TIMBER NSW

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Timber NSW Major Concerns about the Draft Native Forestry Bill

Timber NSW places on record its strong objections to the tenor and philosophy underpinning this Bill. We maintain that this current draft Bill should be immediately withdrawn. Our comments will be made based on the draft Bill and the presentation given jointly by Michael Hood – Director Forestry NSW EPA and Aaron Walker – Acting Group Director Forest Policy NSW Department of Industry.

The mere fact that select stakeholders were notified of a joint presentation by the NSW EPA and Depart of Industry – Lands & Forestry with four working days' notice and then once the presentation had occurred being given 6 working days to make a submission to the draft Bill is an indication that the outcome was designed to be a fait accompli, not a proper consultation.

No other agricultural sector in NSW requires the same level of draconian regulation on private land to produce their product compared to what is being proposed by this Bill. Selective forest harvesting on private land, often with regeneration is no more a risk than harvesting crops, horticultural product, running cattle or sheep or other animal based enterprises and yet it is being treated vastly differently to other commodities.

It would appear that the driver for this draft Bill is an erroneous premise advanced in the Biodiversity Conservation Panel Report whereby they appeared to believe that there was no existing legislation controlling the activities of the landholder and contractor operating in private native forestry. This is completely false.

Licensing

The Bill clearly outlines a major change for native forestry: with the imposition of licenses and fees for both public and private land granted by the regulatory authority; an expanded suite of regulatory powers governing Private Native Forestry (PNF) and an expanded suite of offences and penalties. As a clear priority, these changes are designed to make prosecuting landowners and contractors easier for the NSW EPA and not to improve sustainable forest management outcomes**.**

The introduction of additional regulation on private property forestry contractors with training requirements to meet a "minimum standard", licences and their associated fees, will add significant cost to those small businesses and act as a deterrent to both forestry contractors and landholders who harvest timber sustainably from private property.

During the briefing, Michael Hood stated that the EPA sought to bring private native forest contractors to the same standards as those who work on the public estate. Whilst this may be an admirable goal, it is unrealistic to draw parallels between contractors who work under the financial security of a long-term contract for FCNSW with those whose future is only as secure as the next property they have in front of them. As many private property contractors currently do work, or have recently worked, on both the private and public estates, the level of professionalism, training, accreditation and financial management is on par with those contractors working on state forests.

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The proposed additional costs slated to be introduced through these reforms will potentially force many private native forest harvesting contractors out of the industry.

"A Fit and Proper Person" – Section 14 and Section 25

These provisions that require such information as bankruptcy history and character tests is normally used for directorships or areas such as aged care and child minding centres where vulnerable people are present. When does the NSW government insist on truck drivers being fit and proper persons or gardeners who might use chain saws be licensed and meet the fit and proper person definition? This is the most absurd provision.

Local Land Services (LLS)

The proposed Native Forestry framework legislation is clearly an attempt by the NSW EPA to control all native forestry in NSW and gradually harmonise the conditions across all tenures. Of even greater concern was the contribution from the Environmental Defenders Office at the presentation that Local Land Services (LLS) should ensure that landholders understand the high value to them of locking up their land for conservation and not PNF.

The industry supports the LLS as the appropriate vehicle for landowners to seek advice on all the native vegetation management options relevant to their land, including private native forestry, rather than what exists currently where a landowner must approach both LLS and the EPA. The LLS needs to become a "one-stop shop" for all native vegetation management administration and regulation in NSW and not the NSW EPA. The LLS must be adequately resourced so that they possess the necessary level of forestry expertise in the extension services.

Current Situation – NSW EPA PNF Unit

The current situation has created an information vacuum for landholders on PNF, as generally NSW EPA officers will not provide landholders with clear advice on PNF matters where it could, so as not to compromise any future prosecution. Such an approach hardly encourages landholders to be engaged in PNF. We are aware of examples of landholders and contractors requesting advice from NSW EPA Private Native Forestry Officers on the location of critical boundaries such as Endangered Ecological Communities, but rather than being given a definite answer, landholders are left to make the often ill-informed decision themselves and leave themselves open for potential prosecution by the EPA.

Similarly, EPA Private Native Forestry Officers often do not have a clear understanding of the legislation that they administer and lack the technical forestry skills to provide advice (and enforcement) on PNF. Furthermore, some officers attempt to influence landholder and contractor decisions on PNF in line with their own personal and often ill-informed views and philosophies, rather than the science or even the Forest Practices Code. A prime example of this is some EPA staff advising landholders who have applied for a PNF PVP not to engage a harvesting contractor that uses a mechanical harvester as "it makes too much of a mess", but rather to use a contractor who manually falls the timber with a chainsaw. This is despite the fact that the forest industry in NSW largely moved away from manual falling to mechanical harvesters well over ten years ago following a number of fatalities in just 6 months. Forestry Corporation of NSW is currently phasing out the last of their hand falling contracts and mandating the use of mechanical harvesters in all of their operations.

