

The disconnect between state and federal law fuelling our national nature crisis

Submission of the Australian Conservation Foundation Investigations Unit to the advisory panel assisting the NSW Natural Resources Commission (May, 2025)

The Investigations Unit at the Australian Conservation Foundation ('ACF') thanks the NSW Natural Resources Commission for the opportunity to provide this submission to inform the advisory panel's review of options to enhance the protection and restoration of biodiversity and ecosystem function, and enhance value and support for landholders, in the context of clearing on private rural land in NSW.

Reviews done in the last 5 years have canvassed:

1. how the land management framework, notably the *Local Land Services Act 2013* (NSW) ('LLS Act') and the *Land Management (Native Vegetation) Code 2018* (NSW) ('the Code'), is fuelling a net-loss for nature with rampant land clearing of native vegetation, either unchecked as 'allowable activities' or legalised through a Code that lacks critical safeguards; and
2. how Local Land Services - an agency in the agriculture portfolio - lacks the authority and expertise to identify and prevent ecologically significant clearing on private rural land.

However, not enough consideration has been given to how the NSW land management framework, and its administration, facilitates the destruction of species and ecosystems protected under our national environment law, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act'). Many NSW landholders, for example, are under the incorrect assumption that obtaining a state approval for clearing on private rural land fully satisfies their legal obligations.

This submission aims to highlight how this jurisdictional disconnect is fuelling our national nature crisis, with sections that cover: (1) what this jurisdictional disconnect looks like in the context of the ACF Investigations Unit's reports of land-clearing that likely impacted Matters of National Environmental Significance ('MNES'), (2) how the failures of process, legislation and administration in the NSW land management framework facilitates the destruction of MNES, and (3) why it's critical to strengthen the NSW framework to account for the EPBC Act before clearing occurs, so nationally significant biodiversity values are preserved and NSW landholders are not exposed to potential federal compliance/ enforcement action.

The ACF Investigation Unit's reports of suspected unlawful land-clearing on private rural land

The ACF Investigations Unit frequently reports cases of suspected unlawful land-clearing on private rural land in NSW to either/both NSW Environment Line and the Commonwealth Environment Compliance team. These reports are made only where our research indicates that the clearing may have significantly impacted species or ecosystems protected under the EPBC Act and/or the *Biodiversity Conservation Act 2016* (NSW) ('BC Act').



Too often, we learn that the NSW land management framework has either exempted, excepted or certified the clearing despite evidence pointing to its potentially significant impact on MNES.

To elaborate, the ACF Investigations Unit has reported approximately 39 cases of land clearing on private rural land in NSW in the last 1-2 years. Of these 39 cases, we have been informed that approximately 12 of the properties have Land Management Certificates or Property Vegetation Plans ('PVPs'), or were consistent with the 'allowable activities' exceptions in Sch 5A of the LLS Act.¹ In each of these 12 cases, the NSW government was on notice that clearing was to take place that could potentially destroy MNES and expose landholders to federal enforcement/compliance action, but did not prevent it.

We have included a few case studies from this cohort of reported cases in this submission to illustrate how the NSW land management framework, and its administration, facilitates the destruction of MNES. We can brief the advisory panel with details of any of the reported cases upon request.

How the NSW land management framework, and its administration, facilitates the destruction of Matters of National Environmental Significance

1. CLEARING FOR 'ALLOWABLE ACTIVITIES'

Schedule 5A of the LLS Act facilitates the unchecked clearing of native vegetation that may contravene the federal EPBC Act. For example, Local Land Services incorrectly [advises landholders](#) that the 'allowable activities' in Sch 5A are '*very unlikely to trigger the need for referral under the EPBC Act 1999*'. This is not at all accurate; any number of the 'allowable activities', such as clearing fence lines through an EPBC-listed ecological community or the habitat of a nationally threatened species, could constitute a significant impact under the EPBC Act. See, for example, Case Study 1 below.

