



Environment
Institute of
Australia and
New Zealand

Response to Proposed NSW Biodiversity Reforms 2016

1 Background

The Environment Institute of Australia and New Zealand (EIANZ) is pleased to make comments on the proposed NSW Biodiversity Conservation Bill 2016, Local Land Services Amendment Bill 2016, Draft Biodiversity Assessment Method (BAM), and related documents on public exhibition. EIANZ has previously made other submissions on the development of offset policy in Australia (EIANZ 2014a, EIANZ 2014b).

EIANZ considers that the maintenance and enhancement of biodiversity values is important to achieve a resilient and sustainable landscape that meets the environmental, social and economic needs of Australian communities. A decline in biodiversity values has been reported in recent years in spite of political commitments and legislative frameworks to protect this essential characteristic of the Australian landscape (SeWPaC 2011).

The EIANZ broadly supports review and updating of NSW legislation relating to biodiversity and development to ensure that it remains relevant to contemporary issues and can work effectively. However, EIANZ considers that the fundamental and transformative reform proposed could be substantially improved. There are also significant concerns and omissions especially in relation to implementation details such as the proposed assessment methods, mapping, regulations, and potential carbon emission impacts.

In particular, EIANZ considers it critical that decision-making processes better integrate biodiversity and land use planning, do not over-emphasise the ability of offsets to replace lost vegetation and habitat, and that exemptions to native vegetation clearing approvals do not result in unnecessary clearing and overall further declines in biodiversity. Biodiversity offsets should also be extended to and consistent for all significant clearing and development across the state.

The proposed NSW Biodiversity Conservation Bill 2016, Local Land Services Amendment Bill 2016 and related documents represent an important policy initiative and have been reviewed in this submission. Detailed comments on key aspects of the proposals on exhibition are outlined below, focusing on:

1. Legislative objects and structure
 2. Removal of 'improve or maintain' environmental standard
 3. Slowing the rate of biodiversity loss
 4. Protection of native plants and animals
 5. Areas of outstanding biodiversity value
 6. Land stewardship arrangements
 7. Native vegetation mapping
 8. Biodiversity in land use planning and development approval processes
 9. Biodiversity offsetting
 10. Biodiversity monitoring and reporting
 11. Biodiversity Conservation Trust and Fund
 12. Carbon emission implications
 13. Biodiversity offset method & accreditation
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2 About EIANZ

The EIANZ, as the leading membership based professional organisation for environmental practitioners in Australia and New Zealand, is an advocate for good practice environmental management. It holds members accountable for ethical and competent good practice environmental management.

The Institute regularly delivers professional development activities about a wide range of subjects of interest to environmental practitioners, and delivers an effective training program for early career environmental practitioners in seven core environmental and professional practice proficiencies.

A Certified Environmental Practitioner Scheme (www.cenvp.org) is also in place to assess and certify competent experienced environmental practitioners working in government, industry and the community. This includes specialist competencies such as Ecology.

The EIANZ is an advocate for environmental assessment and monitoring investigations and reports being certified by suitably qualified and experienced persons for the completeness and scientific rigor of the documents. One of the ways of recognising a suitably qualified practitioner is through their membership of, and certification by, an organisation that holds practitioners accountable to a code of ethics and professional conduct, such as the EIANZ.

The EIANZ is a not-for-profit, charitable organisation incorporated in Victoria, and a registrable Australian body under the Corporation Act 2001 (Cwth), allowing it to operate in all Australian jurisdictions.

3 Former and existing biodiversity and native vegetation legislation

The current proposals represent a further step in the evolution of legislative and policy responses to public demands to protect the important role played by native vegetation in maintaining the Australian landscape, its natural resources, biodiversity and cultural identity.

It is important to recognise previous legislation and policy, and how this evolved into the current *Native Vegetation Act 2003*, which is now proposed to be repealed. New biodiversity legislation represents a further iteration in a process that has involved considerable investment by the NSW Government and the community. It is important to build on previous work rather than to replace already complex present practice with untested and potentially even more complex and unworkable changes.

Important features of past legislation and regulatory measures affecting clearing of native vegetation and bushland in NSW are identified in Table 1 below.

