

## Environment and Planning Law Committee and International Law Committee

### *Submission on the Independent Biodiversity Legislation Review Panel: Issues Paper*

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## About Us

NSW Young Lawyers is a division of the Law Society of NSW and is made up of legal practitioners who are under the age of 36 or in their first 5 years of practice, and law students. It is the largest body of newly practising lawyers and law students in Australia, with a membership comprising of some 15,000 members. NSW Young Lawyers supports practitioners in their early career development in numerous ways, including by encouraging involvement in its 15 separate committees, each dedicated to a particular area of practice.

The Environment and Planning Law Committee brings together a network of the State's young practitioners to discuss a shared interest in our environment. It focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law, and policy. The Committee also concentrates on international environment and climate change laws and their impact within Australia.

The International Law Committee offers the opportunity for members of NSW Young Lawyers to discuss international legal issues and network with their peers who share a similar interest in international law. It organises high-quality continuing legal education seminars on contemporary international legal issues as they affect practitioners, drafts submissions and monitors developments in international law affecting Australia and Australia's distinctive contributions to international legal development. The Committee also seeks to broaden knowledge of international law within the legal profession for the benefit of its members and the greater Australian community.

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## Introduction

This is a joint submission by members of the Committees as the topic of biodiversity is one of common interest to both Committees. The comments are the views of individuals and not of the workplaces by which members are employed.

The Committees welcome the opportunity to comment on the *Independent Biodiversity Review Panel: Issues Paper* on the native vegetation, threatened species and related biodiversity laws in NSW, and thank the Office of Environment and Heritage and the Independent Biodiversity Legislation Review Panel for the opportunity to provide this submission.

This submission covers:

- gaps in the current biodiversity framework
- objects and principles for biodiversity conservation (Theme 1)
- conservation in development assessment processes (Theme 4)

It focuses on the need for an aspirational goal for biodiversity conservation, implementation of international obligations, and the importance of integrating protections for biodiversity in planning law.

## List of Recommendations

The Committees make the following recommendations:

- Broaden the scope of biodiversity conservation measures to include protections on a landscape scale.
- Introduce an overarching aspirational goal for biodiversity conservation in the following form:

*The State of New South Wales is committed to the conservation of biological diversity through complete citizen engagement and building ecosystem resilience in a changing climate. This can be achieved via the sustainable use of genetic resources, including appropriate access to these genetic resources for citizens. The NSW Government must be ultimately responsible for this and take into account all rights over those resources and consider technologies which can assist and allocate appropriate funding.*

- Accompany the overarching aspirational goal with a NSW strategy containing targets implementing the national strategy targets.
- Integrate the objects of the current laws, taking into consideration the following cogent measures or characteristics:
  - Stakeholders should be able to identify with a broad but quantifiable and clear target.
  - The objects should serve to uphold a clear and unified government policy in line with international obligations.
- Integrate protections for threatened species, populations and ecological communities in the planning system.
- Reconsider the elevation of the economic pillar of ecologically sustainable development (ESD) at the expense of the environment.
- Articulate the mitigation hierarchy in the relevant legislation as a priority of the current review to remedy the current inconsistent assessment processes, with further practical implementation guidance being provided through policy documents.
- Reconsider the exemptions for major projects from important biodiversity conservation measures, particularly given the scale and potential for impacts on biodiversity.

## Gaps in the framework

The Issues Paper<sup>1</sup> recognises that biodiversity is in decline in NSW. Gaps in the framework exist in relation to species, populations and ecological communities not deemed to be “threatened”. The Committee supports the current system of listing and protecting species, populations and ecological communities under duress. However, in order to achieve the relevant objects of the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**), the *Threatened Species Conservation Act 1995* (NSW) (**TSC Act**), and the *Native Vegetation Act 2003* (NSW) (**NV Act**), a more holistic framework must be employed by broadening conservation measures to include protections on a landscape scale.

