WARRINGAH COUNCIL

12 September 2014

Biodiversity Legislation Review
PO Box A290
Sydney South NSW 1232

Our Ref: [redacted]

Dear Review Panel

Warringah Council Submission - Independent Biodiversity Legislation Review

Please find attached Warringah Council's submission to the Independent Biodiversity Legislation Review Panel (the Panel). I appreciate the opportunity provide this submission on these important issues being reviewed by the panel.

Council has responded to the "areas of particular interest", as identified by the questions listed in the Independent Biodiversity Legislation Review Panel Issues Paper 2014, and how they relate to local government in Warringah Council.

However I wish to highlight that Warringah Council only received notification of this review on 18 August, some 12 days after release of the discussion paper and only 15 business days before close of submissions. A request for an extension of the submission period of 5 days has been granted, however, this remains an insufficient time to adequately comment on the matter.

Considering the gravity of the topics being considered, I wish to raise concerns as to the consultation processes currently being undertaken by the NSW State Government on this matter, following the recent implementation of the 10/50 Vegetation Clearing Code of Practice.

As such, I feel that Council's ability to adequately address the 41 topics of concern raised in the discussion paper has been compromised.

Yours faithfully

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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.

Theme 1: Objects and principles for biodiversity conservation

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

Response: Yes - A broad aspirational goal in relation to biodiversity conservation helps to set t the tone for associated legislation, but may not be achievable in the face of the increasing development pressures and the current direction in NSW. Aspirational goals are only likely to be of value where the underlying legislative controls are specific, measureable and achievable.

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?

No comment

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

Response:
At a local government area scale, the extent to which the current objects of the *Threatened Species Conservation Act 1995* (as listed on Appendix 2 of the Issues Paper) are applied in Warringah is limited. Within the current legislative framework and local government's sphere of influence, limited scope exists for the conservation of threatened species on private land. Further relevant comment on this is provided in relation to Theme 3: Conservation and Land Use Planning.

It is acknowledged that the terms of reference set out by the review excludes management of public lands.

Funding for management and conservation of threatened species on private land is virtually non-existent in the Warringah LGA despite the application of relevant development consent requirements.

Recommendation: That Office of Environment and Heritage staff, with expertise in conservation agreements on private land, proactively liaise with private land holders in Warringah to encourage and facilitate biodiversity conservation agreements on private land.

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

Response:
Improved integration and clarification of the objectives listed for the NPW Act and TSC Act may assist Local Government in undertaking compliance actions affecting threatened species and their habitats. The prohibition on causing damage to threatened species habitat is listed in the NPW Act and links between the two pieces

of legislation is not well understood. In Councils experience, authorities appear to be reluctant to pursue legal action for breaches under the NPW Act.

An example of the potential ramifications of this has been summarised in a relevant submission by the Local Government and Shires Association on the statutory review of the TSC Act undertaken in 2010 as below;

> *The recent NSW Land and Environment Court case against Orogen Pty Ltd found that it was reasonable for the defendant to not be aware of the links between the TSC Act and the NPW Act. An excerpt from the judgement, paragraph 88 states:*
>
> *'If the prosecuting department does not itself draw the attention of the public to such a connection between the NV Act and other legislation it is not fair for the Court to conclude that either Defendant could reasonably have concluded that this habitat could not be legally removed without approval. The information provided in the fact sheets does not refer to s 118D at all. The reference to the NPW Act does not refer to this section. The information on clearing of native vegetation, threatened species and the NPW Act fails to identify the relevant link. Further the legislation for the protection of vegetation comprising threatened species habitat is not logical. The prohibition on causing damage to threatened species habitat is not located in the TSC Act but in the NPW Act which deals with national parks and wildlife.'*

Recommendation: That the Threatened Species Conservation Act and National Parks and Wildlife Act be made consistent and with the same powers and prohibitions applying equally in both Acts.

Theme 2: Conservation action

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?