We acknowledge that particularly in selecting and obtaining trees suitable for poles, there is a role for manual falling but not for general harvesting.

Commentary on Part 4 – A legal dissection of dubious drafting

The Bill has an offence provision and this is spread over four clauses.

27 Causing harm to the environment

(1) A person who carries out native forestry operations in a manner that causes, or is likely to cause, harm to the environment is guilty of an offence.

There are two defined terms in this subclause – "native forestry operations" and "harm to the environment"

Clause 4 the definition clause provides:

"native forestry operations" this term is defined in clause 5.

Clause 5

. ***native forestry operations*** *means any of the following:*

. *(a) the cutting, storing and removal of native timber for the purpose of timber production on an ongoing basis,*

. *(b) the harvesting of forest products (other than timber) of economic value from native trees,*

. *(c) native forest management operations, namely, activities relating to the management of land for timber production on an ongoing basis (such as thinning and other silvicultural activities),*

. *(d) in the case of Crown forestry land only—burning operations carried out in connection with any of the operations referred to in paragraphs (a)–(c),*

. *(e) ancillary activities to enable or assist in any of the operations referred to in paragraphs (a)–(c), including the construction, provision, maintenance and use of roads, snig and extraction tracks, waterway crossings and associated structures.*

"Harm to the environment" is defined in section 4.

Section 4

harm to the environment *has the same meaning as in the Protection of the Environment Operations Act 1997 and includes any activity that constitutes an offence against:*

. *(a) section 2.1, 2.2, 2,3 or 2.4 of the Biodiversity Conservation Act 2016, or*

. *(b) section 60N of the Local Land Services Act 2013, or*

. *(c) section 220ZA, 220ZC or 220ZD of the Fisheries Management Act 1996.*

Clause adds to "harm to the environment" by introducing the word "material"

28 Meaning of material harm to the environment

(1) For the purposes of this Division: (a) harm to the environment is ***material*** *if:*

. *(i) it involves actual or potential harm to the health or safety of human beings or to ecosystems that is not* ***trivial****, or*

. *(ii) it results in actual or potential loss or property damage of an amount, or amounts in aggregate, exceeding $10,000 (or such other amount as is prescribed by the regulations), and*

(b) loss includes the reasonable costs and expenses that would be incurred in taking all reasonable and practicable measures to prevent, mitigate or make good harm to the environment.

(2) For the purposes of this Division, it does not matter that harm to the environment is caused only on the land where native forestry operations are carried out.

The word "trivial" is not defined in the draft Bill. Therefore it takes it ordinary meaning.

The Oxford Dictionary defines the word 'trivial' to mean - "Of small value or importance, concerned only with trivial things".

In the context of forestry what does this mean? This clause is in the context of 'notification".

The offence is in clause 33. It is a criminal office.

33 Offence of failing to notify

. *(1) A person who contravenes this Division is guilty of an offence. Maximum penalty:*

. *(a) in the case of a corporation—$2,000,000 and, in the case of a continuing offence, a further penalty of $240,000 for each day the offence continues, or*

. *(b) in the case of an individual—$500,000 and, in the case of a continuing offence, a further penalty of $120,000 for each day the offence continues.*

. *(2) An offence against this section is a special executive liability offence.*

Special Executive liability offence is defined in section 78.

78 Liability of directors etc for offences by corporation—special executive liability offences

. *(1) If a corporation commits a special executive liability offence, a person who is a director of the corporation or who is concerned in the management of the corporation is taken to commit the same offence, unless the person satisfies the court that:*

. *(a) the person was not in a position to influence the conduct of the corporation in relation to the commission of the offence, or*

(b) the person, if in such a position, used all due diligence to prevent the commission of the offence by the corporation.

(2) The maximum penalty for the offence is the maximum penalty for the special executive liability offence if committed by an individual.

*(3) For the purposes of this section, a **special executive liability offence** is any offence against this Act that is specified by this Act to be a special executive liability offence.*

(4) This section does not affect the liability of the corporation for the special executive liability offence, and applies whether or not the corporation is prosecuted for, or convicted of, the special executive liability offence.

Part 7 deals with the criminal and civil proceedings.

Both the offences in clause 27 and 28 set out above can be treated by the prosecuting authority as either criminal or civil proceedings.

How can a subjective term like trivial be made a criminal offence when the law requires both a clear intent and act under “mens rea” (the elements needed to prove a criminal offence). What is the act that constitutes a trivial act? This is questionable drafting.

Part 2 Native Forestry Rules

The Rules provision needs to be limited in scope or released for comment. The proposed penalties are significantly higher than in the past and considering that in Clause 10, a person who contravenes the Rule is guilty of an offence, **guilt means a criminal offence**.

We have attached a marked up copy of the draft Bill with comments. Timber NSW urges the NSW government to abandon this draft Bill as an example of complete over-reach and with the understanding that there is no stranded legislation as a result of withdrawal. Further cooperative discussion with all stakeholders should occur before another iteration appears.

Yours faithfully

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