



Review of the *Native Vegetation Act 2003*

Submission of the Urban
Development Institute of
Australia NSW

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Introduction

The Urban Development Institute of Australia NSW (UDIA NSW) welcomes the Department of Environment, Climate Change and Water's (DECCW) review into the *Native Vegetation Act 2003* (NV Act). The administration, implementation and operation of the NV Act have been a major concern for the development industry in NSW since its introduction. In this context, UDIA NSW is pleased to provide comment in response to the review's discussion paper and has consulted with its Sustainability Committee and Regional Chapters in preparing this submission.

The urban development industry is a major contributor to the NSW economy and its investment decisions are guided by key strategic documents including the State Plan, the Sydney Metropolitan Strategy and various Regional Strategies. The residential sector of the industry alone contributes more than \$15 billion worth of activity to the NSW economy annually. UDIA NSW believes in genuine sustainability including the preservation of environmental outcomes in balance with social equity and economic stability.

Objectives of the NV Act

The objects of the NV Act are defined in section 3 of the Act. In principle, UDIA NSW supports the objectives defined in the Act as a means to reduce broadscale clearing on agricultural land.

The first objective of the NV Act, and the objective of most relevance to this submission, is 'to provide for, encourage and promote the management of native vegetation on a regional basis in the social, economic and environmental interests of the State'. This objective remains valid although in practice the social and economic interests of the State are compromised by the application of the NV Act itself in the urban development context, particularly in regional areas and as evident in the case studies provided below.

The NV Act compromises the social and economic interests of the State through unintended constraints on the effective operation of the *Environmental Planning and Assessment Act 1979* (EPA Act). It is apparent that significant issues with the operation of the NV Act are arising through the misinterpretation and application of that Act. Such issues include inappropriate development consent conditions, dual consent processes associated with development proposals and the misapplication of the NV Act and associated Property Vegetation Plan (PVP) to the rezoning process.

UDIA NSW believes that a clearer framework for native vegetation management is required for urban growth areas to remove regulatory duplication. Existing legislative safeguards and processes in place under the EPA Act and the *Threatened Species Conservation Act 1995* (TSC Act) sufficiently protect native vegetation from the effects of urban development.

Effectiveness of the NV Act and its Provisions

Currently land excluded under Schedule 1 Section 14 of the NV Act includes, 'Land within a zone designated 'residential' (but not 'rural-residential'), 'village', 'township', 'industrial' or 'business' under an environmental planning instrument or, having regard to the purpose of the zone, having the substantial character of a zone so designated, not being land to which a property vegetation plan applies.'

The NV Act was introduced with the intent to prevent broadscale clearing of agricultural land and not constrain urban growth. UDIA NSW contends that the NV Act is being unreasonably utilised to slow or prevent urban development on land not specifically excluded under Schedule 1 of the Act or planning proposals not specifically excluded under section 25 of the NV Act.

UDIA NSW submits that certain classes of development on land not excluded by Schedule 1 of the NV Act, and granted development consent under the EPA Act, are prevented from being realised as a result of the dual consent regulatory environment. In this regard, UDIA NSW contends that rural-

residential subdivisions, Seniors Living developments on land adjoining urban land, and manufactured home estates have been precluded because of the legislation. Similarly, planning proposals under Part 3 of the EPA Act are incorrectly being subjected to the provisions of the NV Act.

UDIA NSW contends that there are numerous legislative requirements and regulatory policies adhered to, in relation to native vegetation, in order to secure a consent under the EPA Act. Further, the TSC Act applies equally to all lands (whether zoned rural or otherwise) and processes for biobanking and compensatory offsets for the clearing of native vegetation have also been established.

In conjunction with a comprehensive policy framework already in place for the protection of native vegetation, in the urban development context, such as regional conservation plans, vegetation management plans and local government tree preservation policies. The application of the NV Act becomes superfluous in a regulatory and policy environment that development proposals are already subjected.

Part 3 of the EPA Act and the NV Act

UDIA NSW acknowledges that one of the main objectives of the NV Act is to prevent broadscale clearing of native vegetation, defined as the removal of any remnant vegetation or protected re-growth. Part 3 rezonings do not entail the removal of either. Once land is rezoned to an urban use, it becomes excluded from the provisions of the NV Act – this reflects the Government’s intent for the legislation to apply to current and future uses that will impact native vegetation conservation outcomes on a broad scale.

Case Study 1

A rezoning application lodged with Cessnock City Council sought to change the zoning of land zoned rural-residential and rural to residential. Council referred the application to the CMA under the provisions of Section 62 of the EPA Act. The CMA response to Cessnock Council in regards to the rezoning is outlined below.