Response: No - The current system appears to provide insufficient incentives for landowners to engage in conservation actions such as conservation agreements on private land. Despite Warringah having a relatively large extent of natural area in private land holdings, Council is not aware any private land conservation actions which are not directly associated with development consent.

Recommendation: Consider improving private land conservation incentives or better promote the incentives that currently exist.

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?

Response:
It is understood that the Biobanking program is designed to be a market driven system that puts a economic value on threatened biodiversity. As the scheme is largely optional, the lack of take up by the proponants of development has reduced the incentive for private landholders to set up Biobank sites. The NSW Major Projects Offsetting Policy has now been commenced. Councils are consent authorities to large developments which have significant impacts upon biodiversity but do not constitute major projects such as residential subdivisions. Such developments consent may be subject to the '*OEH principles for the use of biodiversity offsets in NSW*', however, non-compliance with these principles may not be grounds for refusal.

Recommendations:
A recommended solution to this would be that for developments over a certain scale be required to utilise the biobanking scheme and that it not be confined to major projects. Projects such as subdivisions also need to have a legislated offset policy (as opposed to the existing OEH offset principles) incorporating comparable requirements to the major projects policy utilising the biobanking scheme or otherwise. This would likely increase incentives for private land conservation with an increased demand for biobank sites.

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?

Response: There may be two potential roles for such bodies:
Firstly, to identify areas of conservation and promote, on behalf of state government, to private property owners. Secondly, as ongoing liaison between State and owner to establish the agreement and the future monitoring and promotion of the successful example.

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?

Response: Local governments including Warringah have limited resources available to invest in research and studies which are required to verify areas of high biodiversity conservation value or high biodversity investment priority. Strategic studies aimed at identifying such areas at a landscape scale may be subject to challenge by the stakeholders due to potential smaller scale inaccuracies.

The current emphasis of biodiversity legislation on threatened species has the potential to channel biodiversity investments away from highly developed coastal areas such as those in Warringah to less economically valuable land away from the coast. This has the potential to remove or isolate the community from direct interaction with biodiversity, the long term implications of which is unlikely to encourage community participation in conservation.

Recommendations:
It would be useful for the NSW OEH or NSW Planning to develop endorsed guidelines on the strategic biodiversity land assessment methodologies which could be used by Local Governments to identify biodiversity investment priorities.

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

Out of time to comment on this complicated topic

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?

Response:
Outcomes on private land are determined by applying legislation at the Development Application stage. Offsetting of natural areas for conservation purposes are usually

negotiated at this stage with the private land owners. Warringah Council has no records of conservation agreements being proactively arranged outside a subdivision or individual development process.

Compliance and monitoring to determine biodiversity outcomes is currently lacking. There are no incentives (or few disincentives) to comply, where Private Certifiers can be used for certify compliance with conditions. Where threatened species or significant habitat trees exist, there are no bonds that can be easily/legally put in place.

Recommendation:
Consideration given to amending the Threatened Species Conservation Act 1995 and/or National Parks and Wildlife Act 1974 to legislate the ability for approval authorities to implement bonds/security deposits to better protect habitat for threatened species/biodiversity.

Theme 3: Conservation in land use planning

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?

Response:
Strategic studies aimed at identifying areas of high biodiversity value at a landscape scale have been subject to challenge by the stakeholders due to potential smaller scale inaccuracies. Planning proposals such as those for spot rezonings to facilitate residential development are driven by land tenure rather than by the location of sensitive environmental features.

The conservation of biological diversity is given a lower priority to other considerations such as development, infrastructure and recreation. In Council's experience, most rezonings, developments and activities which are refused consent by Council on biodiversity grounds are subsequently approved in the NSW Land and Environment Court. Planning decisions on the location of major infrastructure (e.g. hospitals) or residential subdivision (including seniors living) has rarely been limited by the presence of high biodiversity values.

Recommendation:
It would be useful for the NSW OEH or NSW Planning to develop endorsed guidelines on the strategic biodversity land assessment methodologies which could be used by Local Governments to identify biodiversity investment priorities.