Table 1. Chronology of NSW legislation and policies relating to native vegetation and biodiversity

Legislative or regulatory instrument	Period of operation	Key features
Environmental Planning and Assessment Act (Dec 1979)	36 years and still operating	Original objects included ‘the proper management, development and conservation of natural and man-made resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,’ as well as ‘the protection of the environment.’ These objects remain current, with the latter expanded to include ‘the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats.’ The Act sets out the requirements for assessing the significance of effects [from any development/action] on threatened species, populations, ecological communities or their habitats (s5A – seven-part test) and the overall requirements for environmental assessment under pt5.
State Environmental Planning Policy 14 – Coastal Wetlands (Dec 1985)	30 years and still operating	Introduced definitions of clearing and native plants. Required development consent under EP&A Act for wetland clearing or draining and impacts on biodiversity. Main difficulty with implementation related to mapping accuracy.
State Environmental Planning Policy 19 – Bushland in Urban Areas (October 1986)	29 years and still operating	Aimed to protect native vegetation communities, landscapes, bushland and habitat connectivity. Introduced definition of bushland, provided for bushland plans of management, and required consideration of bushland impacts from adjoining developments.
Local environmental plans (various LGAs)	Various	A range of environmental planning instruments have included clearing or native vegetation controls in the past, ranging from environmental and landscape zones, tree preservation, and biodiversity protection. With the introduction of standard LEP provisions these have now been replaced with less effective and non-locally specific generic tree preservation provisions.
State Environmental Planning Policy 46 – Protection and Management of Native Vegetation (August 1995)	3 years	Aimed to prevent inappropriate native vegetation clearing across NSW and required development consent from the Department of Land & Water Conservation and concurrence from National Parks & Wildlife Service. Introduced definitions of biodiversity, clearing, native vegetation, remnant vegetation, riparian vegetation and native grasslands. Intended as an interim measure while a legislative framework was developed.
Native Vegetation Conservation Act 1997	7 years - some provisions still apply	Replaced interim clearing controls with objects to conserve and manage native vegetation on a regional basis and to prevent inappropriate clearing and to apply principles of ecologically sustainable development (ESD). Updated definitions of clearing and native vegetation. Introduced a framework for regional vegetation management planning and consultative committees, native vegetation codes of practice and property agreements. Development consent was required for clearing using the process under Part 4 of the EP&A Act. Some provisions relating to clearing on State protected land and private native forestry still apply.

Legislative or regulatory instrument	Period of operation	Key features
Native Vegetation Act 2003	13 years and still operating	New objects including to prevent broadscale clearing unless it improves and maintains environmental outcomes. Applies principles of ESD. New definitions of native vegetation, broadscale clearing, remnant native vegetation, protected regrowth and routine agricultural management. Introduced property vegetation plans (PVP), and development consent required for clearing or as provided for in a PVP. Native Vegetation Regulation introduced environmental outcomes assessment methodology to determine improve or maintain threshold and private native forestry code of practice.
Threatened Species Conservation Act (April 1995)	21 years and still operating	Key objects include conserving biological diversity (biodiversity), promoting ESD, and preventing the extinction and promoting the recovery of threatened species, populations and ecological communities. The objects of the Act itemise six facets of threatened species/communities' conservation. Provides definition of biological diversity and schedules listing threatened species, populations and ecological communities, as determined by the scientific committee under s128A. The Act includes provisions for the identification and declaration of critical habitat, preparation of recovery plans, threat abatement plans and priority action statements, licencing requirements to harm/pick threatened species, the preparation of Species Impact Statements and biodiversity certification and BioBanking requirements and procedures.

