for agricultural purposes without the need for authorisation under other legislation.

The Bill

Clause a: Remove the application of State Environmental Planning Policy (Koala Habitat Protection) 2019

Position: no longer necessary

Commentary

Clause a – this no longer has any value as the *State Environmental Planning Policy (Koala Habitat Protection) 2019* has been repealed by the *State Environmental Planning Policy (Koala Habitat Protection) 2020.*

The Interpretation Act 1987 NSW already would cause any reference to *State Environmental Planning Policy no 44 – Koala Habitat Protection* in the Act) to be a reference to the latest Koala SEPP, and this being a reference now to the *State Environmental Planning Policy (Koala Habitat Protection) 2020.*

Relevant part of Schedule 1 of the Bill:

Schedule 1, clause 4 is not required.

Schedule 1, clause 5 is not required.

Clause b: Removal of dual consent for PNF

Position: supported

Commentary

Part 5B of the Local Land Services Act 2013 (LLS Act) and the Standard Instrument – Principal Local Environment Plan (2006 EPI 155A) (Standard Template) and its application to a local Council's Local Environment Plan (LEP) can require dual consent

to be obtained. The first will be obtained under Part 5B of the LLS Act and the second pursuant to a LEP where 'forestry operations' are proposed may require a development application to be lodged with the Council.

For private native forestry, the Bill removes the need for dual consent and the unnecessary involvement of Councils, who have no expertise or specialist knowledge in forest science. Under the current governance arrangements, the process is far from satisfactory. On the north coast alone, there are 35 individual Councils each taking a different approach to the treatment of private native forestry. For private landholders who are required to obtain development approval, the process is akin to a lottery. Removing the involvement of Councils will remove this uncertainty without eliminating the LLS regulatory framework, which provides environmental protection.

This is a duplication of process for the land owner and establishes a disincentive that negates the public policy of encouraging private native forestry operations. This public policy has operated for some time and across several governments of differing political character. PNF operations have been viewed as an important source of native timbers to replace the supply from Crown lands that have been transferred to the NSW national park estate.

Policy considerations that are also present with dual consent is that a Council will not operate to any instrument that improves on the PNF Code established by the LLS Act. Each Council will have its own approach to consideration of the development application, even though this process has legislative requirements that must be met that are contained within the *Environment Planning and Assessment Act 1979.* This amounts to a dual consent system independent of each other.

In turn, this gives rise to a legal principle around any possible repugnancy between the two laws currently requiring dual consent. It is very arguable that the dual consent has one set of legislation working against the other. The issue of repugnancy will certainly be present if a Council should refuse consent to a development application of a PNF operation when the land owner has a LLS PNF Plan approval.

A larger policy issue emanates from this outcome. In the event of litigation to challenge a Council refusal and subsequently a Court upholds the refusal of a development application for a PNF operation that has approval from the Local Land Service pursuant to Part 5B of the LLS Act, then what is established is an EPI overturning an Act of Parliament.

This has far wider implications for the operation of EPIs than just the PNF application. It is not surprising that the State Cabinet might have identified this issue and saw fit to avoid this circumstance by placing this provision into the Bill under review. By doing so, Cabinet was ensuring the continued administration of its environmental policies through EPIs without any possible legal challenge.

The removal of dual consent in the proposed bill removes this tension to ensure harmony between the legislation it has enacted. This provision in the Bill should be supported.

Relevant part of Schedule 1 of the Bill:

Schedule 1, clause 13 and clause 14 further clarifies and ensures that the LLS Act takes priority over the Environmental Planning and Assessment Act 1979 and any EPI issued under that Act. This should be supported.

Schedule 1, clause 17 should be supported as it is a measure that arises because of the provision in Schedule 1, Clause 14. It is sensible drafting from the Office of Parliamentary Counsel.

Additional Background Commentary:

Private Native Forestry (PNF)

Part 5B of the Local land Services Act sets out provisions for the operations of a private land owner within NSW to engage in harvesting of native trees on their land.

Any PNF Plan must be conducted in accordance with:

- the principles of ecologically sustainable forest management;
- the protection of biodiversity and water quality;
- the objective to carry out the forestry operation in a sustainable manner and
- assurance that differences between PNF and native forest operations in State forests are recognized, including in the application of protocols, codes, standards and other instruments.

These objects are provided through the PNF Code. The Code is made by the Minister for Forestry with the concurrence of the Minister(s) for administering the Biodiversity Conservation Act 2016 and the Fisheries Management Act 1994.

A PNF Plan is made on application by the land owner and approved by the Local Land Service applying the PNF Code.

