

1 Submission to Govt review NVC Act and TSC Act

Part 1.

5th September 2014

I wish to comment on the biodiversity legislation review on behalf of the Armidale Branch of the National Parks Association of NSW, a voluntary non-profit organisation dedicated to protecting nature through community action,

The Independent Biodiversity Legislation Review Panel is considering the policy settings, programs and funding arrangements that support the management of biodiversity, threatened species and native vegetation in NSW.

We greatly fear that the emphasis on *streamlining and reducing red tape* will lead to weakening or removing the laws that are essential to protecting and maintaining our biodiversity – environmental laws for which conservationists have fought continuously for the last 40 years or more.

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Revoking or weakening the NVC Act will conflict with the State's obligations to protect biodiversity, and should **not** be recommended by the Review Panel.

NSW (and other States) biodiversity protection laws must meet Australia's obligations under the various international treaties to which Australia is a signatory, including the Convention on Biological Diversity, the Convention on International Trade in Endangered Species of Wild Flora and Fauna, and the *Convention Concerning the Protection of the World Cultural and Natural Heritage*. For this reason the Commonwealth *Environment Protection and Biodiversity Conservation Act* 1999 powers **should not be divested** to NSW or other States under proposed bilateral assessment and approval agreements.

Comments on overarching issues in the NSW biodiversity legislation review:

a) *what elements of the current framework are working and not working?*

Biodiversity strategy is not working, especially biodiversity offsetting and biobanking as applied in the Hunter Valley and Liverpool Plains coalmine projects.

Example: Whitehaven's Maules Creek coalmine allegedly dishonest biodiversity offsets plan has been approved despite court challenges to its validity based on independent expert ecological reports. There is no mechanism at federal or state level to assess the validity of identified offsets nor to ensure compliance with conditions of consent. See below

b) *where there are gaps (for example, aspects of biodiversity that are not being dealt with including ecosystem services, landscape processes, threats)?*

Biodiversity offsets for high impact proposals are the biggest gap in processes for determining landscape- wide conservation. There is no consideration of landscape processes or ecosystem services or cumulative impacts at landscape scale when biodiversity offset requirements are determined for mining proposals, and no mechanism to monitor or ensure compliance with management plans for identified offsets. OEH advice about threats and risks to species, ecosystems or biodiversity is routinely discounted and apparently ignored. Biodiversity impacts are **not** being adequately considered in environmental assessments of large mining proposals. Offsetting still results in a net loss of threatened species habitat, likely resulting in a loss of threatened species and endangered ecological communities, as clearly shown by Whitehaven's biodiversity offsets identification and management plan. See Submission to Senate Environment and Communications Reference Committee Offsets inquiry attachment (extract below)

This is a planning matter, but also a policy matter impinging on operation of the NVC Act, the TSC Act and the NP&W Act. It is not dealt with adequately in the draft Biodiversity Strategy.

In Feb 2013 Mr Burke, Minister for the Environment, granted conditional approval for Maules Creek and Boggabri mine projects in Leard State Forest near Narrabri NSW, requiring more than 15000 ha of biodiversity offsets to “protect and improve the extent, condition and connectivity of the ecological community and listed threatened species habitats being destroyed”.

Mr Burke stated (press release 11.2.2013) that the conditions to protect matters of national importance under the EPBC Act must be implemented by the companies to his satisfaction, and that he may still withhold approval if not satisfied within a year regarding the provision of 15,000 ha of offset areas, management plans to improve the extent, condition and connectivity of the endangered ecological community and listed threatened species habitats, and \$2.5 million dollars of investment in rehabilitation research and contributions to threatened species recovery actions

There is mounting evidence in four scientific reports by local independent ecologists (attached) that Whitehaven submitted false and misleading information about its offset vegetation. The biodiversity offsets offered to mitigate impacts identified in environmental assessments for the NSW Department of Planning approvals process **have been shown in independent field studies by these qualified independent ecologists to be based on false data, with misidentification of species and inaccurate definition of the area of the endangered box gum woodland ecological community claimed to be on the proposed offsets.**

Mr Burke's decision was challenged in the Federal Court by the Northern Inland Council for the Environment, on the basis that the approval should be declared invalid because of the inaccurate information on the offsets. The judge found that it was within Mr Burke's powers to issue the approval and that any problems with implementation of conditions such as offset requirements could be dealt with by varying conditions or revoking consent after considering the statutory Independent Review of the Offsets, due by December 30th, 2013.