Legislative or regulatory instrument	Period of operation	Key features
Biodiversity Conservation Bill 2016	Proposed	<p>Key purpose is to 'maintain a healthy, productive and resilient environment', in particular to conserve biodiversity and ecological integrity at bioregional and State scales and to <u>facilitate</u> ESD. Key definition of 'biodiversity values'. Contains provisions for protection of native plants and animals, establishes a new category of 'areas of outstanding biodiversity value' (formerly critical habitat but relates to biodiversity conservation investment strategy), listing of threatened species, ecological communities and key threatening processes. Retains an independent scientific committee. Requires a biodiversity conservation investment strategy and simplifies and renames private land conservation agreements. Establishes a framework for biodiversity offsets scheme with a method, accreditation of assessors, assessment requirements, and arrangements for creation and transfer of biodiversity credits, largely based on existing Biobanking scheme under the Threatened Species Conservation Act 1997. Establishes a biodiversity stewardship payments fund linked to the biodiversity offsets scheme. Existing approval requirements under the EP&A Act are generally retained, including the '7 part test of significance' and potential use of the biodiversity offset scheme to create credits. However, this may depend on the definition of biodiversity values and an undefined threshold is introduced for applications requiring a biodiversity development assessment report. In some cases 'serious and irreversible impacts on biodiversity values' need to be considered in approvals. Requirements for species impact statements for significant impacts are retained. Biodiversity certification of land can be given by the Minister for the Environment, with approved conservation measures or retirement of credits and biodiversity certification agreements. A key innovation is the proposed establishment of a biodiversity conservation trust which has the object of protecting and enhancing biodiversity by encouraging private stewardship arrangements and seeking offset outcomes, and is apparently an extension of the existing Nature Conservation Trust of NSW.</p>
Local Land Services Amendment Bill 2016	Proposed	<p>One of 9 objects is to 'ensure proper management of natural resources consistent with the principles of ESD'. Regulates vegetation clearing. Approval requirement depends on categorisation in a native vegetation regulatory map, whether authorised under other legislation (e.g. EP&A Act, exempt development, bush fire hazard reduction, infrastructure or biosecurity, forestry, mining, etc), is an allowable activity (e.g. construction timber, firewood, public works, gravel pits, infrastructure, sustainable grazing, airstrips, firebreaks, or rural infrastructure, etc. Approvals are given by Minister for Primary Industries under the LLS Bill (not EP&A Act although provisions <u>may</u> apply). Consent requires consideration of the likely impact on biodiversity values in a biodiversity development assessment report and approval must be refused if 'serious and irreversible impacts on biodiversity values' are likely after proposed measures to avoid or minimise and implemented. Environment agency has no role in approval except for administering biodiversity offset scheme. The native vegetation regulatory map may be amended and decisions are appealable, as are decisions to refuse clearing applications.</p>

4 Legislative objects and structure

Significant changes are proposed to the existing arrangements. While the structure and administrative responsibilities of the existing legislation are relatively clear, the bills on exhibition appear to add complexity and confusion to an already complicated framework. Specifically, it is proposed to increase the number of agencies involved in the approval framework from Department of Planning and Environment, local government authorities, Office of Environment and Heritage, Local Land Services, Minister for Primary Industries (or Department), and the responsibilities between agencies are less clear. Separating vegetation clearing approvals into two separate pieces of legislation is inappropriate.

Key comments on the Biodiversity Conservation Bill 2016 and Local Land Services Amendment Bill 2016 are as follows:

1. The objects of the Draft Biodiversity Conservation Bill 2016 are not appropriate, and should be amended to ensure that biodiversity and ecological integrity are conserved at site, local, bioregional and State scales. If the underlying purpose of the bill is 'for the well-being of the community,' consideration of site and local biodiversity must be an integral component of biodiversity conservation, local communities often being most affected by clearing of vegetation, loss of habitats and changes in the local landscape. The objects of the existing Native Vegetation Act 2003 should be incorporated into the objects of the bill.

Additionally, the overall purpose of the Draft Biodiversity Conservation Bill 2016 appears to be only for the well-being of the community, suggesting a very anthropocentric focus and belying the title of Biodiversity Conservation Act. The well-being of the environment per se also should be included (as in the objects of EP&A Act right from the commencement of the act in 1979 [s5(a)(i)]).

2. The definition and application of 'biodiversity values' in the Draft Biodiversity Conservation Bill 2016 (1.5) is difficult to interpret and does not really reflect the science underpinning biodiversity. Because this can be defined by regulation, it is difficult to determine what the consequences could be in terms of the scope of approvals.
3. Land use decisions and land management decisions are quite different and require different approaches, assessment and processes as recognised by the Independent Biodiversity Legislation Review Panel (IBLRP 2014). This is a fundamental issue identified in the IBLRP report (Recommendation 40) and not followed in the draft legislation. It was recommended that clearing associated with agricultural development be regulated under the planning system with agricultural land management clearing managed by Local Land Services.
4. Local Land Services is a land management agency whereas the approval role is primarily related to land use decision-making. The Local Land Services Act 2013 is not the appropriate legislation within which to include clearing approvals, and shifting responsibility for vegetation clearing approvals from a planning & environment /development agency to a land management agency (Department of Primary Industries and Local Land Services) is inappropriate.
5. Approvals for impacts on biodiversity in rural and urban areas are inconsistent and in separate pieces of legislation, subject to different administrative frameworks and requirements, and with three separate NSW Government agencies as well as local government approval authorities. There seems to be no plan or structure to rationalise and establish equitable arrangements between rural landholders, the development industry, and agencies subject to exemptions from approval such as infrastructure providers. The

consequence of this is to create unfairness, lack of transparency, and to increase uncertainties and disputes.