The EPA has enforcement functions on compliance with the PNF Code by the land owner(s).

A PNF Plan does not give the right to 'land clearing'. It is selective harvesting.

EPI

Part 3 'Planning Instruments' of the Environmental Planning and Assessment Act 1979 established the regime of an 'environmental planning instrument'. An example is an LEP that a local government Council issues for the zoning of land within the local government area for which it is responsible. A State Environmental Planning Policy is another. Another example is the *State Environmental Planning Policy (Koala Habitat Protection) 2019)* gazetted on 20 December 2019 and rescinded on 30 November 2020.

An EPI is created by various means depending on whether it is a SEPP or an LEP, but importantly the instrument never comes before Parliament or becomes a Parliamentary sanctioned instrument. Parliament delegated the creation of these instruments, removing itself from the approval. It is finally made law by the Governor in Executive Council, similar to a bill enacted by Parliament, which means the Minister has carriage of the instrument during the delegated process.

This potentially creates an interesting conflict between an Act of the Parliament and an instrument created under delegated authority of Parliament. This conflict will occur when there is an inconsistency or repugnancy between the two 'instruments'

The legal principle

Where there are two statutes from the same Parliament and the application of a provision of one statute is repugnant to the provisions of the other, then this tension needs to be resolved as the presumption is that the Parliament would have intended both pieces of legislation to work in harmony.

Where repugnancy is found to exist then the usual remedy is that the latest instrument in time, prevails.

Where a PNF Plan approval has been granted pursuant to the provisions of the LLS Act and the provisions of an LEP as delegated legislation to the Environment Planning and Assessment Act 1979 (EPA Act) is inconsistent and repugnant to the LLS Act, then the LLS Act will prevail. It will prevail because it is the superior instrument, as the LEP is an instrument of delegation to an Act earlier in time.

The situation is further clouded where the delegated legislation produces an instrument that is the later in time. The matter can only be resolved with certainty of the legal principle that Parliament would have intended the two Acts to work in harmony. The EPI (and another delegated legislation such as a regulation) might be later in time but it has not been legislated by the Parliament but under delegated authority. Such a situation leads back to the actions of the Parliament being in harmony, so the later legislation of Parliament must prevail to restore the 'harmony' in light of the repugnancy.

All of this is, of course, arguable, but it is difficult to see how an instrument made under delegation, and not Parliament, would be superior to an instrument enacted by Parliament later in time than the Act, giving rise to the delegated instrument.

However, no matter how contestable the issue might be, a government would not wish to see it being determined by a Court that would establish a precedent across many potential exercises of delegated authority. It would be prudent to deal with the one-off circumstance. It would appear that this is what the Executive decided to do and what the Government in Parliament elected to do. Those concerned about the administration of the environment in NSW and its direction might also consider these issues with care.

Clause c: Extension of PNF plans to 30 years.

Position: supported

Commentary

This clause should be supported.

Currently a PNF plan cannot exceed 15 years – section 60ZZ (1) LLS Act.

The provision that extends the approval period of a PNF Plan from 15 to 30 years is another important measure. The additional time will provide landholders with the confidence they need to invest in their forests' future, potentially encourages them to seek forest certification and reduces the need to maximise timber revenue in a single harvesting events. This measure will be enhancing the health of the forest and improving the environment.

Forestry operations are not a single generational matter but several generations due to timber growth cycles and reafforestation programs. A 15 year period is not even half the period of a normal hardwood timber growth cycle.

Relevant part of Schedule 1 of the Bill:

Schedule 1 clause 18

Clause d: Requirement to consult on PNF Code review

Position: supported

Commentary

This wider consultation between Departments leads to good public policy.

The proposal should be supported.

Relevant part of Schedule 1 of the Bill:

Schedule 1, clause 15 and 16 extends the consultation between agencies for the preparation of a PNF Code and should be supported.

Clause e: Permit Allowable Activities in rural E zones

Position: supported

Commentary

This measure concerns 'allowable activities.

Allowable activities

'Allowable activities' is a term used in the LLS Act to refer to the clearance of native timber which is permissible without approval. Essentially, the policy concept is that land that is used by the private land owner requires some management of that land. The clearing of fence lines, the clearing around dwellings and the use of timber for construction on the land are examples of what is permitted.

The Bill

The issue set out in clause **"e"** again raises the matter of 'repugnant legislation'. In particular, an Act and an EPI that are incompatible. The LLS Act authorises clearing of vegetation known as 'allowable activities' - the terms of which are found in Schedule 5 of the LLS Act. A SEPP may remove the right granted under Schedule 5 of the LLS Act either through direct removal or through a reference to a prohibited use or activities associated with land in an LEP 'Zone'. This has occurred in NSW with respect to 'allowable activities'.