Whitehaven's Independent Review has been lodged with the Department, but not released. The Department has said it is investigating the independent ecologists' reports and a criminal matter regarding the Maules Creek offsets, which may take several months.(ABC Radio National Background Briefing Sun16/3/2014).

If the allegations of use of false or misleading information about the vegetation in the offsets are found to be true after full investigation of the proponent's and the various independent ecological field studies, the consent for the Maules Creek mine should be revoked because the company will be in breach of the offset conditions attached to the consent. The independent ecological studies listed above have shown clearly that the vegetation in the offsets is not what is claimed, is not listed as endangered, contains little or no White Box and does not provide habitat for the threatened species the offset was supposed to protect: the Swift Parrot, Regent Honeyeater or Corben's Long-eared Bat.

This dishonest offset cannot mitigate the impacts of the Maules Creek mine development, and the whole episode illustrates the disgraceful failure of the NSW planning system to apply laws to protect the environment.

We call on the Independent Biodiversity Legislation Review Panel to reject calls to extend and further weaken laws relating to identification and management of biodiversity offsets.

We offer the following **comments in red** on the following items of the Draft NSW Biodiversity Offsets Policy for Major Projects methodology for assessing and offsetting impacts of major projects (draft Framework for Biodiversity Assessment) which are listed as of particular interest to the panel:

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? Problem: State significant developments are excluded from proper assessment because of certain exemptions from the TSC Act and NVC Act. Cumulative impacts are estimated only for the development site, not for landscape wide impacts. This should be remedied.

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? No, risks cannot be quantified, exemptions subvert the integrity of assessments for mining and undermine or destroy public confidence
2. 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? Can't see how it could work. State significant developments should NOT be excluded from proper assessment, or be allowed certain exemptions from the TSC Act and NVC Act. Cumulative impacts should be estimated for state-wide and landscape-wide impacts, **not** restricted to the area or footprint of the actual physical development site.
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? No Do the assessment methodologies appropriately accommodate social and economic values? Not for mining – misleading inaccurate economic values routinely override envt and social values, see Bulga, see Maules Creek
4. Does the regulatory system adequately protect listed threatened species, populations and ecological communities? Not when distorted by improperly identified/monitored offsetting processes - MaulesCk Is there utility in specifically protecting these entities through the regulatory system? Yes, has prevented additional losses to biodiversity in some cases.
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? Not much, rather biodiversity is often lost by failure to apply regulation or to monitor outcomes and compliance.
7. Some impacts cannot be offset. What are they? destruction of vegetation by open-cut mining Are these appropriately addressed in approval systems? No What is the relevance of social and economic benefits of projects in considering these impacts? Not an overriding relevance. Jobs and \$ estimates should not be inflated to automatically override social and environmental impacts, as found by the Land and Environment Court in the Bulga case, and as shown by community protest and court actions about the Whitehaven Maules Creek coal mine. Nor should the SEPP regulation to put economics above all else be applied to State significant mining developments.
8. How can offsets be more strategically located? Cannot if no like-for-like remaining, as for Maules Creek
9. Are there areas currently regulated that would be better left to self-regulatory codes of practice or accreditation schemes? No, PNF and RAMAs have shown that self-regulation mostly does not work, that systemic evasion is prevalent, that monitoring is essential but not adequately carried out, that breaches of compliance are not investigated or promptly dealt with.

Part 2 Comments on items of the Issues Paper

Armidale NPANSW submits the following comments in red to the Panel, responding to each of the broad goals and reform directions set out in NSW 2021 and by the principles set out in the 2012 Commission of Audit, as listed below in the Issues Paper:

a focus on devolution to regional and local levels We oppose devolution to Local Govt, we oppose devolution of EPBC Act powers to States

