Independent Biodiversity Legislation Review Panel

Issues paper
August 2014

Management, conservation and regulation of biodiversity in New South Wales – have your say

The Independent Biodiversity Legislation Review Panel (the panel) is examining native vegetation, threatened species and related biodiversity laws in New South Wales.

The panel encourages all those interested in this subject to make a written submission addressing the issues identified in this paper and any other relevant issues for consideration.

Key review dates

Release of terms of reference	18 June 2014
Release of issues paper	6 August 2014
Submissions due	5 September 2014
Interim report to Minister	18 October 2014
Final report to Minister	18 December 2014

Written submissions should be made by **Friday 5 September 2014** by email to biodiversity.legislationreview@environment.nsw.gov.au, or to Biodiversity Legislation Review, PO Box A290, Sydney South NSW 1232.

Submissions will be acknowledged by letter or email. Submissions will be treated as public documents and published on the review website. If you require your submission, or part of it, to be treated as confidential please make this clear at the time of making your submission.

The panel may decide not to accept a submission or not to publish all or part of it if, for example, the submission is not considered relevant, does not address the legislation or policy issues, contains offensive or defamatory language, or is illegible.

For more information, contact the review by email at: biodiversity.legislationreview@environment.nsw.gov.au.

Website: www.environment.nsw.gov.au/biodiversitylegislation/review.htm

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Introduction

The Independent Biodiversity Legislation Review Panel is conducting a review into the laws, policies and programs that manage, conserve and regulate native vegetation, threatened species, and wildlife in NSW.

The term of reference set out the scope of the review and the NSW Government's objective to establish a simpler, streamlined and more effective legislation that will:

- facilitate the conservation of biological diversity
- support sustainable development
- reduce red tape.

This review provides an opportunity to address inadequacies in the current framework and develop a modern, integrated biodiversity law. The review will test whether the current institutional, policy and legislative framework is delivering efficient outcomes for government, business and the community.

The scope of the review covers the *Native Vegetation Act 2003*, the *Threatened Species Conservation Act 1995* and the *Nature Conservation Trust Act 2001*, plus parts of the *National Parks and Wildlife Act 1974* (see Appendix 1).

The review will consider these laws, related subordinate legislation and relevant policies and programs. The review will also look at how this system interacts with the planning system. The management of national parks or other public lands will not be assessed in this review.

This issues paper considers a range of issues that arise across the following six major themes of the legislation:

- objects and principles for biodiversity conservation
- conservation action
- conservation in land use planning
- conservation in development approval processes
- wildlife management
- information provisions.

Context

Biodiversity is vital in supporting human life on Earth. It helps us to access and/or use clean water and air, healthy soils, food and medicinal resources, to resist disease and adaptively respond to threats such as climate change. Biodiversity provides important economic benefits and is also a defining feature of our heritage. Nature's plants and animals are an intrinsic part of our land and culture. Key industries, including agriculture, fisheries, biotechnology and tourism, depend on it.

There is a strong international policy focus to ensure biodiversity is valued, conserved, restored and wisely used. This includes ensuring that ecosystem services are maintained and productive landscapes sustained so that the resulting benefits, essential for all people, are delivered.

Australia is a signatory to the International Convention on Biodiversity, the high-level goals of which aim to:

- *address the underlying causes of biodiversity loss by mainstreaming biodiversity across government and society*

- *reduce the direct pressures on biodiversity and promote sustainable use*

- *improve the status of biodiversity by safeguarding ecosystems, species and genetic diversity*

- *enhance the benefits to all from biodiversity and ecosystem services*

- *enhance implementation through participatory planning, knowledge management and capacity building.*

This focus has been incorporated into national, state and territory laws. However, like other states and territories, the biodiversity of NSW is in decline and there is considerable debate about the best ways to slow, then reverse, this decline.

The New South Wales (NSW) Government's role in biodiversity conservation has, over the past 40 years, evolved to reflect changing community concerns and values. The legislative and policy framework in NSW has tried numerous mechanisms to address biodiversity decline and to maintain healthy landscapes. These include:

- direct government action (for example, establishment of a reserve system and regulatory controls)

- threatened species listings with associated recovery and threat abatement planning

- native vegetation planning at a state (SEPP 46), regional (regional vegetation management plans) and property scale (property vegetation plans)

- covenants, either altruistic or with financial support

- strategic land-use planning

- education and persuasion

- market-based mechanisms

- biodiversity offsetting
- self-assessable codes.

Overall, outcomes are mixed. In the absence of comprehensive long-term evaluation and monitoring, it is difficult to assess which mechanisms have been effective where, by how much, and why.