It makes good legislative sense to clarify this issue across all applicable Zones of land in the Standard Template and LEPs. This is what Schedule 1 Clause 2 does.

Relevant part of Schedule 1 of the Bill:

Schedule 1, clause 2 sets out a range of lands that are identified in the Standard Template and LEP.

Schedule 1, Clause 2(2)(c) identifies lands as Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living. In respect to the terms of each of these Zones found in the Standard Template, the clearing of vegetation permitted by the LLS Act, is prohibited in these Zones. Clearly the LLS Act Schedule 5 is incompatible with the LEP. In respect to E-Zones this Bill removes this tension.

Essential Technical Background to Matters in the Bill

- Timber NSW is committed to the conservation of the koala. Well before the development of the NSW Koala Strategy, TNSW developed a Koala Code of Practice to ensure that native forest and plantation harvesting in NSW is planned and undertaken in such a way that Koala populations do not decline in areas where timber harvesting occurs. TNSW remains a strong supporter of koala research. This research is essential to gain a better understanding of the species and its needs and to ensure that the most appropriate management prescriptions are applied.
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- Private native forestry is not land clearing despite often being portrayed as such. Genuine land clearing results in land-use change. Private native forestry does not change the use of the land. Private native forestry results in partial and temporary canopy removal. After harvesting occurs, the forest regenerates, which is codified and enforceable.

- Private native forestry operations are typically small-scale and low intensity, as demonstrated by the NSW Government's Department of Environment's own monitoring of the causes of forest canopy change. The monitoring differentiates between permanent clearing and temporary canopy changes [as a % of the NSW forest estate]:

  <u>Permanent clearing:</u>
  - Agriculture (grassland, cropping, horticulture, farm infrastructure) [0.07%],
  - Infrastructure (residential, commercial, mining, public infrastructure) [0.03%]

Temporary canopy removal:

- Fire [0.13%]
- Forestry (native and plantation harvesting, establishment, thinning, forestry infrastructure:

    - public native forestry [0.06%]
    - private native forestry [0.02%]

The monitoring reveals that private native forestry annually removes just 3,690 hectares of forest canopy on average[1] or just 0.02% of the NSW's 20-million-hectare native forest estate[2] (Figure 1). The comparatively small scale and low intensity of private native forestry rule it out as a key threatening process for koalas.

- Comprehensive environmental protection measures ensure the impacts of private native forestry on koalas and the environment are temporary and minor. Private native forestry is only allowed to occur in regrowth forests, harvesting is selective and there is no clear-felling. All private native forestry operations must be planned and abide by a Code of Practice. Under the Code, all sensitive and significant environmental features, including riparian zones, old growth, steep slopes, rainforest, rocky outcrops, wetlands and heath are protected. Protection is also provided for individual trees and plants that are important for wildlife, such as hollow-bearing trees and feed trees. For plants and for animals, such as koalas, which are classified as vulnerable or threatened, there are special prescriptions that ensure the protection of key habitat features. After harvesting is completed, the forests must be allowed to regenerate. Operating in accord with the Code ensures that private native forestry is a sustainable land-use.

[1] EES (2018) Results Woody Vegetation Change Statewide (SLATS) 2018. Website https://www.environment.nsw.gov.au/topics/animals-and-plants/native-vegetation/landcover-monitoring-and-reporting

[2] Department of Ag (2018) https://www.agriculture.gov.au/abares/forestsaustralia/sofr/sofr-2018/criterion1