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

See above

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

Theme 4: Conservation in development approval processes

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?

Response: The scale of the development should determine the assessment approach to be used. Where developments, including new subdivision applications, exceed a certain scale, offsetting or biobanking should be a legislative requirement.

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?

Response:

Application of the impacts assessments under section 5A of the EP&A Act (7 Part Test) is undertaken by consultants, under direction from applicants, therefore potential impacting the independence of this advice. Despite the best intent by most consultants, reports appear inherently subject to bias (including bias by omission) in relation to the decision via the 7 part test of whether or not a significant impact is likely or unlikely to occur as result of a proposed action.

Consultants, whom regularly apply the precautionary principle in determining impacts (and predict a likely significant impact through the 7 part test) may be less likely to retain clients. While *Threatened Species Assessment Guidelines, The Assessment of Significance* have been prepared by DECC 2007 (now OEH) interpretation and application by private consultants is lacking despite the fact that the guidelines are gazetted and in force, so are required to be “taken into account.”

Commercial competition between consultants means that the price to undertake field surveys and make informed judgement (through preparation of reports including 7 Part Tests) is deficient. Cost cutting by consultants to win the work inevitably results in field surveys which do not follow established industry guidelines or current “best practice”. Given that the DEC 2004 *Threatened biodiversity survey and assessment guidelines* are still in draft form and have not been enshrined within legislation, the powers of consent authorities such as council to enforce these guidelines is limited.

Disclaimers regularly appear within impact assessment reports by a number of NSW ecological consultancies which make statements acknowledging that the assessment has been defined in consultation with clients based on time and budgetary constraints that

have been dictated by the client. Such disclaimers suggest a lack of independence in the assessment process.

Recommendations - In the absence of a government body to ensure independence between consultants and applicants, an accreditation scheme should be established (by government in consultation with industry such as the NSW Ecological Consultants Association)

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?

Response: No, the regulatory system does not adequately protect listed threatened species.

This is particularly so for the removal of habitat that may support threatened species on development sites, especially for smaller lots in urban areas containing habitat.

Individually, the loss may not be significant, but cumulatively, over a number of years and number of developments where habitat is removed, the loss can be significant, often described as “the death (of habitat) by a thousand cuts”. Former ammendment to the NSW Planning and Assessment Act 1979 aimed to address this issue with changes from the ‘8 Part Test’ to ‘7 Part Test’ where proponants are required to consider local populations rather than ‘the species’. This change has failed to address the cumulative impacts of development on threatened species.

Inadequate penalties exist for illegal clearing of threatened species and communities. This has resulted in a feedback cycle in encouraging even less enforcement, where administrative agencies are disinclined to prosecute because low fines do not make it worthwhile. If the fine for clearing is less than the subsequent financial benefits of the clearing, then there is little incentive for the land user to comply with the law.

The effectiveness of the regulatory system in controlling the clearance of native vegetation is limited, especially for development applications on private land where a large proportion of Warringah’s native vegetation is located. While development approval involving land clearing is increasingly subject to constraints such as offsets and or meeting the “improve or maintain” test, the end result of development consent is usually a net loss of threatened species.

Council may be less likely to pursue, through the Land and Environment Court, applicants of smaller individual developments that “accidently” remove threatened species habitat (common native vegetation or a small number of habitat trees) through a “misunderstanding” of Biodiversity Management Plans.
Often the applicant offers, or are served a Council Order to, “restore” land under Environmental Planning And Assessment Act 1979 - Sect 121B.