Case Study 1: how the 'allowable activities' clearing exception facilitates unchecked clearing that may significantly impact MNES

In mid-2024, a landholder cleared 26 hectares in two linear sections within the Southern NSW [Key Biodiversity Area](#), one of the places recognised globally as '*the most important places in the world for species and their habitats*'. There are 12 recorded observations of the EPBC-listed Malleefowl within a 10 km radius. Most of the cleared vegetation was also mapped consistent with the nationally endangered Mallee Bird Ecological Community, and nine key mallee bird species had also been previously recorded in the broader area in the last decade. Despite these indications that the clearing could have required a referral under the EPBC Act, a NSW compliance officer advised the ACF Investigations Unit in March 2025 that the clearing appears to have been consistent with the 'allowable activities' under the LLS Act and was

Several factors contribute to, and compound, this failure to account for MNES under the 'allowable activities'

¹ For the remaining cases, we have been informed that some concern properties that do not have Land Management Certificates, meaning the clearing may be non-compliant under state law. For the most part, though, we are unaware of the status of the NSW government's inquiries.

exception: (1) the qualification in Sch 5A that clearing must be to the '*minimum extent necessary*' lacks precision, (2) the absence of any notification or approval requirements for the 'allowable activities' exception means there is generally no government oversight or public transparency regarding when and how much landholders purportedly clear pursuant to Sch 5A, and what the cumulative biodiversity toll of this clearing is on MNES, and (3) areas that are of known, or likely, relevance to MNES, such as nationally endangered ecological communities and areas known to contain 'important populations' of nationally threatened species, are not directly/explicitly mapped or recognised as 'Category 2 - sensitive/vulnerable' on the NSW Native Vegetation Regulatory map ('NVR map'), which would restrict the application of the 'allowable activities' exception.

2. CLEARING UNDER THE CODE

Where landholders cannot rely on the 'allowable activities' exception and must notify or obtain a certification to clear under the Code, there is - with one weak exception² - no mandatory mechanism for triggering the proper consideration of the proposed clearing through the lens of the EPBC Act before it is legalised under the land management framework.

While some EPBC-listed species and ecological communities are also listed under the *Biodiversity Conservation Act 2016* (NSW), their inclusion is tied to the BC Act's offence provisions (where a knowledge element also applies) and not to the assessment/approval of clearing under the Code, even if the clearing could significantly impact MNES. The absence of any trigger for assessing the proposed clearing under the EPBC Act, combined with poor-quality advice that Local Land Services may provide about the need to refer clearing under the EPBC Act, also means landholders who are issued with a certificate but do not carry out the clearing until much later run the risk that a species or ecosystem is listed or uplisted under the EPBC Act in the interim, exposing them to potential compliance/enforcement action. Further, because the public registers do not allow any scrutiny of individual clearing notifications or certifications under the Code other than what 'set asides' have been approved, there is no transparency for which clearing applications may require a referral under the EPBC Act.

Case Study 2 below is an example of clearing can be approved under the Code despite the potential that it could significantly impact MNES and therefore have required an EPBC referral. There are several similar examples among the cases reported to the NSW government recently that the ACF Investigations Unit that can provide at the advisory panel's request.

² There is a weak requirement for Local Land Services to consider the EPBC Act before approving clearing if it '*forms the opinion*' that proposed clearing under the Equity part of the Code may require EPBC approval. However, the Code provides that Local Land Services need only be '*reasonably satisfied by the landholder*' that EPBC approval is not required or has been obtained (see clause 83).



Case Study 2: how clearing under the Code can significantly impact EPBC-listed and NSW-listed threatened species

Between 2021 and 2024, more than 600 hectares of what was likely remnant vegetation was cleared across two properties situated next to the Gondwana Rainforests of Australia World Heritage Area (see photo taken by drone, above). NSW compliance officers advised the ACF Investigations Unit that both properties have Land Management Certificates, at least one of which is for mosaic thinning for pasture expansion.

There are over 160 records of the Brush-tailed Rock Wallaby previously being sighted within a 10 km radius of the cleared areas. This species is listed as 'endangered' in NSW and 'vulnerable' under the EPBC Act. The national [conservation advice](#) lists the population of Brush-tailed Rock Wallabies in this area as an 'important population' for the survival of the species, which is relevant to the '[significant impact' criteria](#) for when an EPBC referral may be required. Vegetation mapping also indicates that all the vegetation that was cleared was suitable habitat for the Brush-tailed Rock Wallaby.

What makes these properties' Land Management Certificates even more baffling is the fact that the [draft national recovery plan](#) notes that this area is a 'priority site' for the Brush-tailed Rock Wallaby *under the NSW Saving Our Species Program*. Threatened species distribution maps and nearby records suggest that the cleared bush was also likely habitat for other species listed as endangered and vulnerable under both state and national law, including the Glossy Black Cockatoo, Greater Glider, Koala, Yellow-bellied Glider, and Stuttering Frog.