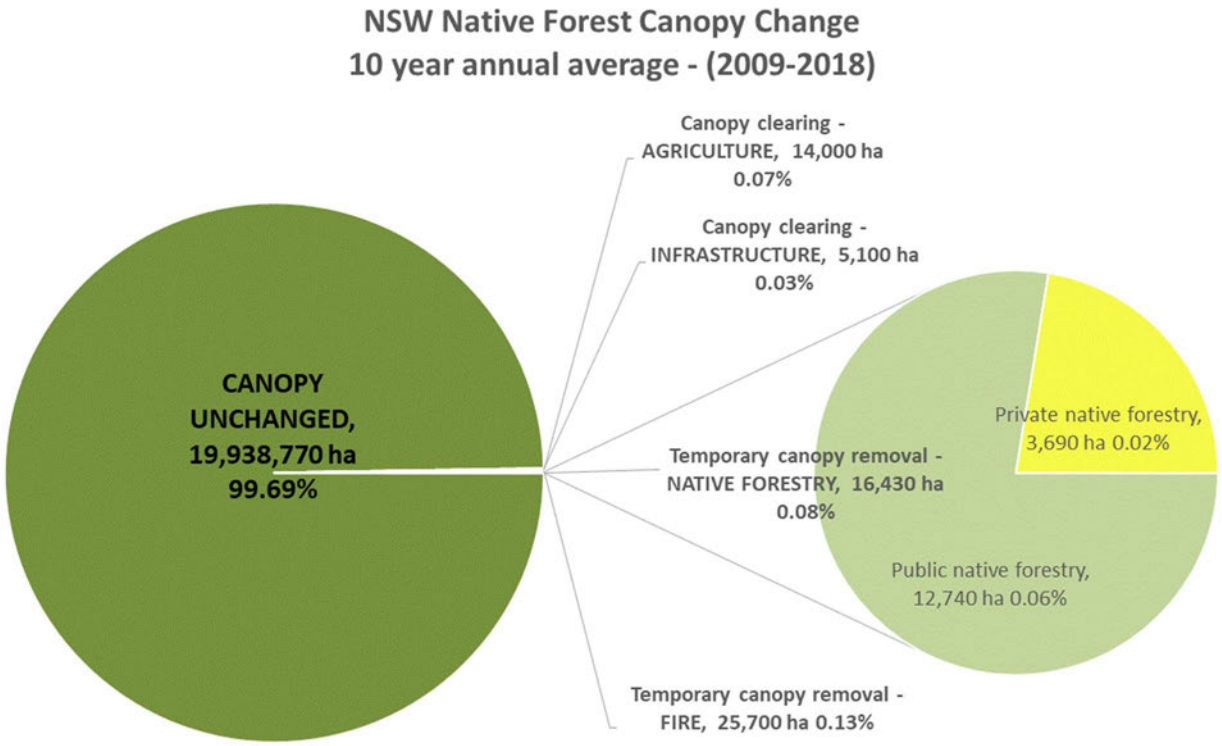

Figure 1 – Size and scale of land-use activities that result in temporary and permanent canopy change in NSW native forest (2009-2018 annual average) (data source: EES (2018) Results Woody Vegetation Change Statewide (SLATS) 2018.)

- Private native forestry is subject to independent regulatory oversight. All private native forestry plans must be approved by Local Land Services, and all private native forestry operations are regulated and policed by the Environment Protection Authority using a dedicated forestry compliance team.

- Published research by Dr Brad Law (2017) is revealing that native forestry is not impacting on koala populations. After extensive survey across millions of hectares of north coast hinterland forests Dr Law found that there were high koala occupancy rates in State forests with a long history of moderate and heavy timber harvesting. The same research found similar occupancy levels between harvested State forests and National Park. Three consecutive years of koala monitoring (prior to the 2020 bushfires) revealed occupancy rates to be stable. A current koala tracking project on State forest supports these findings. It shows that koalas are spending similar amounts of time in recently harvested forest as they are in forest reserves protected from harvesting disturbance. Similar trends are emerging for private native forestry which is less intensive.

- In remote forest areas the single greatest threat to koalas (by far) is wildfire. In 2019-20, over 4 million hectares of native forest was burnt, much of which was koala habitat. It is estimated by koala conservationists that over 5,000 koalas were killed. The most severe impacts were caused by megafires which all originated in remote National Parks & Reserves. Unfortunately, the 2019-20 wildfires were not the first time that koalas have been heavily impacted. NSW wildfires have been killing koalas in large numbers for decades. Over the past 20 years alone, wildfires have consumed over 5.7 million hectares of our National Parks and reserves (Figure 2). Together these fires have covered 86.5% of all the forest that is formally set aside in NSW to protect our native fauna (Figure 3). The NSW Government has been very slow to acknowledge this issue and is yet to act upon it. In 2018 Timber NSW made a public submission on the Government's Draft Koala Strategy urging it to recognise and address the threat that wildfires posed to koalas. The Department of Environment who developed the strategy for the Government chose to completely ignore its advice and in the final published version there is no reference to wildfires as a key threat. Not until the aftermath of the 2019-20 wildfires in February 2020 did the Departmental architects of the Strategy meet to discuss the issue. In their subsequent 2019-20 annual report they sheepishly acknowledge that *there is a need to better prepare for future bushfires and climate change to improve outcomes for koala populations*. With such a poor track record it is now critical that the NSW government intervene in the way public forests are being managed. This must begin with a major overhaul of the Department of Environment's forest fire management policies. The forest industry supports the protection of koala and sees strategic fire and fuel management as critical to the long term safety of wild koala populations.