6. NSW Government is departing from a key recommendation of the Independent Biodiversity Legislation Review Panel to 'level the playing field for agricultural development and land management activities' that suggested that the assessment and approval of all forms of agricultural development that involve clearing of native vegetation into the Environmental Planning and Assessment Act 1979. (1d of Independent Panel report)
7. The bills also depart from recommendation from the IBLRP to 'amend local environmental plans to provide landholders with certainty about which types of agricultural development that includes native vegetation clearing would require development consent under the Environmental Planning and Assessment Act 1979.
8. The IBLRP recommended that biodiversity objectives and priorities are incorporated in regional plans prepared under the Environmental Planning and Assessment Act 1979, and this is not reflected in the structure of the legislation or in any detailed provisions. It is not clear whether this can be implemented without restructuring the proposed legislation.

Lacking a clear legislative and administrative structure and logic, there are likely to be many unexpected and unintended consequences. The legislation would also be expected to be difficult and expensive to administer, with the consequence that if implemented in its present form, it would be likely that it needs significant amendments or replacement within a short time.

Proposals:

1. *That the Local Land Services Act 2013 is not appropriate legislation for native vegetation clearing provisions, and that definitions, approval processes for native vegetation clearing and exemptions should be included within the Environmental Planning and Assessment Act 1979 and be consistent with the processes of that Act.*
2. *It is unwise and unnecessarily complex to divide administration of native vegetation, biodiversity, bushland, urban trees and land use planning between three ministers and multiple agencies and numerous pieces of legislation and regulatory instruments.*
3. *Object 1.3(a) of the bill should be amended to recognise that biodiversity must be conserved at the site and local level within a bioregional and State context.*
4. *The objects of the current Native Vegetation Act 2003 remain appropriate and should be incorporated within new legislation.*
5. *That recommendation 40 of the Independent Biodiversity Review Panel Report be implemented, with clearing associated with agricultural development regulated under the planning system.*
6. *That the wording of the purpose of the draft Biodiversity Conservation Act be amended viz: '...to maintain a healthy, productive and resilient environment for the greatest well-being of the community **and the environment...**'*

5 Removal of 'improve or maintain' environmental standard

The existing Native Vegetation Act 2003 includes the object to improve or maintain environmental outcomes, which is not retained in the new proposed legislation. The existing standard has become accepted practice, and should be maintained to ensure the current rate of decline in biodiversity actually is reversed. Improving knowledge (1.3[c] of the Biodiversity Conservation Bill)) is highly desirable but actions to improve also must occur. It is noted that the Independent Biodiversity Legislation Review Panel (IBLRP 2014) recommended that the 'improve or maintain' standard be removed '**at a site scale**' (1b of IBLRP) (with which we are not in agreement as

indicated in Point 4.1), but the concept of 'improve or maintain' has been omitted completely at any scale.

It is appropriate that the legislation contain some guiding principle or standard to guide decision-making in relation to conservation of native vegetation. The improve or maintain standard remains appropriate, and provides an important benchmark especially for determining the acceptability of biodiversity offsetting arrangements, using the biodiversity offsetting methodology or other methods that may be applied in strategic planning or minor development proposals determined by local government.

Proposals:

1. *That the improve or maintain environmental standard be retained to guide decision-making and be incorporated in the legislation.*

6 Slowing the rate of biodiversity loss

It is stated that the purpose of the bill will be achieved by: 'taking conservation and threat abatement actions to **slow the rate of biodiversity loss** [our emphasis]. Simply aiming to slow the rate of biodiversity loss is inappropriate and unacceptable for a Biodiversity Conservation Act, particularly in view of the findings of the NSW State of the Environment Report 2015 (EPA 2015) that the numbers of species considered at risk of extinction in NSW is continuing to increase and there is a relatively stable but continuing rate of clearing of approximately 11,000 hectares per year. In this context, the only logical aim should be to reverse the current trends and prevent further biodiversity loss.

Proposals:

1. *That the wording of point (a) be amended to: 'taking conservation and threat abatement actions aiming to halt or reverse biodiversity losses.'*

7 Protection of native plants and animals

The existing arrangements for protection of native plants and animals, and also the listing of threatened species and threatened ecological communities are largely proposed to be retained. It is welcome to see the continuity of existing practice maintained, and also to retain the independent scientific committee to review and determine listings of communities, species and key threatening processes.

However, it would be appropriate to improve consistency between threatened species listings under State and Commonwealth legislation, provided this process is subject to robust scientific assessment and peer review.

