

Introduction

The *Native Vegetation Act 2003* (the Act) is the primary piece of legislation which regulates clearing of native vegetation in NSW on rural land. The Act was brought in to replace the *Native Vegetation Conservation Act 1997* and was introduced at the same time Catchment Management Authorities (CMAs) and the Natural Resource Commission were established. The Act operates in tandem with the *Native Vegetation Regulation 2005* (the Regulation) which provides additional detail on the operation of certain elements of the Act.

The stated objects of the Act, in summary, are:

1. to provide for, encourage and promote the management of native vegetation in the social, economic and environmental interests of the State;
2. to prevent broadscale clearing unless it improves or maintains environmental outcomes;
3. to protect native vegetation of high conservation value;
4. to improve the condition of existing native vegetation; and
5. to encourage the revegetation of land.

Categories of native vegetation

The Act defines native vegetation as any trees (including saplings or shrubs), groundcover (any type of herbaceous vegetation including grasses) and wetland plants which are indigenous to NSW. It goes on to create the following categories of native vegetation.

Regrowth

Any native vegetation which has regrown since 1 January 1983 in the Western Division, or 1 January 1990 in the rest of the state.

Protected regrowth

Regrowth identified as protected in a property vegetation plan (PVP), environmental planning instrument, natural resource management plan, or interim protection order.

Remnant native vegetation

Any native vegetation other than regrowth.

What is considered 'broad scale clearing'?

The Act provides that 'broad scale' clearing includes cutting down, felling, thinning, logging, removing, killing, destroying, poisoning, ringbarking, uprooting or burning any native vegetation other than regrowth. Despite the misleading use of the term 'broad scale', the definition therefore applies to single plants such as paddock trees. It does not include pruning, lopping or slashing provided those activities do not kill the vegetation.

What can be cleared under the Act?

The Act permits clearing of any regrowth (as distinct from protected regrowth) and certain ground cover (in short, where less than 50% of the species are indigenous vegetation) without approval.

Clearing restrictions can also be subject to a number of exemptions detailed later in this briefing note.

For the remainder of remnant native vegetation and protected regrowth, clearing is only allowed following development consent granted by the relevant CMA, under an approved PVP, or under Part 4.1 of *Environmental Planning and Assessment Act 1979* (the EPA Act).

To grant development consent the CMA must have regard to the relevant Catchment Action Plan and consent cannot be given where the clearing will not improve or maintain environmental outcomes. Development consent generally only lasts for up to five years and authorises only specific clearing to be undertaken. Part 4.1, which is used to assess proposals for 'state significant development', overrides the provisions of the Act which require approval to clear native vegetation. Farmers would rarely meet the requirements for assessment under Part 4.1.

PVPs are a voluntary mechanism under the Act which allow for negotiated agreements between farmers and CMAs. These legally binding agreements can provide for clearing approval, protection and restoration incentives, clarification of regrowth dates, and offsets. PVPs can be put in place for periods of up to 15 years and also avoid the need for separate approvals under threatened species legislation.

Assessment by CMAs

Consent for broadscale clearing cannot be given by the CMAs unless it will improve or maintain environmental outcomes. The Regulations give further direction on what this means. Specifically, the scientific methodology adopted by the regulations, known as the *Environmental Outcomes Assessment Methodology*, is used. The methodology is essentially broken up into four assessments: salinity, biodiversity, soil and invasive native scrub. These are applied using computer software known as the PVP Developer. The software takes in local environmental variables and details of proposed clearing and offsets before weighing up the positive and negative benefits of different management actions. Following input of map and other data by CMA assessment officers, the software determines whether environmental outcomes will be improved or maintained and therefore whether the PVP or development consent should be approved.

If the PVP Developer determines that an action will not improve or maintain environmental outcomes, CMA officers are able to seek a second opinion from an accredited expert provided that:

1. a minor variation to the methodology would result in a positive determination; and,
2. strict adherence to the methodology in the particular case would be unreasonable or unnecessary.

The expert's discretion is subject to some further restrictions outside the scope of this briefing note.