### **Recommendation:**

- **In order to slow the decline of biodiversity loss in NSW, the scope of biodiversity conservation measures be broadened to include protections on a landscape scale.**

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<sup>1</sup> State of NSW and Office of Environment and Heritage, *Independent Biodiversity Legislation Review Panel: Issues Paper*, at p 2.

## Theme 1: Objects and principles for biodiversity conservation

### Should there be an aspirational goal for biodiversity conservation?

The Committees consider that an overarching goal for biodiversity conservation may assist in binding together the various pieces of legislation that cover biodiversity conservation in NSW with a common aspirational purpose.

In Australia, the foundations for such a goal are provided for by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth),<sup>2</sup> which in turn has been informed by the *Convention on Biological Diversity*<sup>3</sup> to which Australia is a signatory.

Accordingly, NSW should look to utilising international law as the basis for an overarching aim for biodiversity conservation. By way of example, Article 1 of the *Convention on Biological Diversity* is supplemented by the three “Priorities for action”<sup>4</sup> in the 2010 national policy on biodiversity conservation. Another is the *Draft NSW Biodiversity Strategy 2010–2015*, though still in draft form, which was formed to contribute to the three priorities under the national Australian Biodiversity Strategy (i.e. engaging all Australians; building ecosystem resilience in a changing climate; and getting measurable results).<sup>5</sup>

The Committees are of the view that any aspirational goal for biodiversity conservation should be adopted only in conjunction with more specific, defined and quantifiable goals within NSW legislation and policy.

#### Recommendation:

- **An overarching goal in the following form be adopted:**

*The State of New South Wales is committed to the conservation of biological diversity through complete citizen engagement and building ecosystem resilience in a changing climate. This can be achieved via the sustainable use of genetic resources, including appropriate access to these genetic resources for citizens. The NSW Government must be ultimately responsible for this and take into account all rights over those resources and consider technologies which can assist and allocate appropriate funding.*

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<sup>2</sup> Section 3(1)(c).

<sup>3</sup> United Nations *Convention on Biological Diversity*, adopted 5 June 1992, available at <http://www.cbd.int/doc/legal/cbd-en.pdf>.

<sup>4</sup> Engaging all Australians; Building ecosystem resilience in a changing climate; Getting measurable results.

<sup>5</sup> Department of Environment, Climate Change and Water NSW and Industry and Investment NSW, *Draft NSW Biodiversity Strategy 2010- 2015*, available at <http://www.environment.nsw.gov.au/resources/biodiversity/strategy/10821DraftBioStrat.pdf> , at p 1.

**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?**

In strictly responding to the question of whether the legislative objects are valid in light of the state of the environment, the Committees submit that they are valid insofar that they align with the principles in international instruments that Australia is a signatory to.<sup>6</sup>

These objectives fall short, however, in their substance and practical execution; the lack of a coordinated, coherent, and integrated approach needs to be addressed.

Biodiversity protection relies on, and is affected by, the discretionary exercise of power by numerous statutory or government authorities in Australia. In turn, the responsibility:

*for biodiversity protection is legally divided among, or conferred on, many of these authorities, creating a complex regulatory web that is often uncertain in its application, inefficient in its approach, and ineffectual in adequately protecting biodiversity.*<sup>7</sup>

This issue can be highlighted by the way that Federal and State legislation address biodiversity conservation. The legislation is broadly definable into 3 categories:

- those that are designed specifically to protect biodiversity;
- those that are not designed specifically to protect biodiversity, but nevertheless have significant application on biodiversity protection; and
- those that are not designed specifically to protect biodiversity, but the application of which may adversely affect biodiversity.<sup>8</sup>

This myriad of legislation alone is ineffectual in providing adequate protection for the increasingly declining biodiversity in this State.

An overarching aspirational goal for biodiversity conservation for all NSW legislation accompanied by a State-wide strategy setting out more specific and clearly quantifiable targets implementing the national strategy targets would go a long way in bringing consistency to biodiversity conservation in NSW law and policy.