It also is concerning that there do not appear to be any additional provisions relating to improving biodiversity outcomes from private forestry operations. Threatened species and fauna species in general have been known to be severely impacted by such operations and clearing of native forests for private forestry should be subject to appropriate assessments and controls.

Proposals:

1. *That consistency between State and Commonwealth threatened species and community listings be improved, subject to robust scientific assessment and peer review.*
2. *That the provisions and codes for farm forestry operations be subject to careful and considered review and appropriate protection for fauna species better incorporated into the proposed legislation.*

8 Areas of outstanding biodiversity value

The concept of declaring ‘areas of outstanding biodiversity value,’ also incorporating areas currently declared as critical habitat, could be expected to provide a positive contribution towards biodiversity conservation. Under s3.5 (2) and 3.5.(3) of the Biodiversity Conservation Bill, the revocation of such an area can be at the discretion of the Minister for the Environment, subject to the same consultation and notification procedures as required for the declaration process. However, it is unclear as to what extent or in what manner the regulations may affect these procedures.

Proposals:

1. *That the manner in which the procedures undertaken for a revocation of ‘areas of outstanding biodiversity’ are ‘subject to the regulations,’ be clarified.*

9 Land stewardship arrangements

A biodiversity and investment strategy and proposed simplification of private land conservation agreements is welcome, and appears to represent an improvement on existing practice. However, there appears to be a significant administrative disconnect between the investment strategy and mapping of biodiversity protected areas which are the responsibility of the Minister for the Environment, and the issuing of clearing approvals and monitoring of native vegetation which are the responsibility of the Minister for Primary Industries.

While the existing Biobanking scheme is generally retained with a changed name (Biodiversity Stewardship Agreements), there appear to be numerous minor changes to the detailed operation of the scheme which are difficult to determine.

EIANZ suggests that a review of the *Mining Act 1992* is required before new biodiversity legislation is enacted. In particular, the current mining legislation and mining titles represent a barrier to the establishment of biodiversity offset sites and land stewardship agreements because they prevent opportunities to establish offset sites in practice. This has prevented the establishment of Biobank sites over the course of operation of the Biobanking Scheme.

Additionally, a range of developments by public authorities (for essential public purpose or of special state significance) would appear to take precedence over the retention of established biodiversity stewardship sites, suggesting the long term integrity of such sites as viable offsets is uncertain. The provision to allow the public authority to retire other biodiversity credits to ‘offset the offset,’ in combination with the soft wording of s 5.16 (3) that ‘the Minister for the Environment **may** [authors’ emphasis] ... direct the public authority to retire biodiversity credits..., further decreases the level of certainty regarding offset integrity and permanency.

This process has been highly contentious, as evidenced by recent court actions within NSW (Martin 2013, *Bulga Milbrodale Progress Association Inc v Minister for Planning* 2013). Is the same process to be followed if the replacement biodiversity stewardship site is subsequently subject to an essential public purpose or state significant development? As the owner of a biodiversity stewardship site is not entitled to any compensation for termination of the stewardship agreement, the provisions favouring public authority developments in this context, also may deter landowners from entering into biodiversity stewardship agreements.

Proposals:

1. *That a review of mining legislation and titles be undertaken to ensure that these do not prevent the establishment and management of land stewardship agreements.*
2. *That the biodiversity stewardship agreement, site establishment and termination provisions be reviewed and amended to strengthen the certainty that offsets will maintain or improve biodiversity values.*

10 Native vegetation mapping and approval requirements

The proposed regulation of native vegetation clearing is underpinned by mapping. While the broad method has been outlined, it is not clear how reliable and accurate this mapping will be across the whole State. This is fundamental to the operation of the proposed legislation, yet experience shows that this is likely to be problematic. In particular, there is a need for accurate local vegetation mapping at a suitable scale.

There is a problem of having one map across NSW given different mapping accuracies and methods, and the wide variety of variation in vegetation communities across the landscape. The ability to request amendments to the maps and appeal against determinations in the Land & Environment Court is problematic and will create uncertainty and conflict, and potential inconsistency.

Local Land Services codes of practice for vegetation clearing appear unworkable, and on-site ground truthing is essential. This is provided for in the current PVP process but not included in the proposed legislation. It is of concern that the mapping focuses on woody vegetation and although individual trees apparently are captured, the treatment of scattered shrubs, such as the threatened Thorny Pea (*Desmodium acanthocladum*) and threatened herbs or grass species, such as Hairy Jointgrass (*Athraxon hirsutus*) is unclear. Such species can occur in areas that have been cleared and grazed for many decades, but it would seem likely that these areas would be classified as Category-1 exempt land. Unless on-site ground truthing is undertaken, the occurrences of these types of species would not be taken into account.