However, the value of the habitat is undervalued or cannot be effectively “restored”. The reliance on the order “restore” to repair damage done, and the undervaluing of

the original habitat, can be seen in Falcomata v Ku-ring-gai Council (No 2) [2005] NSWLEC 459, Judgement 52, “it is appropriate to deal with the broad issue of how preservation of landscaping or protection of existing vegetation might be dealt with in a development consent by setting out the relevant planning principles for conditions which might deal with such matters.
Planning principle for the imposition of conditions relating to the preservation of landscaping or protection of existing vegetation”

Judgement 53 contains recommended conditions to prevent damage to landscape, with, in case of damage;
“(4) Conditions can include the requirement that if a tree or vegetation to be protected dies or is significantly damaged, it is to be replaced;”

The requirement in the condition or in a order to have damaged trees or vegetation “replaced” significantly undervalues habitat that was removed. For example, a 70-100 year old habitat tree, containing habitat hollows for threatened species, if accidently removed is replaced by an “advanced” tree, 3-5 years old, approximate cost of $100 to $200, not including the planting or maintenance. It is often impractical or impossible to replant trees older than 5 years of age, with most trees taking at least 70 years to produce hollows.

Environmental Planning And Assessment Regulation 2000 - Reg 136M can allow bonds/security to be set on Council land, “The funds realised from a security may be paid out to meet the cost of making good any damage caused to any property of the council”.

However, this type of security cannot be applied to protect trees or biodiversity on private land.

Judgements in Falcomata v Ku-ring-gai Council (No 2) [2005] specifically mention that Council is restricted in pro-actively setting bonds to protect habitat or individual trees on private property. This relies on well written conditions set or reactive orders to “restore”, which previously discussed, is inadequate compensation, or prosecution through the Land and Environment Court, a costly exercise for both parties and rarely sees adequate compensation towards the environment.

To address better protect threatened species habitat on private land, a more effective regulatory system should include amendments in either the Environmental Planning And Assessment Act 1979, Threatened Species Conservation Act 1995 to allow “biodiversity bonds” to offset damage to threatened species habitat on private land would be a pro-active method, without the reliance on pursuing “damage” to habitat through the Land and Environment Court.

Recommendation: Consideration given to amending the Threatened Species Conservation Act 1995 and/or National Parks and Wildlife Act 1974 to legislate the

ability for approval authorities to implement bonds/security deposits to better protect habitat for threatened species/biodiversity.

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

Response: Yes – relating to Bonds/Security for retention of trees and landscaping relating on private land are currently in place in a number of Councils in Canada. http://www.surrey.ca/files/TREE_BYLAW_INTRODUCTION_AND_OVERVIEW.pdf

NSW Land and Environment Court cases have rejected Council's application of bonds or securities to better protect trees that may be habitat for threatened species. Falcomata v Ku-ring-gai Council (No 2) [2005] http://www.lawlink.nsw.gov.au/lecjudgments/2005nswlec.nsf/c45212a2bef99be4ca256736001f37bd/40e09355ad94ed76ca2570650081b805?OpenDocument

Correspondence with Surrey Council Planning and Development Department found that bonds/securities are the most effective way to ensure compliance and protection relating to trees and the landscape.

If similar bonds or security deposits could be applied to Threatened Species habitat, including trees, through State wide legislation, such as the Threatened Species Conservation Act, Councils could apply these bonds are a more efficient form of regulation.

Recommendation: Consideration given to amending the Threatened Species Conservation Act 1995 and/or National Parks and Wildlife Act 1974 to legislate the ability for approval authorities to implement bonds/security deposits to better protect habitat for threatened species/biodiversity.

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

Response: As an alternative consideration, the number of lost opportunities for biodiversity management and protection caused by development.
The Northern Beaches hospital development resulted in the removal approximately 2ha of Duffy Forest Endangered Ecological Community (EEC), and with potentially more loss with the associated traffic and housing infrastructure. The final outcome resulted in the loss of EEC being compensated with BioBanking. However, innovative biodiversity practices such as the use of topsoil translocation to preserve seed bank in the soil were not pursued to completion. What could have been an opportunity demonstrate innovation and best practice were lost on this development.

Recommendation: Consideration given for current and future major projects to use innovative and best practice in biodiversity management, above and beyond Biobanking, in consultation with local land managers.

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

Lack of time to comment

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

Lack of time to comment

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?

Any “rationalisation” or simplification of processes has inherent risks of reducing robustness of consideration of locally important species and communities.

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?