Guide to making a submission

A submission may cover all the points in the terms of reference and this issues paper or only some of them, depending on your interests and experiences. Views are also sought on the following overarching issues:

- what elements of the current framework are working and not working?
- where there is duplication of legislative and regulatory requirements?
- where there are gaps (for example, aspects of biodiversity that are not being dealt with including ecosystem services, landscape processes, threats)?
- how legislation should deal with trade-offs?

Comments supported by examples on the effectiveness or otherwise of operational matters of the current framework are also welcome.

The panel is appealing to all interested parties across NSW to contribute their assessment and experiences of how the current suite of legislation and government actions on biodiversity conservation could be improved and made more effective and efficient. The panel is particularly interested in facts and evidence to support comments made in submissions.

Theme 1: Objects and principles for biodiversity conservation

This theme is concerned with the objects of the current laws:

- Section 3 of the *Native Vegetation Act 2003*
- Section 3 of the *Threatened Species Conservation Act 1995*
- Section 10 of the *Nature Conservation Trust Act 2001*
- relevant objects of section 2A of the *National Parks and Wildlife Act 1974*.

Appendix 2 provides a summary of the legislative objectives that are the subject of this review.

Several factors might influence appropriate objectives for a modernised and integrated biodiversity law in New South Wales (NSW), including:

- national and international obligations, laws and agreements
- scientific evidence about the current state of biodiversity in NSW
- the role of biodiversity law, having regard to the roles of closely related policy and legislative frameworks such as national parks and planning laws
- the nature and extent of biodiversity conservation that occurs in NSW beyond the scope of government-run programs.

Submissions are sought on these issues. Areas of particular interest to the panel are:

1. *Should there be an aspirational goal for biodiversity conservation?*

2. *Given available evidence about the value and state of the environment, are the existing legislative objects still valid? Do the current objects align with international and national frameworks, agreements, laws, obligations? If not, what objects are required?*

3. *To what extent are the current objects being met?*

4. *Could the objects of the current laws be simplified and integrated? If so, how?*

Theme 2: Conservation action

This theme is about requirements in the legislation to take positive action to recover threatened species or address threats, and provisions to support conservation on private (or non-park) land, including:

- Parts 4, 5, 5A, 7 and 7A of the *Threatened Species Conservation Act 1995*
- Section 28(d) of the *Native Vegetation Act 2003*
- the *Nature Conservation Trust Act 2001*
- Divisions 11 and 12 of Part 4 of the *National Parks and Wildlife Act 1974*.

One of the ways governments facilitate the conservation of biodiversity on private land is through the use of conservation agreements. All states and territories have systems that allow landowners to negotiate binding or non-binding agreements over their land for conservation purposes.

Financial support varies and in many cases private engagement in conservation action is reliant on voluntary and altruistic interests. In recent years, governments have focused on developing new opportunities for market-based incentive mechanisms (such as biobanking). In New South Wales (NSW), mechanisms to encourage conservation on private land and redress environmental degradation include incentive property vegetation plans, conservation agreements and biobanking agreements.

Threatened species recovery programs in Australia and overseas are broadly similar and often involve mandatory preparation of species recovery plans. Over the past decade there has been a gradual shift by governments to remove these requirements and establish programs that set clear priorities and allow greater flexibility in management approaches.

The NSW Saving Our Species program is a new conservation program that aims to maximise the number of threatened species that can be secured in the wild for at least the next 100 years. The program encourages community, corporate and government participation in threatened species conservation by providing a website and a database with information on project sites, volunteering and research opportunities.

Of particular interest to the panel are:

1. *Is the current system effective in encouraging landowners to generate public benefits from their land and rewarding them as environmental stewards? Or are current mechanisms too focused on requiring private landowners to protect ecosystem services and biodiversity at their own cost?*

2. *Are there elements of the current system for private land conservation that raise*

impediments (for example, the binding nature of agreements and potential loss of production) for individuals who want to manage their land for conservation? If so what are they? What incentives might be effective, efficient and equitable in promoting biodiversity conservation on private land?

3. *What should be the role of organisations and bodies, such as the Nature Conservation Trust, in facilitating and managing private land conservation through mechanisms such as conservation and biobanking agreements?*

4. *How should the government determine priorities for its investment in biodiversity conservation while enabling and encouraging others (e.g. community groups) to contribute to their own biodiversity conservation priorities?*

5. *How can the effectiveness of conservation programs be monitored and evaluated?*

6. *How should any tradeoffs be assessed?*

7. *To what extent is the system forward looking or dealing with legacy impacts?*

8. *To what extent does current practice (rather than the legislation) determine outcomes?*

Theme 3: Conservation in land use planning

The review is not considering the operation of the planning system *per se*, but it is interested in how biodiversity issues are dealt with in land use planning decisions.