It is noted that the Category 1- exempt land includes land that has been 'cleared of native vegetation as at 1 January 1990' (s60G [1] [a] of the LLS Amendment Bill). This definition is the same as the definition for regrowth under the *Native Vegetation Act 2003*, established over 10 years ago. This means that trees on the Northern Rivers for instance, that are well established young mature trees over 25 years old, are to be considered as regrowth and subject to clearing. How long is this definition expected to apply? EIANZ would suggest that this definition needs to be reviewed and it would be more logical to apply age classes to the definition of regrowth.

Additionally, it seems that category 2 - regulated land does not include land that supports any threatened fauna (other than Koalas), or any threatened plants or communities of a lesser category than critically endangered (s60H [2] of the LLS amendment bill). The designation of category 2 – regulated land also appears to be over-ridden by the provisions of category 1-exempt land in some instances and vice versa in other instances and designation of the latter refers to land 'of a kind prescribed by the regulations as category 1-exempt land,' for which we have no details. This overall outcome is generally unclear.

Proposals:

1. *That the mapping method be able to include local and site based mapping, also giving consideration to the potential for threatened shrubs and groundcover species to occur.*
2. *That the definition of Category 1 - exempt land relevant to the time that an area was cleared needs to be reviewed and consideration be given to applying age class categories to vegetation considered as regrowth.*
3. *That the categorisation of land be reviewed and clarified and category 2-regulated land designations include land identified as supporting threatened species habitat and/or threatened vegetation communities.*
4. *That amendment and review of the native vegetation map to determine clearing amendments should not be able to be appealed through court processes, but by independent peer review.*

11 Biodiversity in land use planning and development approval processes

The Independent Biodiversity Review Panel emphasised the importance of consideration of biodiversity in land use planning. It recommended clearing for agricultural and other development be approved under the Environmental Planning and Assessment Act 1979 (Recommendation 1d and 6), amendment to local environmental plans to clarify clearing requiring approval (Recommendation 4), and integration of biodiversity in regional plans (Recommendation 15 and 16). These have not been carried through into the legislative proposals.

Focus only on bioregional and state issues relating to biodiversity conservation is a key failure in principle. Biodiversity conservation needs to simultaneously occur at both the site and bioregional scales, which means that actions and plans at the local level are essential for meaningful decision-making and environmental outcomes.

Proposals:

1. *That biodiversity legislation should enable biodiversity conservation planning to be integrated into land use planning processes under planning legislation.*
2. *That the legislative provisions should allow for local actions to implement biodiversity planning and conservation measures, including in local environmental plans and in the administration of other local government responsibilities.*
3. *Object 1.3(a) of the bill should be amended to support biodiversity conservation at the site and local level.*

12 Biodiversity offsetting

The draft bill fails to recognise the wide range of biodiversity offsetting arrangements that are implemented in current practice, and established principles underpinning offsets (Fallding 2014).

A legislative standard is needed to consistently apply the offset method, to be consistent irrespective of the purpose which is applied (e.g. use the existing 'improve or maintain' standard, or move to a 'no net loss' standard which is widely accepted around the world).

It is difficult to understand the offsets scheme without full details of regulations. However, it appears that offsets can be transferred into financial payments instead of credits, which then are paid into the Biodiversity Stewardship Payments Fund. There is concern that these funds will not be used to source appropriate offsets and to conserve suitable lands, but rather to make stewardship payments to landholders who may not be in a position to make up the shortfall in the loss of biodiversity resulting from the clearing.

A particular concern is that offsetting fails to consider the local strategic land use and planning context. At the local level, there may be habitat corridors, small areas of native vegetation and features which are not evident at the bioregional or State scale but which are important to retain.

During the preparation of the bills there appears to have been little consultation with existing practitioners in biodiversity offsetting and planning. Biodiversity offsets are a planning and development assessment tool, and there is considerable experience with problems with the lack of take-up of the existing Biobanking scheme which need to be remedied. Many local governments already apply negotiated biodiversity offsetting arrangements outside Biobanking, and flexibility to maximise conservation outcomes needs to be retained in strategic land use planning processes.

Proposals:

- 1. That further information on the operation of the offsets scheme be provided.*
- 2. That prior to the finalisation of the legislation, consultation occur to review past experience in determining and securing biodiversity offsets in strategic land use planning and development assessment processes.*

13 Biodiversity monitoring and reporting

The reform does not include a robust whole of government monitoring and evaluation framework as proposed by the IBLRP in its final recommendations. Monitoring and reporting is divided between the Office of Environment and Heritage and Local Land Services, plus many local government areas also maintain their own development and monitoring programs.