- *an increased focus on partnership and outsourcing* OK if sufficiently resourced, but it is essential to avoid cost shifting and abrogation of responsibility. Outsourcing by privatisation or sale of Crown land or State Forests should not be an option.
- *greater focus on transparency and evidence based decisions*, Yes, needs independent qualified scientific assessors, not just consultants for EISs or consent authorities.
- *fostering greater collaboration and coordination between government and the private and community sectors*. Will be stymied by volunteer fatigue and loss of trust following ICAC corruption findings, by the de-funding of Landcare and Wildlife Refuge programs and by perceived problems with implementing the NVC Act to prevent widespread clearing, and by the lack of support for private conservation initiatives such as Voluntary Conservation Agreements
- *budget restraint*. Maybe, but I don't think amalgamations in LLS system will do it

The panel will also be guided by the strategic goals and approach set out in the Office of Environment and Heritage Corporate Plan 2014–2017. In particular, the panel will find ways to:

- *increase regulatory efficiency, remove duplication and promote consistency in approval requirements* Sounds fine, but **not** if it means weakening environmental laws. We oppose devolution of EPBC Act powers to the States, especially because of its likely adverse impacts on the water trigger, water and the Murray Darling Basin if administered under current NSW laws which do not assess cumulative impacts of big mining developments on the landscape, community or environment outside the development site.
- *increase upfront clarity and transparency in environmental standards*. Very desirable, but needs adequate resourcing of research and advisory and regulatory capacity of OEH and EPA
- *minimise the private costs and maximise the public benefits of regulation* Yes, include restoring agricultural research advice capacity, restoring funding for Landcare and voluntary non-government environment protection efforts. Adequately resource the EPA to fully monitor and promptly implement and ensure compliance with regulations
- *encourage economic development, including by supporting regional and rural communities without devaluing the environment and biodiversity* Yes, include restore funding for Landcare and voluntary environment protection efforts such as Voluntary Conservation Agreements and Wildlife Refuges.
- *build resilience to environmental hazards and risks*. Yes, implement buffer and no-go zones for CSG and open-cut coal mines, learn to say no to expansion applications, abolish the mining SEPP regulation that puts economic “benefits” above all else. Take a forensic approach to assessing risk, rather than just accept proponent's/consultant's EIS estimations/views without examination.

Method

The panel will evaluate the current legislative framework. In doing so it will consider:

- *Are objectives appropriate...* Mainly yes, but add and define objectives for climate change and ecologically sustainable development to the various Acts.
- *whether the current policy framework reflects best practice in biodiversity conservation* No, offsets policy flawed, allows destruction of EECs even if no like-for-like veg available for offsetting a critically endangered EEC like Box –Gum woodland (eg Maules Ck). Recovery planning not well implemented, seriously underfunded. Conditions on mining approvals to save threatened species or offset habitat losses are NOT being monitored or implemented
- *approaches and experiences of other states and territories, and relevant jurisdictions overseas*
- *the social and economic impacts of the legislation including whether the current regulatory provisions balance environmental, social and economic factors in decision making (i.e. consideration of the triple bottom line)* No, it is unbalanced, economic “benefits” routinely outweigh environmental issues due to inaccurate and false estimates of jobs, \$ benefits, lack of proper cost/benefit analysis
- *any perverse environmental and regulatory outcome* Yes, EECs and biodiversity are being destroyed without acceptable offset provisions or implementation thereof, particularly under the State Significant development provisions/regulations of the EP&A Act and the Mining Act
- *the objectives of the current legislation and whether they remain valid whether the current provisions facilitate effective and proportionate compliance* No, they do not. Biodiversity offset provisions are being systematically ignored, subverted and breached under existing planning approvals (eg Whitehaven's Maules Ck, Exstrata's Ravensworth mine)
- *to what extent the current policy frameworks sufficiently encourage the abatement of environmental risks, protect and restore key ecosystem processes and prevent species extinctions* To a very small or nil extent. Biodiversity offset provisions are being systematically ignored, subverted and breached under existing

planning approvals. Environmental risks are being systematically underestimated and downplayed, and risk of cumulative impacts on the wider environment and landscape are being ignored.