For instance, under “Thirteen state-wide targets for (natural resource management) NRM”<sup>9</sup> in Appendix 5 - *Draft NSW Biodiversity Strategy 2010- 2015*. One of the “Biodiversity” targets is “By 2015 there is a reduction in the impact of invasive species.”

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<sup>6</sup> *Antarctic Treaty*, adopted 1 December 1959, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20402/volume-402-I-5778-English.pdf>; *Convention on Biological Diversity*; *Convention on the Conservation of Migratory Species of Wild Animals* (Bonn Convention), adopted 23 June 1979, available at [http://www.cms.int/sites/default/files/instrument/cms\\_convtxt\\_english.pdf](http://www.cms.int/sites/default/files/instrument/cms_convtxt_english.pdf); Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment (CAMBA) adopted 20 October 1986, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1988/22.html>; *Convention on Conservation of Nature in the South Pacific* (Apia Convention), adopted 12 June 1976, available at <http://www.sprep.org/attachments/legal/ApiaConvention.pdf>; *Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction and their Environment* (JAMBA), adopted 6 February 1974, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1981/6.html>; *Agreement between the Government of Australia and the Government of the Republic of Korea on the Protection of Migratory Birds* (ROKAMBA), adopted 6 December 2006, available at <http://www.austlii.edu.au/au/other/dfat/treaties/2007/24.html>; *Rio Declaration on Environment and Development*, adopted 14 June 1992, available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

<sup>7</sup> Gerry Bates, *Environmental law in Australia*, (LexisNexis Butterworths Australia, 8<sup>th</sup> ed, 2013), at p 433.

<sup>8</sup> Above n 7.

<sup>9</sup> Appendix 5 - *Draft NSW Biodiversity Strategy 2010- 2015*



Where properly applied, any overarching goal could be used as a catalyst to remove that third category of legislation and significantly improve the practical application of the preceding two categories in meeting their respective legislative objects.

**Recommendation:**

- **Introduce an overarching aspirational goal accompanied by a NSW strategy containing targets implementing the national strategy targets.**

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

The Committees consider that the objects of the current laws can be simplified and integrated, and propose that the following cogent measures or characteristics be considered.

Firstly, stakeholders should be able to identify with a broad but quantifiable and clear target. This may enable most, if not all laws dealing with biodiversity conservation to share a collective target, while maintaining their independent objectives. This would involve incorporating objective criteria that meet Australia's international obligations whilst being relatable and observable among the respective pieces of legislation, as well as reflecting the physical, social and economic realities of domestic Australia.

Secondly, the objects should serve to uphold a clear and unified government policy in line with international obligations. This will assist inter-governmental/departmental understanding and communication, which in turn should assist and improve the process of simplifying and integrating the objects.

### **Recommendation:**

- **The objects of the current laws be simplified and integrated, taking into consideration the above measures or characteristics.**

## Theme 4: Conservation in development assessment processes

The nature of land use planning means that there will often be conflicts between development and biodiversity conservation. The Committees consider that it is vital for the planning system to integrate protections for threatened species, populations and ecological communities.

While the TSC Act provides a framework for listing and protecting threatened species, populations and ecological communities, certain provisions are not always required to be applied to decisions impacting on biodiversity due to a number of exemptions provided for in the *Environmental Planning and Assessment Act 1979* (**EP&A Act**).