The CMA, ‘will object to any rezoning if it is likely to result in the clearing of native vegetation and where the ‘maintain or improve’ principle has not been demonstrated. The NV Act allows for offsets to mitigate against the impact of any clearing, these offsets can be used to demonstrate the ‘maintain or improve’ principle.’ The letter of objection went on to explain, “Clearing of native vegetation is regulated by the NV Act 2003 and is managed by the CMA. Under this Act clearing can only be approved where it improves or maintains environmental outcomes.”

UDIA NSW contends that a lack of clarity exists amongst Councils and CMAs over the need for CMA approval for rezoning proposals. Land subject to rezoning applications is consequently and erroneously impacted. Although the NV Act does not apply to Part 3 of the EPA Act, Part 3 of the EPA Act is not specifically included under the section 25 legislative exclusions of the NV Act. UDIA NSW contends that this contributes to uncertainty amongst CMAs and Councils on the relevance of the NV Act to Part 3 of the EPA Act.

In practice there have been instances where CMAs, misapplying provisions of the NV Act, have advised Councils that a rezoning could only proceed in accordance with a property vegetation plan (PVP). This is despite the fact that a CMA is not empowered under the NV Act to require a PVP for a rezoning as the Act does not apply, and was not intended to apply, to Part 3 of the EPA Act. This is demonstrated in Case Study 1 above.

Effectively, CMAs are using the rezoning process to object to future development applications that subsequent to a rezoning taking place would otherwise be on land excluded under Schedule 1 of the NV Act from the operation of that Act. This is outside the framework and objectives of the NV Act, counter to the intent of the Act and renders the Act ineffective for its purpose.

RECOMMENDATION

UDIA NSW recommends the amendment of the NV Act to explicitly specify the exclusion of Part 3 of the EPA Act from the NV Act under section 25 of that Act.

Part 4 of the EPA Act and Dual Consents

Numerous examples have emerged of the application of the NV Act and resultant inclusion of provisions of the NV Act into conditions of consent for development applications (DAs) particularly on the rural-urban interface. Subdivisions granted consent by a local Council can be refused consent by a CMA in certain cases where access infrastructure is required for an approved site.

Case Study 2

A rural-residential subdivision approved by Council on the Mid North Coast was subject to the following condition of consent:

'This consent will become null and void if an approval/permit is required under the Native Vegetation Act and is subsequently not granted by the CMA. Therefore, prior to the commencement of any clearing, the CMA should be contacted to ascertain whether or not a separate approval/permit is required under the Native Vegetation Act with any evidence of approval or approval not being required from the CMA for records purposes.'

CMA approval for necessary vegetation clearing to construct an access road to the subdivision was not granted because the landowners could not provide sufficient offset under the requirements of the NV Act. As a result the development proposal approved by the Council under the EPA Act was unable to proceed.

Case Study 2 illustrates the dual consent process. In this case the consent granted by Council became null without the necessary CMA consent to clear for the construction of an access road. The requirement for a dual consent itself, and the inability to meet the requirements of the CMA, provides no level of investment certainty to the proponent and in that regard the NV Act does not meet its first objective.

Approvals for certain classes of development proposals, such as subdivisions under the EPA Act that require minimal clearing of native vegetation, should not require or be subject to approvals or further conditions of consent under the NV Act. UDIA NSW contends that this would be consistent with section 6 of the *Native Vegetation Regulation 2005* (NV Regulation) exempting single dwellings from a dual consent under the NV Act.

UDIA NSW contends that in the context of smaller lot rural residential projects the provisions of the NV Act are largely unsuited to securing a worthwhile conservation outcome. In this regard, the dual consent provisions create unnecessary delays in the assessment process for a negligible conservation outcome.

UDIA NSW recommends that the development of a rural residential development of lots not greater than two hectares be excluded from the provisions of the NV Act. UDIA NSW understands that this class of development could be added to the exclusions to the Act under Schedule 1.

RECOMMENDATION 2

UDIA NSW recommends the amendment of section 6 of the NV Regulations to exclude the subdivision of individual rural residential parcels of land that are no greater than 2 hectares from the from the operation of the NV Act.

Conclusion

UDIA NSW contends that genuine sustainability is required to meet the objectives of the NSW Government's Metropolitan and Regional Strategies. Sustainability requires maintenance of social, economic and environmental interests.

UDIA NSW maintains that the administration of the NV Act in the urban development process is essentially 'double dipping' on matters of native vegetation protection. In order to improve the operation of the NV Act and better facilitate the environmental planning and assessment process, there is a need to amend parts of the NV Act. In this context, UDIA NSW offers the following recommendations to support the NV Act in meeting its original intent and purpose without compromising its objectives.

Recommendations

1. *UDIA NSW recommends the amendment of the NV Act to explicitly specify the exclusion of Part 3 of the EPA Act from the NV Act under section 25 of that Act.*
2. *UDIA NSW recommends the amendment of section 6 of the NV Regulations to exclude the subdivision of individual rural residential parcels of land that are no greater than 2 hectares from the from the operation of the NV Act.*