3. 'SET ASIDES'

The Code allows landholders to exchange 'set asides' of indeterminate ecological value for the ability to conduct broadscale clearing that could potentially destroy MNES. To elaborate, 'set aside' areas are used to supposedly 'offset' broadscale clearing under the Equity and Farm Plan parts of the Code. However, there are no meaningful safeguards that require:

1. that 'set asides' mirror the biodiversity values of those MNES lost in the clearing, or achieve specific and measurable conservation goals/outcomes;
2. that 'set asides' are protected 'in perpetuity' with legally robust mechanisms;³ or
3. that clearing proposed under the Equity and Farm Plan divisions of the Code must be properly considered through the lens of the EPBC Act.

Consequently, the land management framework facilitates the use of 'set asides' for Code-based clearing at a net-loss of nationally protected species and ecosystems; thus, fuelling the national nature crisis.

4. EPBC BIODIVERSITY OFFSETS

The lack of coordination between NSW and EPBC approval processes can mean NSW landholders seeking to clear their land may be unaware of opportunities that can support them to instead retain habitat to meet the demand of EPBC Act approval holders for offsets.

Case Study 3, below, is an example of how NSW landholders may be unaware that EPBC approval holders are often seeking land-based offsets to satisfy the conditions of their federal EPBC approvals, which can provide an alternate revenue source that avoids unnecessary habitat destruction.

³ The NSW Plan for Nature does not cover the importance of protective mechanisms in this context. See the [ACF's 'Set and Forget' report](#) for information about: the importance of legal protections of offset sites; the results of an empirical analysis of the legal protection of EPBC offset sites; and an assessment of the legal mechanisms available in NSW (in the appendix).

Case Study 3: how NSW landholders may be unaware of the demand for EPBC offsets before clearing rural land

Between 2022 and 2023, NSW landholders cleared over 1500 hectares of vegetation mapped as koala habitat on a rural property (see photo taken by drone, right). The landholders also cleared an 80-hectare track on their neighbour's land and bulldozed the vegetation and soil in the council-owned creek bed dividing the two properties.

A Biodiversity Offsets Strategy shows that Santos had earmarked the two properties where the clearing took place as potential offset sites for satisfying their state and EPBC biodiversity approval obligations for Phase 2 of their Narrabri Gas Project. It is unknown whether the landholders were aware of this potential revenue source before they proceeded to clear 1500 hectares of habitat, when the koala had just been nationally listed as endangered.



5. VEGETATION MAPPING AND THE CATEGORISATION OF LAND UNDER THE NSW NATIVE VEGETATION REGULATORY MAP

The accuracy of NSW's vegetation mapping, and by association, the way land is categorised (and therefore regulated) under the NVR map critically affects whether clearing that may significantly impact MNES can be identified and prevented.

However, there are currently only very limited provisions for reflecting MNES and areas highly relevant to MNES as 'Category 2 - vulnerable/sensitive' in the NVR map;⁴ none of the following must be explicitly/directly captured: Key Biodiversity Areas, areas known to contain 'important populations' of EPBC-listed species, habitat critical to the survival of EPBC-listed species, or areas mapped as containing vegetation with a known association with nationally protected ecological communities. In the absence of a mandatory mechanism for triggering the proper consideration of proposed clearing through the lens of the EPBC Act, the omission of these areas from the NVR map is another reason why MNES are exposed to destruction under the NSW land management framework.

Why it's critical to strengthen the NSW framework to account for national environment laws *before* clearing takes place

⁴ This includes Ramsar wetlands (see s 60I(k) of the LLS Act) and possibly (though indirectly) some nationally listed Critically Endangered Ecological Communities ('CEEC') that have a NSW-listed equivalent/corresponding CEEC.