Strategic planning provides the opportunity to identify areas of high biodiversity value as well as provide up-front assessment of the potential impacts of development on biodiversity. Strategic planning can support greater certainty to developers, landowners and the community about how development and conservation objectives will be balanced. It can also streamline regulatory processes at both a state and national level.

To streamline development assessment processes, the Commonwealth and NSW Governments have introduced forms of strategic assessment. In NSW, this takes the form of biodiversity certification (Part 7AA of the *Threatened Species Conservation Act 1995*). Biodiversity certification offers planning authorities a streamlined biodiversity assessment process for areas marked for future development at the strategic planning stage, along with a range of secure options for offsetting impacts on biodiversity. It identifies areas of high conservation value at a landscape scale and protects them, as well as identifying areas suitable for development. After biodiversity certification is conferred on an area, development may proceed without the usual requirement under the *Environmental Planning and Assessment Act 1979* for site-by-site threatened species assessment.

The Office of Environment and Heritage provides information on strategic planning processes that may guide land use planning decisions; for example, regional conservation plans.

Of particular interest to the panel are:

1. *How effective are current arrangements at ensuring biodiversity values are identified early and properly considered in strategic planning systems? How can they be improved?*

2. *How effective are current arrangements for delivering strategic outcomes for biodiversity and enhancing ecosystem services? How can they be improved?*

3. *How should the effectiveness of strategic planning approaches be monitored and evaluated?*

Theme 4: Conservation in development approval processes

This theme is concerned with the ways that biodiversity is considered in the regulation of development (including land clearing for agricultural production, major projects and all development that is assessed on a site-by-site basis).

The New South Wales (NSW) development approval system consists of a range of regulatory instruments to authorise activities that impact on biodiversity, including:

- Consents, approvals and licenses – for example, consent of development and approval of activities under the *Environmental Planning and Assessment Act 1979*, approval of property vegetation plans under the *Native Vegetation Act 2003*, licensing of actions under the *Threatened Species Conservation Act 1995*

- Exemptions – for example, exempt development under the *Environmental Planning and Assessment Act 1979*, routine agricultural management activities under the *Native Vegetation Act 2003*

- Code assessed – for example, complying development under the *Environmental Planning and Assessment Act 1979*, ministerial orders under the *Native Vegetation Regulation 2013*

- Other legislative exclusions – for example, activities authorised under the *Rural Fires Act 1997.*

In practice, instruments that require a formal approval (for example, development consent, property vegetation plan) require consideration of an activity's impacts on biodiversity and other environmental values as part of the decision to approve the project. Approvals are often provided on the condition that impacts are mitigated in certain ways. These conditions may include requirements to avoid, minimise and offset impacts on biodiversity.

A biodiversity offset involves protecting and improving similar biodiversity elsewhere to compensate for the loss of biodiversity at the development site. Offsetting is a developing practice that is recognised under the Convention on Biological Diversity as an important component of environmental impact assessment once all options to avoid and mitigate biodiversity loss have been exhausted.

In the past, consideration of the impacts of development on biodiversity and what offsets should be required has occurred on a project-by-project basis with little consideration of cumulative impacts. The methods used to assess impacts, and justification of what is an appropriate offset, varied from case to case.

To improve transparency and consistency, governments are moving to approaches that use more objective methodologies, underpinned by scientific data, to guide the assessment of impacts and how offsets are to be determined. Different methodologies have been developed as new needs arise.

The following three assessment methodologies are currently used in NSW to assess the impacts of biodiversity:

- clearing of vegetation is assessed under the *Native Vegetation Act 2003* (i.e. the environmental outcomes assessment methodology),
- biodiversity certification is under the *Threatened Species Conservation Act 1995* (i.e. the biodiversity certification assessment methodology)
- the BioBanking Scheme is under the *Threatened Species Conservation Act 1995* (i.e. the biobanking assessment methodology).

More recently, the draft NSW Biodiversity Offsets Policy for Major Projects has introduced a methodology for assessing and offsetting impacts of major projects (draft Framework for Biodiversity Assessment).

