

Submission on Independent Biodiversity Legislation Review Panel Issues paper (August 2014)

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5 September 2014

Council welcomes the opportunity to provide comment on the abovementioned issues paper.

The following comments have been prepared by Council's Natural Resource Management Unit and have not been endorsed by Council due to time constraints.

This submission endorses the "top 20 key issues for best practice biodiversity legislation" identified by the NSW Environmental Defenders Office (reproduced at the end of this submission).

In addition to the issues highlighted by the EDO a number of further points are made below.

Theme 1: Objects and principles for biodiversity conservation

- Biodiversity conservation should be a fundamental and overriding obligation for all stakeholders involved in land management.
- Principles of Ecologically Sustainable Development (ESD) should continue to underpin all state legislation affecting biodiversity.
- Legislation should avoid the concept of "achieving a balance" between biodiversity conservation and economic interests. This terminology is unhelpful and sets up a false dichotomy that fails to appreciate that the economy is the sum total of things we value including biodiversity.
- Similarly, legislation should avoid the term "evidence-based". Legislation should be based on science. "Evidence" is only part of the story - the other component is uncertainty or lack of evidence. A scientific approach to decision making needs to consider both the available evidence and uncertainty. This is consistent with precautionary principle enshrined in the definition of ESD.
- The objects of the *Native Vegetation Act 2003*, the *Threatened Species Act 1995*, the *Nature Conservation Trust Act 2010* and the *National Parks and Wildlife Act 1974* are strongly supported.
- The continuing decline in biodiversity indicates that in many cases the objects of these Acts are not being met. This appears to be due to a number of

reasons including insufficient triggers, lack of positive incentives for better land management, the cumulative effect of many small impacts, tolerance of existing uses that adversely impact biodiversity, liberal legislative exemptions and poor compliance.

- While the objects of the Acts considered are strongly supported, there may be some opportunity to standardise some of the terminology while maintaining their intent.
- However, care should be taken to ensure that a one-size-fits-all approach to biodiversity conservation is not created. This has been particularly problematic with the introduction of the Standard Instrument LEP and the 10/50 Code. Biodiversity legislation should set up the overarching biodiversity principles and state priorities but avoid the fine detail. For example, mandating all offsetting via BioBanking is unlikely to be successful as individual councils are unlikely to accept losses in their LGA that are offset elsewhere.

Theme 2: Conservation action

- The current level of government support for landholder incentives to better manage biodiversity is considered inadequate to meet the objects of the legislation and reverse biodiversity decline.
- However, the current decentralised incentive framework where incentives are provided from a range of sources (e.g. by state, federal and local government and community based organisations) with varying priorities is strongly supported. The current system is highly flexible and responsive.
- Centralised regulation of incentives is likely to lead to poorer biodiversity outcomes.
- Although there are necessary legislative measures in place to protect biodiversity, (e.g. NV Act) landholders are under very little obligation to manage their land for biodiversity. Refraining from clearing land that is protected under law is not a form of stewardship. The concept of environmental stewardship implies active management of biodiversity and other values. The system should support landholders to better manage biodiversity values through the provision of incentives although it should not be assumed that they are capable of doing it themselves. The management of biodiversity values typically requires the input of ecologists and bushland restoration specialists. This means that stewardship payments as a source of landholder income are not likely to lead to improved biodiversity outcomes.
- Binding agreements can be a significant disincentive to many landholders. Tweed Shire Council uses a risk-based approach where the level of agreement is very basic for small investments and is increased for greater investments.
- Care should also be taken with linking management to formal levels of protection. While there is no argument that management incentives should be

available for areas under formal agreements, the converse is not necessarily the case. In practice, there are many cases deserving of management incentives that are not formally protected by covenants.

- A substantial focus of the current legislation is increasing the levels of protection via covenants and similar agreements. While this is supported, there needs to be improved support for management. Indeed most native vegetation is already protected through clearing controls under the NV Act, environmental protection zoning and the like. The need for better management is particularly acute in fragmented habitats where weeds and feral animals are a major issue.
- Government priorities for investment in biodiversity conservation should be based on adopted biodiversity management plans, species recovery plans and the like. Government should avoid setting individual priorities outside of this process.
- Monitoring and evaluation is important but can consume a large proportion of scarce funds without showing measurable biodiversity outcomes. Grant applicants should only be required to establish that the agreed actions were successfully carried out and report on these (action, timing, areal extent etc). The grant application should not be approved unless the grant authority is convinced that the actions proposed are appropriate and reflect current best practice.
- Funding bodies should support independent research projects to establish the link between on ground actions and biodiversity outcomes acknowledging that improvements in biodiversity may be long term and incremental.

Theme 3: Conservation in land use planning

- Environmental zoning is the primary mechanism to ensure that biodiversity values are protected early in the planning process. Unfortunately, many councils have not comprehensively updated their environmental zonings since they produced their original LEPs two or more decades ago. Consequently, many LEPs are out of date and councils have been reluctant to update their LEPs due to a lack of clear guidance on where environmental zones should be located. Clear and unambiguous legislative guidelines are required for Councils to identify areas for environmental protection zoning.

Theme 4: Conservation in development approval processes

- The land clearing laws applying to farmers and agricultural interests should be extended to urban development including the assessment methodologies and the need to protect and manage remaining habitat in perpetuity.
- The need to consider cumulative impacts should be a key consideration.