### Major projects

The NSW planning system facilitates development, particularly where major projects, including State significant development (**SSD**) and State significant infrastructure (**SSI**) are concerned. The Issues Paper itself refers to “development approval” rather than “development assessment”,<sup>10</sup> and statistically, very few major project developments, which are generally large-scale developments with the potential to adversely impact on biodiversity, are refused. The last *Major Development Monitor* shows that the refusal rate for Part 3A projects was 1.6 per cent, and the refusal rate for Part 4 major projects was 3 per cent.<sup>11</sup>

There are a number of exemptions for SSD and SSI from the requirement to obtain certain environmental approvals such as a permit to clear native vegetation which would ordinarily be required under the NV Act.<sup>12</sup> In addition, certain biodiversity protection measures that cannot be applied to prevent the carrying out of critical SSI, such as a stop work order under the TSC Act.<sup>13</sup>

### Offsetting

Another exemption allows development on critical habitat or development that significantly affects threatened species, populations and ecological communities and their habitats to be approved where the impacts are offset, including through the BioBanking framework.<sup>14</sup> The Issues Paper acknowledges that offsetting is only an option once avoidance and mitigation measures have been exhausted.<sup>15</sup> However, in practice, neither proponents nor decision-makers are given clear instructions in the TSC Act or EP&A Act about how to implement this mitigation hierarchy. The Committees consider that articulating the hierarchy in the relevant legislation should be a priority of the current review, with further practical implementation guidance being provided through policy documents.

In addition to this, there have been moves to unbalance the three pillars of ecologically sustainable development (**ESD**), skewing decisions in favour of the economic pillar. Recent amendments to the *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* seek to elevate the “significance of the resource” as a consent authority’s principal consideration over environmental and social considerations when determining an application for a mining development.<sup>16</sup> The *Draft NSW Biodiversity Offsets Policy for Major Projects* allows offset requirements to be

<sup>10</sup> Above n 1, at p 8.

<sup>11</sup> NSW Department of Planning, *New South Wales Major Development Monitor 2009-10*, at p 13: [http://www.planning.nsw.gov.au/Portals/0/planningsystem/Major%20Develop%20monitor\\_text\\_press.pdf](http://www.planning.nsw.gov.au/Portals/0/planningsystem/Major%20Develop%20monitor_text_press.pdf).

<sup>12</sup> *Environmental Planning and Assessment Act 1979* (NSW) ss 89J, 115ZG; *Native Vegetation Act 2003* (NSW) s 12.

<sup>13</sup> *Environmental Planning and Assessment Act 1979* (NSW) s 115ZG, *Threatened Species Conservation Act 1995* (NSW) Pt 7.

<sup>14</sup> *Threatened Species Conservation Act 1995* (NSW) Pt 7A; *Environmental Planning and Assessment Act 1979* (NSW) ss 79B, 79C, 111, 112.

<sup>15</sup> Above n 1, at p 8.

<sup>16</sup> *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (NSW) cl 12AA.

reduced where significant social and economic benefits accrue to NSW because of the proposal.<sup>17</sup> A flow-on effect of this elevation of economic over environmental interests is the approval of developments, even where the impacts on biodiversity are unacceptable, with the employment of offsetting rather than *in situ* conservation measures.

**Recommendations:**

- **Integrate protections for threatened species, populations and ecological communities in the planning system.**
- **Reconsider the elevation of the economic pillar of ESD at the expense of the environment.**
- **Articulate the mitigation hierarchy in the relevant legislation as a priority of the current review to remedy the current inconsistent assessment processes, with further practical implementation guidance being provided through policy documents.**
- **Reconsider the exemptions for major projects from important biodiversity conservation measures, particularly given the scale and potential for impacts on biodiversity.**

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<sup>17</sup> State of NSW and Office of Environment and Heritage, Draft NSW Biodiversity Offsets Policy for Major Projects, at p 7.

## Conclusion

An aspirational goal for biodiversity conservation should be employed, and NSW should look to national and international obligations for guidance. Given the continuing decline in biodiversity in NSW, it is vital that the legal and policy framework offers strong and effective protections. Because of the potential for significant impacts of development on biodiversity, these protections must be incorporated into the planning system, and should be effectively monitored and enforced. Current gaps in the system should be addressed to tackle biodiversity loss before it happens rather than after it is too late. The Committees thank the Office of Environment and Heritage and the Independent Biodiversity Legislation Review Panel for the opportunity to provide this submission.



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