Of particular interest to the panel are:

1. *To what extent has the current framework created inconsistent assessment processes, environmental standards, offset practices and duplicative rules? What can be done to harmonise processes?*

2. *Can we have a single, integrated approach to the approval of all forms of development, including agricultural development, that is proportionate to the risks involved? If yes, should one methodology (or a harmonised methodology) be used to assess all impacts? Does a need remain for some differences in assessment approaches?*

3. *What are the advantages and disadvantages of the different biodiversity assessment methodologies? Are the rules transparent and consistent? Is the way data is used to underpin decisions transparent? Do the assessment methodologies appropriately accommodate social and economic values?*

4. *Does the regulatory system adequately protect listed threatened species, populations and ecological communities? Is there utility in specifically protecting these entities through the regulatory system?*

5. *Are there other models (international or Australian) that regulate activities impacting on biodiversity that may be relevant to NSW?*

6. *To what extent has the current regulatory system resulted in lost development opportunities and/or prevented innovative land management practices?*

7. *Some impacts cannot be offset. What are they? Are these appropriately addressed in approval systems? What is the relevance of social and economic benefits of projects in considering these impacts?*

8. *How can offsets be more strategically located?*

9. *Are there areas currently regulated that would be better left to self-regulatory codes of practice or accreditation schemes?*

Theme 5: Wildlife management

The *National Parks and Wildlife Act 1974* (NPW Act) establishes mechanisms to deal with unique conservation issues associated with the management and use of native animals and plants including exploitation, culling and movement.

All states and territories have native wildlife legislation that operates through different types of licences. Common types of licences are for:

- scientific and educational purposes
- recreational and commercial keeping of wildlife
- wildlife rescue and rehabilitation
- sustainable use of wildlife (e.g. animal and plant harvesting)
- managing human/wildlife interactions and conflict.

Of particular interest to the panel are:

1. *Have the threats to biodiversity posed by: (a) people taking animals and plants from the wild, (b) feral animals and weeds, and (c) illegally imported species, been effectively managed?*

2. *Has the NPW Act and the supporting policy framework led to a positive change in the welfare of native animals (captive and free-living)? What role if any should the government have in ensuring the welfare of individual native animals – particularly where there are already stand-alone welfare laws such as the Prevention of Cruelty to Animals Act 1979?*

3. *Are the provisions for marine mammals effective?*

4. *Is the current framework for wildlife licensing, offences and defences, including those applying to threatened species, easily understood? Is the current licensing system too complex? How can it be improved and simplified to focus on conservation outcomes?*

5. *Is there currently appropriate regulation for the sustainable use and trade of wildlife?*

Theme 6: Information provisions

Data and information systems are relied on by governments to devise programs and policies, support regulatory decisions and land use planning decisions, guide conservation action and to report on changes in the state of the environment.

This theme is concerned with legislative provisions and other programs that generate information and knowledge about biodiversity, including Parts 2, 3 and 8 of the *Threatened Species Conservation Act 1995* (listing provisions).

Many governments around the world have a system for listing those species most at risk of extinction. Like many jurisdictions, New South Wales (NSW) has adopted criteria derived from the International Union for Conservation of Nature Red List Categories and Criteria. All states and territories require assessments to be made using scientific criteria and data only.

NSW is the only jurisdiction that has listing decisions made by an independent scientific committee (rather than by a government minister or delegate). In NSW the listing process is driven by public nominations – any person can nominate to have a species, population or ecological community assessed for listing (or delisting or a change of status). Listing automatically triggers blanket restrictions on actions that will impact the listed entity or its habitat, unless the action is legally authorised or is otherwise exempt.

Some jurisdictions including the USA, Canada, the Australian Government, NSW and Tasmania also provide for the statutory identification and declaration of critical habitat (i.e. habitat that is critical to the survival of a listed threatened species). There are four declarations of critical habitat in NSW, three of which occur solely on reserved land.

Over recent years there has been greater recognition that evaluation is an integral part of understanding the outcomes of government programs. As a result there is increasing collection of information that enables governments to make informed decisions on policy directions, program design and implementation and to be held accountable to the public. For example, the NSW Saving our Species program has been designed to evaluate not only the success or otherwise of the program but also account for government expenditure.

The Office of Environment and Heritage also maintains a number of databases which underpin assessment methodologies, are used for reporting on changes to the environment and allow the public to access information about threatened species.