- Development consents should not be able to be undermined by land clearing exemptions.
- Offsetting should be reserved for very minor impacts and should only be carried out on site, with strict 'like for like' provisions in relation to vegetation communities. Clear thresholds that identify values that cannot be offset need to be established (e.g. EECs; Core Koala Habitat; hollow bearing trees etc.)
- Offsetting should not result in a net loss of habitat. That is, improvements in management cannot compensate for habitat loss (clearing).
- Offsets must:
 - contribute directly to the impacted values
 - meet, as a minimum, the quality of the habitat at the impact site (i.e. the offset management plan must cover the timeframe until the offset site is the same quality as the impact site before impact)
 - secure existing unprotected areas
 - be new or additional to what is already required, determined by law or planning regulations or agreed to under other schemes or programs
 - have transparent governance arrangements including being able to be readily measured, monitored, audited and enforced

Theme 5: Wildlife management

- No comment

Theme 6: Information provisions

- OEH should collect and collate data and mapping on biodiversity values, threats, protection and management on both public and private land where supported through public funding. This data should be publically available (subject to some limitations) through a portal such as the Atlas of Living Australia.
- The role of the Independent Scientific Committee under the TSC Act should be retained and listing must continue to be based on the professional advice of the Scientific Committee.

EDO top 20 key issues for best practice biodiversity legislation

(Source: http://www.edonsw.org.au/biodiversity_legislation_review accessed 5 Sept 2014)

Robust, principled and enforceable legislation

1. **Strong, enforceable legislation** designed to protect biodiversity, including native vegetation and threatened species, is crucial in ensuring adequate environmental protections in NSW. Core provisions must be clear in legislation, not unenforceable policy documents.
2. Discussion about 'achieving balance' and triple bottom line outcomes must be framed by the concept of **ecologically sustainable development (ESD)**.**
3. Legislation must clearly state that NSW has an obligation to **maintain or improve environmental outcomes**, including facilitating the recovery of threatened species. Recent proposals would significantly weaken protections for native vegetation. EDO NSW supports a continued ban on broadscale clearing unless it maintains or improves environmental values in the *Native Vegetation Act 2003*. The same standard should apply to vegetation clearing across all land tenures and uses, both urban and rural.
4. The current **objectives** of the *Threatened Species Conservation Act* must remain paramount and be **operationalised** by decision-makers. This includes the aspirational goal of protecting all species and populations in NSW. Legislative objectives should specify the need to recover species and populations, not just maintain them.
5. Any activity-based **exemptions must be strictly limited**, for example Routine Agriculture Management Activities (RAMAs) should be highly restricted and any clearing undertaken through RAMAs should be recorded.
6. Biodiversity laws must have **open standing provisions** for 3rd parties to enforce breaches.
7. Financial incentives to encourage **private land conservation** need to be legislated, for example, Nature Conservation Trust agreements should to have equal access to tax relief, as for Voluntary Conservation Agreements.

Science-based and evidence driven

8. The largest developments with the most significant potential impacts must be subject to **rigorous and comprehensive assessment**, and not exempted from environmental or heritage assessment requirements. Safeguards must ensure that development in sensitive environmental and heritage areas is not exempt from proper assessment
9. Biodiversity decision making processes must be robust, transparent and science-driven, and be underpinned by **objective scientific assessment methodologies**.
10. Any framework for **prioritisation between listed species** should be based on scientific considerations and also involve public ethical debate over what we try to protect and why. Any such Priority Action Statements must be a mandatory consideration in strategic planning and development assessment.
11. Listing of categories of threatened species and communities must be based on **scientific** reasons. Scientific expert committees must continue to be independent.
12. Biodiversity **offsets** must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts. Any use of offsets must be based on a national standard that is legally enforceable and uses transparent and sound ecological studies and principles, such as 'like for like' and the avoidance of the use of indirect offsets. Environmental 'red flag' areas must be maintained, recognising that some values cannot be offset. Offsets must be maintained in **perpetuity**, not subject to perpetual trade-offs.
13. Biodiversity laws and related decisions must explicitly **consider and plan for climate change** impacts, using adaptation plans, buffers and adaptive management to enhance ecosystem resilience.

Strategic and integrated across government

14. Biodiversity protection must be **integrated** across all decision making processes. Biodiversity considerations must be supported and integrated in other regulatory frameworks such as fisheries management, native vegetation protection, public and private forestry, noxious weed control, bushfire management and planning laws.
15. Comprehensive **strategic environmental assessments** must be resourced and prioritised to maximise the clear advantages of 'landscape scale' biodiversity

conservation. Assessment at a broad scale can better take into account cumulative impacts of a number of developments, better plan for strategic biodiversity corridors and enhance connectivity.

16. Protections developed under the **Strategic Regional Land Use Policy** need to be strengthened and expanded to include high conservation value land. The 'Gateway' provisions should be amended to include specific environment and heritage protection safeguards relating to cumulative impact assessment; private conservation and biodiversity offset lands; upfront completion of biodiversity mapping; and proper protection of and consultation on Aboriginal culture, heritage, intellectual property and privacy rights.
17. **Protected areas** (both terrestrial and marine) must be managed for conservation and only allow activities that are consistent with conservation goals. For example, activities must not be exempted in marine sanctuary zones; conservation areas should not be logged; and recreational shooting should not be permitted within the national park estate.

Good governance, resourcing and accountability

18. **Ecological consultants** should be professionally accredited.
19. NSW needs **strong, well-resourced, environment-focussed agencies** that are responsible for ensuring that biodiversity and conservation laws are implemented as intended. EDO NSW has consistently argued that it is incompatible to rely on resource-use legislation to achieve conservation outcomes.
20. Systematic **monitoring, evaluating and reporting** will aid long-term effectiveness and adaptive biodiversity management. NSW agencies should lead and collaborate on a system of **environmental accounts**, and reinvigorate **State of the Environment** reporting.