It appears that monitoring and reporting arrangements can be more efficiently administered than proposed in the new legislation, and ideally should be undertaken by an independent authority.

Proposals:

- 1. That further consideration be given to the proposed monitoring and reporting framework to improve its likely effectiveness.*

14 Biodiversity Conservation Trust & Fund

The Biodiversity Conservation Bill 2016 would establish a trust, which is a significantly expanded NSW Nature Conservation Trust. There are also three separate funds to support its activities, namely:

- Biodiversity Conservation Fund
- Biodiversity Stewardship Payments Fund (related to biodiversity offsets scheme, and the current Biobanking Trust Fund)
- Biodiversity Conservation Trust Public Fund

While the establishment of these arrangements is a good idea in principle, more details of the proposal are required. Key principles underpinning the establishment of the funds should be that:

- Payments to the Biodiversity Stewardship Payments Fund must be at least the equivalent of the costs of providing and maintaining suitable offset land in perpetuity.
- Funds should only be able to be spent on offset acquisition and management, not on scientific research or derelict mine rehabilitation, etc.
- The Fund should be operated independently of government to avoid conflicts of interest, and to ensure targeted investment is appropriate.

- The Trust board should include representatives from both state and local government, and specialists in biodiversity land management. In particular, the Fund investment program should be linked to local strategic land use planning frameworks.
- Payments to the Fund need to be expended appropriately, and within a reasonable time frame.
- The Fund should be available to provide offsets for all development, particularly local government which may have local offset schemes in addition to the legislated requirements for offsets above a certain vegetation clearing threshold.

While the Fund has the advantage that it simplifies the process of transferring biodiversity offsets and can enable more strategic and co-ordinated purchase and management of offset land, there are, however, a number of risks. A significant risk is that not enough land will be available for acquisition for offset sites and the use of a fund transfers the risk and cost of providing offsets from developers to the NSW Government.

Because it is a convenient offset option, payments to the Fund are likely to become the default option for all development proposals requiring offsets. Therefore, it is essential for the policy to provide more detailed guidance outlining when payments to a Fund are appropriate and acceptable, and how the quantum of payment is to be determined. Additional arrangements may be necessary to ensure that suitable offsets can be secured, such as compulsory acquisition arrangements.

Proposals:

1. *That a review be undertaken of the quantum of offset land that may be required for the effective operation of the proposed legislation.*
2. *That the Biodiversity Conservation Trust be given powers to enable compulsory acquisition of land for biodiversity conservation purposes in the event that no suitable biodiversity offset sites are available.*

15 Carbon emission implications

Native vegetation in NSW constitutes a significant potential carbon sink and also a potential carbon source. Therefore, changes which affect clearing will have implications for carbon emissions in the state. As a significant national and international issue, a review should be undertaken of the likelihood that removing exemptions to native vegetation clearing requirements will increase carbon emissions with resultant climate change impacts.

Proposals:

1. *That an additional object should be added to both the Biodiversity Conservation Bill 2016 and the Local Land Services Amendment Bill 2016, namely to minimise atmospheric carbon emissions that may result from the clearing and management of native vegetation, and to facilitate carbon neutrality in natural resource management.*

16 Biodiversity offset method (BAM) & accreditation

The application of standard, science based methodology to the assessment of biodiversity impacts is supported. However, some limitations of the approach proposed are that:

- Applying the methodology within the complex regulatory framework proposed, together with exemptions, codes and local government development approval processes will lead to inconsistent assessment of biodiversity between different approval pathways and for

different scales of impact. In particular, developments with local or site biodiversity impacts are likely to fail to be assessed, notwithstanding the cumulative impacts of these proposals.

- Proper ecological surveys are required, not simply regional scale vegetation mapping and modelling which in many localities is inaccurate and unreliable for quantifying offsets. The Plant Community Type (PCT) classification system for vegetation communities is very broad, and is poorly suited to site based ecological assessment. Furthermore, impacts on all flora and fauna should be considered, not simply listed threatened species.
- Biodiversity assessment should be linked to, or at least take into account the strategic land use planning framework. Issues of habitat connectivity and corridors are not adequately catered for in the BAM and need to recognise altitudinal and latitudinal shifts necessary for climate change adaptation.
- Quick determination of the likely scope and acceptability of offsets and options is essential for development planning. Use of the BAM is limited to accredited assessors and is not transparent or readily applied to land use planning.