Of particular interest to the panel are:

1. *What information should be generated about the different kinds of value (for example, monetary and intrinsic value) of biodiversity and other natural assets in NSW?*

2. *What type, quality and frequency of data should be collected about biodiversity? Who should be responsible for such a system?*

3. *Is current data about biodiversity highly credible and readily accessible? If not, how can quality and access be improved?*

4. *How effective is the threatened species listing process (including the listing of key threatening processes) in guiding subsequent conservation action?*

5. *Should threatened species listing decisions be decoupled from decisions on conservation actions (including recovery planning) and regulatory processes?*

6. *To what extent, if any, does having national and state lists of threatened species cause confusion, regulatory burden or duplication of conservation effort? How could national and state lists be rationalised?*

7. *To what extent is the identification of critical habitat an effective tool for biodiversity conservation? Should we list critical habitat for more species where relevant and useful?*

8. *Should private conservation data be collected and if so how?*

Appendix 1: Parts of the *National Parks and Wildlife Act 1974* under review

The parts of the *National Parks and Wildlife Act 1974* included within the scope of this review are:

- **Part 4 Division 11 – Wildlife refuges:** Under this part the Governor may declare land to be a wildlife refuge.

- **Part 4 Division 12 – Conservation agreements:** Under this part the Minister may enter into a conservation agreement relating to land with the owner of the land.

- **Part 4 Division 13 – Offences relating to wildlife refuges and conservation areas:** Contains prohibitions relating to the harm of fauna and picking or possession of native plants in wildlife refuges, conservation areas, wilderness areas or areas subject to a wilderness protection agreement.

- **Part 6A – Stop work orders, interim protection orders and remediation orders:** Contains powers for the making of stop work orders, interim protection orders and remediation directions.

- **Part 7 – Fauna:** Contains provisions relating to the protection and care of fauna including offence provisions relating to the harm, trade and sale of fauna.

- **Part 7A – Marine mammals, special provisions:** Establishes the Marine Mammals Advisory Committee (MMA) and contains provisions relating to the MMA's functions, plans of management for marine mammals and an offence provision for approaching a marine mammal in certain circumstances.

- **Part 8 – Native plants:** Contains provisions relating to the protection and management of native plants including offence provisions relating to picking and selling of native plants.

- **Part 8A – Threatened species, populations and ecological communities and their habitats, and critical habitat:** Contains offence provisions relating to threatened species, endangered populations, endangered ecological communities and their habitat and critical habitat.

- **Part 9 – Licensing in respect of fauna, native plants and threatened species:** Contains provisions allowing for licensing of specified activities in respect of fauna, native plants and threatened species.

Appendix 2: Summary of legislative objectives

Threatened Species Conservation Act 1995	*Native Vegetation Act 2003*	*Nature Conservation Trust Act 2001* (NCT Act)	*National Parks and Wildlife Act 1974* (NPW Act; as objectives relate to the scope of the review)
a) Conserve biological diversity and promote ecologically sustainable development b) prevent the extinction and promote the recovery of threatened species, populations and ecological communities c) protect the critical habitat of those threatened species, populations and ecological communities that are endangered d) eliminate or manage certain processes that threaten the survival or evolutionary development of threatened species, populations and ecological communities e) ensure that the impact of any action affecting threatened species, populations and ecological communities is properly assessed f) encourage the conservation of threatened species, populations and ecological communities by the adoption of measures involving co-operative management.	In accordance with the principles of ecologically sustainable development: a) provide for, encourage and promote the management of native vegetation on a regional basis in the social, economic and environmental interests of the state b) prevent broadscale clearing unless it improves or maintains environmental outcomes c) protect native vegetation of high conservation value having regard to its contribution to such matters as water quality, biodiversity, or the prevention of salinity or land degradation d) improve the condition of existing native vegetation, particularly where it has high conservation value e) encourage the revegetation of land, and the rehabilitation of land, with appropriate native vegetation.	The NCT Act does not contain an objects clause. The indicator of its purpose is the object of the Nature Conservation Trust. The object of the Nature Conservation Trust is to protect and enhance natural heritage (including any cultural heritage associated with natural heritage) by: a) encouraging landholders to enter into co-operative arrangements for the management and protection of urban and rural land in private occupation that is significant for the conservation of natural heritage (and any cultural heritage associated with natural heritage), and b) providing mechanisms for achieving conservation of that heritage, and c) promoting public knowledge, appreciation and understanding of: i. natural heritage (and any cultural heritage associated with natural heritage), and ii. the importance of conserving that heritage.	a) The conservation of nature, including, but not limited to, the conservation of: i. habitat, ecosystems and ecosystem processes, and ii. biological diversity at the community, species and genetic levels b) Fostering public appreciation, understanding and enjoyment of nature and cultural heritage and their conservation. The NPW Act requires that the objects are to be achieved by applying the principles of ecologically sustainable development.