- *whether current arrangements appropriately deal with new and emerging policy frameworks in NSW and nationally, including the planning reforms, the proposed NSW Biodiversity Offsets Policy, a NSW Biosecurity Act, local government reforms, regional service delivery models and associated strategic plans, and State–Commonwealth bilateral and strategic agreements. No, they do not. see above*

2. The panel will consider the evidence base for government intervention, including:

- *the status, trends and pressures on native vegetation, biodiversity and ecological processes Pressures increasing – expansion of open-cut mining Hunter Valley + Liverpool Plains, CSG in Pilliga means loss of significant areas of native veg/EECs without possibility of workable offsets being implemented*
- *the relationship between healthy ecosystems (including water, land and biodiversity) and sustainable development. Hard to measure, what is “sustainable” development? Is destruction of environment by open-cut mining for coal ecologically sustainable? Most would say NO.*
- *likely future environmental conditions given existing and emerging threats including climate change. Likely to be severe impacts on biodiversity, which must be addressed by protecting, maintaining and managing **all corridors and remnant vegetation, especially TSRs***

3. The panel will propose new legislative arrangements for biodiversity conservation in NSW. It will consider

- *an overall philosophy for biodiversity conservation in NSW and objectives to underpin a new legislative framework. Yes, if without overriding bias towards economic interests. See Part 1 above*
- *ways to incorporate environmental, social and economic considerations (i.e. triple the bottom line) into decision- options to identify biodiversity priorities given proposed biodiversity conservation objectives making frameworks - Yes, but only in a balanced way - avoid giving preference to economics without regard to conservation issues, ensure that decisions are made on well-researched scientific information and do not weaken existing protection for threatened biodiversity, species or ecological communities*
- *opportunities to improve regulatory efficiency, remove duplication and adopt proportionate, risk-based approaches to regulation and compliance. Needs baseline natural resource information which is lacking for most current development proposals Reinstate vegetation mapping of whole of NSW.*
- *the concept and practice of ‘duty of care’ in relation to native vegetation management in the context of land, water and biodiversity conservation objectives along with measures to promote cost sharing for biodiversity conservation and native vegetation management OK if applied to Govt administration of all public land including Crown land and TSRs and State Forests*
- *measures to promote upfront clarity and transparency in environmental standards including options for self-regulation Yes, but self-regulation has proved ineffective in PNF, forestry, and routine ag management activities (RAMAs), with widespread systemic breaching of the rules apparent in some cases. Self-regulation only works in a clearly understood framework with consistent advice and monitoring of compliance and prompt enforcement action against blatant breaches. Present system doesn't do it.*
- *options for effectively integrating native vegetation management with the protection and maintenance of land and water resources and the conservation of biodiversity ? reinstate CMA programs, re-consider the merging of CMAs and Crown lands division with LLS and DPI. Maintain the Native vegetation Act, reject calls for its revocation.*
- *removing barriers and providing incentives to voluntary private land conservation, and measures to reduce duplication, promote paid stewardship and foster greater collaboration and coordination between government and the community Yes, yes, yes – but how? Limited by lack of will and funding for government/bureaucratic participation*
- *appropriate frameworks to abate environmental risks, prevent species extinction and maintain ecological processes Yes, but how? Keep the Scientific Committee identifying Key Threatening Processes, and implement threat abatement action as a high priority.*

governance arrangements, statutory concurrence and consultation requirements, and compliance and enforcement provisions. Needs overhaul – consultation and statutory concurrence for OEH/Env't Minister is a joke, always overridden by veto powers of Mining Act, OEH recommendations to Planning Dept ignored. Compliance and enforcement provisions are absent or inadequate and are not being applied in large coal and coal seam gas mining projects in the Hunter Valley and Liverpool Plains regions. Cite Maules Ck winter clearing courtcase. (see Land and Environment Court findings)

Submission compiled by Beth Williams* for Armidale Branch of the National Parks Association of NSW

5th September 2014

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*My qualifications: I have an honours science degree majoring in Botany from University of Sydney, and have been involved in teaching practical and field botany to undergraduates in the Botany Department at University of New England for some 30 years. This has developed my understanding of practical botany and ecology and vegetation in the New England and North-west regions of NSW, which has underpinned a lifetime of voluntary conservation advocacy as a member of the National Parks Association of NSW Armidale Branch, and as a member of BirdLife Australia Northern NSW. In the latter capacity I am a member of the Recovery Team for Regent Honeyeaters and have been voluntarily monitoring, studying and mapping occurrences of Regent Honeyeaters in the local Bundarra-Barraba-Kingstown districts for more than 20 years in support of the Regent Honeyeater Recovery program. I have also served on the former Northern Tablelands Regional Vegetation Committee.