There are several reasons why it's incumbent on the NSW government, in collaboration with the Commonwealth, to institute process and legislative changes to mend the disconnect between the NSW land management framework and the EPBC Act. For example:

1. There is a [bilateral agreement](#) between the NSW government and the Commonwealth that imposes an obligation on the NSW government to use its '*best endeavours*' to ensure referrals are made under the EPBC Act. The current regulatory framework does not satisfy this obligation, and [the NSW Plan for Nature](#) - the NSW government's response to the reviews of the LLS Act and BC Act - does not contain a single reference to the EPBC Act. The Plan for Nature refers only to a general agreement between environment ministers to improve information sharing across jurisdictions, and the proposed amendments for strengthening protections in the Code do not include robust measures for identifying and referring clearing that is likely to significantly impact MNES. The proposed amendment, for example, of '*ensuring greater security and accountability for higher risk Code approvals by requiring LLS senior executive sign-off*' is not on its own a strong enough mechanism for identifying potential impacts to MNES in light of the examples raised in this submission.
2. On a practical level, the NSW government is often uniquely placed to identify and prevent clearing that may fall foul of the EPBC Act at the critical touchpoint when landholders interface with the land management framework. As discussed above, the classifications a landholder sees on the NSW NVR map greatly affects what steps - if any - the landholder will take to try and meet their obligations before clearing. Moreover, when a landholder liaises with their Local Land Services to notify/seek certification for Code-based clearing that could significantly impact MNES, the NSW government is the only authority to hold that information and must therefore ensure a proper assessment through the lens of the EPBC Act is triggered.

Recommendations

It is imperative that the NSW government, in collaboration with the Commonwealth, institutes process and legislative changes to trigger the proper consideration of the proposed clearing through the lens of the EPBC Act at this crucial touchpoint when a landholder interfaces with the NSW land management framework. This, in turn, will mean that the NSW government is (1) complying with the obligation in the bilateral agreement to use its '*best endeavours*' to ensure referrals are made under the EPBC Act, and (2) supporting landholders to comply with their federal obligations. The ACF Investigations Unit offers the following non-exhaustive recommendations for what some of those process and legislative changes should look like.

- '**Allowable activities**': Local Land Services must stop advising landholders that 'allowable activities' are '*very unlikely*' to require an EPBC referral, unless and until 'allowable activities' are genuinely limited to low-impact clearing. The '*minimum extent necessary*' provision must be strengthened and clarified, and there must be mandatory measures for oversight and public transparency regarding when landholders purportedly clear pursuant to the 'allowable activities' exception.
- **Clearing under the Code**: there must be a mandatory mechanism that triggers the proper consideration of all proposed clearing through the lens of the EPBC Act before it can be approved under the land management framework. This could take the form, for example, of a mandatory notification to the Commonwealth DCCEEW with a suitable buffer of time before clearing can

commence. Details of individual clearing notifications and certifications under the Code must also be made available for scrutiny in public registers.

- **'Set asides' and EPBC biodiversity offsets:** as the NSW government embarks on the reforms outlined in the NSW Plan for Nature relating to biodiversity offsets and increasing areas of private land conservation, consideration should be given to addressing the coordination between NSW and EPBC approvals for landholders seeking approval to clear their land to be supported to instead retain habitat to meet the demand for offsets by EPBC Act approval holders. At a minimum, there must be meaningful safeguards that require that any 'set asides': mirror the biodiversity values of those MNES lost in the clearing; achieve specific and measurable conservation goals/outcomes; and are protected 'in perpetuity' with robust legal mechanisms.
- **The NVR map:** the NVR map should capture areas relevant to MNES as 'Category 2 – sensitive/vulnerable land.' However, it is not feasible to spatially map *all* areas relevant to MNES in this way (for example, vegetation may constitute a nationally protected ecological community only if it is of a certain quality). As such, it is again critical that there is a mandatory mechanism that triggers the proper consideration of all proposed clearing through the lens of the EPBC Act.

[Other recommendations relating to issues not canvassed in this submission](#)

This submission has largely focused on the way Sch 5A and the Code set a low bar for clearing that can significantly impact MNES. However, the LLS Act exempts clearing done in accordance with PVPs from even the weak requirements of Sch 5A and the Code, despite the ACF Investigations Unit finding numerous examples where PVPs have facilitated the destruction of MNES with clearing that arguably contravenes the EPBC Act. The NSW government should introduce sunset provisions for PVPs, in conjunction with safeguards to prevent panic clearing before those sunset provisions take effect.

The focus of this submission has also been on clearing that is legal under NSW state law. If it is within the terms of reference for this review to consider clearing that is unlawful under NSW state law, we are anecdotally aware that the Queensland government utilises early detection technology in conjunction with SLATs data to identify illegal clearing, which may be of benefit to the NSW government if not already in use.