Further exemptions

Routine agricultural management activities

Clearing (to the minimum extent necessary) for routine agricultural management activities is permitted under the Act. These activities are taken to include:

- construction, operation and maintenance of rural infrastructure;
- removal of noxious weeds;
- control of pest animals;
- collection of non-commercial firewood;
- Aboriginal activities;

- maintenance of public utilities;
- reducing risk of personal injury or damage to property;
- corridors for fire protection; and,
- garden maintenance.

Existing uses

The Act permits clearing of non-remnant vegetation, with exceptions for some species in the Western Division, for the continuation of cultivation, grazing, or rotational farming provided those uses were existing at the commencement of the Act (July 2005).

Other authorisation

Clearing for certain purposes is authorised by other specific legislation, including clearing for state significant development, emergency fire fighting, mining, surveying or road works.

Dwelling construction

Consent granted under the EPA Act for construction of a single dwelling also allows for the necessary clearing to construct the dwelling.

Previous consent

The repeal of the *Native Vegetation Conservation Act 1997* did not effect authorities to clear granted under that act. Holders of authorities which are still current are still able to clear.

Sustainable grazing

Section 24 of the Act provides that "*sustainable grazing that is not likely to result in the substantial long-term decline in the structure and composition of native vegetation is permitted*".

Threatened Species

Threatened species in NSW are protected under the *Threatened Species Conservation Act 1995* (the TSC Act). The main objectives of the TSC Act are to:

- conserve biological diversity and promote sustainable development;
- prevent the extinction of native plants and animals;
- protect habitat that is critical to the survival of endangered species;

- eliminate or manage threats to biodiversity;
- properly assess the impact of development on threatened species; and,
- encourage cooperative management in the conservation of threatened species.

When is a species considered ‘threatened’?

The TSC Act sets criteria for what species can be classified as ‘threatened’. For instance, a species can be listed where:

1. it is likely to become extinct in nature in NSW unless the factors threatening its survival cease to operate;
2. its numbers or habitats have been so drastically reduced that there is an immediate danger of extinction; or
3. it might already be extinct, but is not presumed extinct.

The process for listing

The listings for threatened species are maintained by the Scientific Committee established under the TSC Act. Listing can be initiated by anyone who provides information to the chair of the committee.

Biodiversity certification

Generally in NSW, applications for development consent which have the potential to affect threatened species or their habitat must be accompanied by a species impact statement. Under biodiversity Certification arrangements, an approval under the Native Vegetation Act is deemed to meet the requirements of the TSC Act such that species impact statements are not required.

Enforcement and compliance

The Office of Environment and Heritage (OEH) is in the process of moving from medium resolution satellite imagery using Landsat Satellites, to the 10 metre pixel resolution SPOT5 Satellite. This will allow OEH to determine changes in vegetation even in areas with less than 20% canopy cover. SPOT5 started taking statewide images in 2004-05 and has taken partial and full snapshots in the years since. The Government has also formed partnerships with a number of universities and interstate departments to develop improved

software to analyse the imagery to determine vegetation change.

A great deal of information is also received via the public. In 2009 the Department received 533 reports related to native vegetation clearing.

The Department has a number of legal mechanisms available where instances of illegal clearing have occurred, including prosecution, penalty notices, stop work orders, remedial directions, notices to provide information and warning and advisory letters. The usage of these throughout 2009 are outlined in the table below.

Penalties can range from \$1,100.00 - \$5,500.00 for penalty notices, through to \$1.1 million for full prosecution under the act. A case in 2009 saw a record \$400,000 fine imposed on a landholder found guilty of clearing 450 Ha in the Gwydir wetlands.

Clearing without authority also exposes the landholder to prosecution under the *National Parks and Wildlife Act* for damaging the habitat of a threatened species. The maximum penalty under that act is \$220,000.00 and 2 years prison.

Departmental Enforcement Actions

| | 2008 | 2009 |
|---------------------------------------|------|------|
| Legal directions | | |
| Stop work orders served | 2 | 0 |
| Remedial directions served | 4 | 26 |
| Notices to produce information served | 51 | 28 |
| Advisory and warning letters | | |
| Numbers sent | 103 | 192 |
| Prosecutions * | | |
| Commenced | 10 | 11 |
| Convictions | 4 | 8 |
| Penalty notices | | |
| Numbers issued | 8 | 22 |

For further information please contact NSW Farmers on 1300 794 000 or visit www.nswfarmers.org.au.