EIANZ supports the concept of accreditation of assessors using the BAM. However, given the importance of the calculation of offset requirements, assessment should be undertaken independently of the development proponent or should be subject to an independent peer review process.

EIANZ would be interested in participating in the establishment of an accreditation scheme, and proposes that this should include consideration of ethical standards as well as technical standards for using the methodology.

The IBLRP recommended that the NSW Government adopt a single, scientifically-based, transparent, publicly-available and independently reviewed method for assessing the biodiversity and other environmental impacts of all development in NSW. The proposed bills have one method, but it is inconsistently applied across the state, based on a process that is not consistent in its accuracy, and is subject to numerous exemptions that mean that most development involving clearing will not have to apply the process. In other words, the recommendation of the review panel has not been implemented.

Proposals:

1. *That the NSW Government include ethical standards as well as technical standards to underpin the establishment and operation of the biodiversity assessment methodology accreditation scheme.*
2. *That the applicability of the EIANZ Certified Environmental Practitioner scheme arrangements be considered in any of the proposed accreditation schemes for the biodiversity assessment methodology.*



17 Conclusion

The proposed biodiversity legislation represents a radical change to regulation of key environmental resources in NSW. EIANZ is concerned about the lack of community consultation in the preparation of the draft legislation and the poor explanatory information which fails to clearly identify the full detail or implications of the proposed changes to existing arrangements. The overall thrust of the legislation appears to be to facilitate offsetting, vegetation clearing and development, rather than biodiversity conservation. If the proposed legislation is to replace two key acts designed to protect and conserve native vegetation (and thus also fauna habitats) and threatened species, populations and communities, the new legislation should be aimed at building on the previous legislation to improve the condition of biodiversity in NSW. This does not seem to be the case with the proposed legislation in its current form.

Importantly, the proposals on public exhibition appear to increase an already complex regulatory framework. Many of the proposals appear to be difficult to administer and could be expected to increase uncertainty and inconsistency between the rural sector and the development industry.

Key proposals directly contradict the recommendations of the NSW Government's Independent Biodiversity Legislation Review Panel report (IBLRP 2014). The proposed legislation and exhibition materials are confusing and are likely to increase legislative complexity and lead to inconsistency and administrative confusion. This is contrary to the principles of good governance.

EIANZ recommends that the proposed legislation and assessment methodology should not proceed without substantial revision and pilot testing. In particular, it is essential that a comprehensive, transparent and equitable framework for the conservation of biodiversity applies across NSW and is fully integrated with NSW land use planning legislation.

EIANZ would be pleased to assist in, and contribute to the further development of the NSW biodiversity reforms. EIANZ can be contacted directly via the NSW Division: fiona@gainsford.com.au or mob 0414 400 352 or 02 9705 7558.

Yours sincerely

A handwritten signature in black ink, reading "Fiona Gainsford" followed by the date "28/6/16".

Fiona Gainsford
President, EIANZ NSW Division

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This submission has been voluntarily authored and peer reviewed by the following EIANZ member practitioners, and EIANZ NSW gratefully acknowledges their efforts in compiling this submission.

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References

Bulga Milbrodale Progress Association Inc v Minister for Planning [2013].

EIANZ (2014a) Submission to Draft NSW Biodiversity Offsets Policy for Major Projects. May 2014.

EIANZ (2014b) Submission to the Senate Standing Committee on Environment and Communications References Committee Inquiry into Environmental Offsets. April 2014.

Environment Protection Authority (EPA) (2015) New South Wales State of the Environment, NSW Environment Protection Authority.

Environmental Planning and Assessment Act 1979 (NSW)

Fallding, M (2014) Biodiversity Offsets: Practice and Promise. *Environmental and Planning Law Journal* 31: 11-33.

Independent Biodiversity Legislation Review Panel (2014) A review of Biodiversity Legislation in NSW – Final Report.

Martin, Alison, (2013). A Review of the Environment Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy and it's Potential to Improve Biodiversity Outcomes for Nationally Listed Threatened Species and Communities, Legal Research Dissertation for MEnv Law, Macquarie University.

Native Vegetation Act 2003 (NSW).

SEWPaC (2011) Australia State of the Environment 2011: Independent Report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities.

Threatened Species Conservation Act 1995 (NSW)

World Wildlife Fund (WWF) (2014) Living Planet Report 2014, World Wildlife Fund in collaboration with Zoological Society of London, Global Footprint Network and Water Footprint Network.