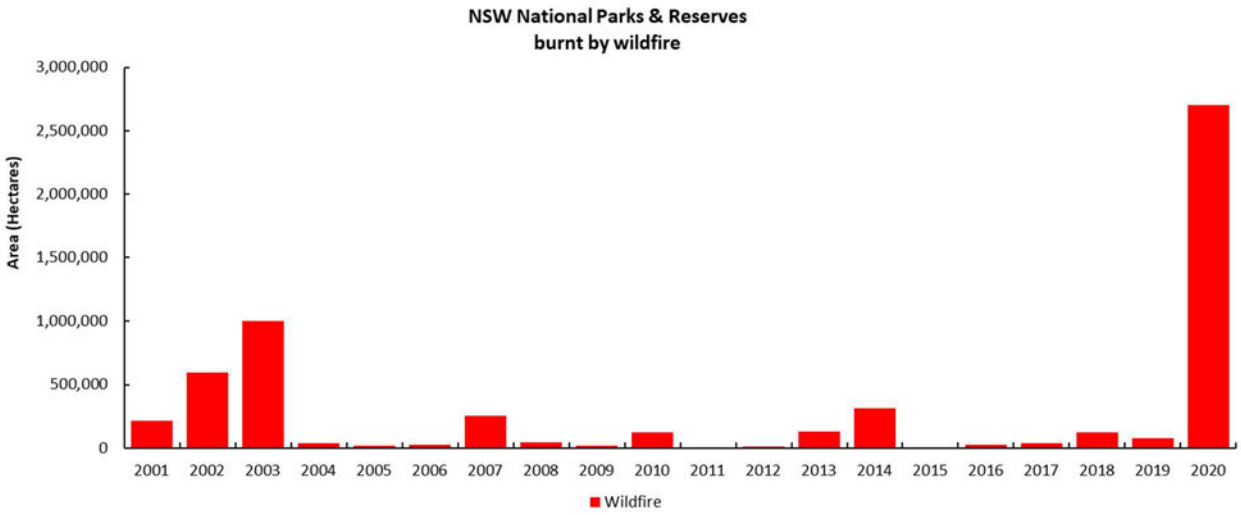

Figure 2 – Annual area of NSW National Parks and Reserves burnt by wildfire over the last 20 years

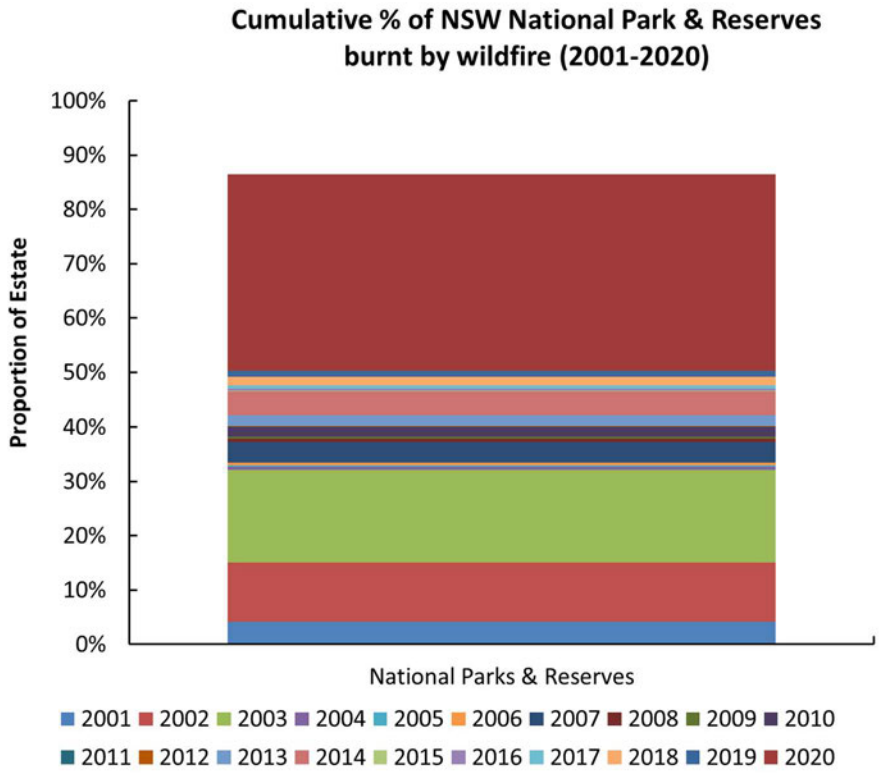

Figure 3 – Cumulative proportion of NSW National Parks and Reserves burnt by wildfire over the last 20 years.

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General Manager

26 February 2021