



Environment  
Institute of  
Australia and  
New Zealand

## Submission on the NSW biodiversity and land management reforms: Draft regulations and products on exhibition

### 1 Background

The Environment Institute of Australia and New Zealand (EIANZ) is pleased to make comments on the NSW biodiversity and land management reforms: Draft regulations and products on public exhibition. EIANZ provided detailed feedback on the (then proposed) NSW Biodiversity Conservation Bill 2016, Local Land Services Amendment Bill 2016, Draft Biodiversity Assessment Method (BAM), and related documents on public exhibition in June 2016. 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 mapping, various ancillary rules, Serious and Irreversible Impacts (SAII) thresholds and the SEPP.

EIANZ have engaged our practitioners and technical experts to provide valuable industry feedback on the draft Regulations and other key products.

This submission addresses the following components:

- Draft Biodiversity Conservation Regulation 2017
- Draft Local Land Services Amendment Regulation 2017
- Explanation of Intended Effect for the *State Environmental Planning Policy (Vegetation) 2017*
- Land Management (Native Vegetation) Code
- Biodiversity Assessment Method (BAM)
- Accreditation Scheme for the application of the Biodiversity Assessment Method
- Serious and irreversible impacts guidance
- Offsets payment calculator

## 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](http://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 Impact Assessment, Ecology and Contaminated Lands.

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 registerable Australian body under the Corporation Act 2001 (Cwth), allowing it to operate in all Australian jurisdictions.

## 3 General Feedback on the Package

1. An extremely complex regulatory framework is proposed, with confusing approval pathways and exemptions spread across three pieces of legislation, three regulations, two maps, and over ten sets of guidelines, codes of practice, ancillary rules, orders, and methods. Regulation by numerous authorities such as OEHL, Department of Industry, Department of Planning and Environment, and Councils appears unwieldy. This is going to make the system even more complex than currently and very difficult to navigate and administer. We are concerned the reforms fail several of the initial aims of the original review of biodiversity legislation in NSW, which included: *to recommend a simpler, streamlined and more effective legislation which improves the conservation of biodiversity and supports sustainable development thereby reducing the compliance and administrative burdens.*
2. The package materials generally exhibit poor articulation of how the framework hangs together. The general lack of simple flowcharts and graphics displaying approval mechanisms reflect the inherent complexity of the reforms.
3. Self-assessable rural clearing codes allow landholders to clear without permission and are based on the assumption that farmers have ecological/threatened species knowledge to inform where areas of higher biodiversity value are present within their land. EIANZ is concerned there is potential for gradual cumulative native vegetation loss due to lack of monitoring and compliance auditing by any consent authority and/or through the lack of ecological knowledge at the LLS office level. Of particular concern is the reduction in protection of threatened ecological communities, which would become more available for clearing as long as providing set asides are provided. The ongoing management for conservation purposes in perpetuity and regulatory oversight of these set asides is also a concern for the EIANZ.
4. It is a great concern that much of the rural clearing assessment process relating to the application of the vegetation codes (where regulated) and permits relies on LLS personnel perceived by many practitioners to be either inadequately resourced and/or skilled in the



biodiversity issues being addressed. EIANZ is very concerned that the provision of appropriate additional personnel and training by the government is not likely not to meet the workload requirements. Based on practitioner feedback and real case studies to date, OEH has never kept pace with processing proponent BioBanking assessments and the like. Likewise, Local Government cannot be expected to have the expertise and specialist resources to process the complex applications that they will be responsible to determine under the proposed package. EIANZ have grave concerns these various agency and local government stakeholders will not have the resources and technical capacity to effectively administer the new reforms.

5. Several crucial tools are simply not developed enough to comment on. These include the Native Vegetation Regulatory Map, Draft Sensitive Biodiversity Values Land Map and SEPP (Vegetation) to name a few. We note that there are a number of areas where detail has not yet been finalised or made public. EIANZ strongly recommend that the scheme does not commence until key instruments have been consulted on and finalised, and until there has been sufficient time for assessors to be trained and accredited, State Agency and Local government staff be trained, LLS to conduct outreach for landholders, and mapping is accurate and comprehensive. The risk to biodiversity across NSW arising from regulatory failure during transition is too high to commence an incomplete regime.
6. Effective strategic land use planning appears to be undermined by the biocertification arrangements which allow local matters to be ignored with the Environment Agency Head to override local planning.
7. Inaccuracy and inadequacy of the maps supporting the regulatory framework is of concern. The Sensitive Biodiversity Land Values Map is currently inadequate for the purpose for which it is intended, and not at a suitable scale.
8. The key thrust of the regulations reflects the intent of the relevant Acts, which emphasise the offset process and allowances for this process, at the expense of allowing increased levels of rural vegetation clearing with little or no oversight from regulatory personnel.

It is disappointing to note that the NSW Government failed to take into account most of the proposals made by EIANZ in its 2016 submission on the proposed legislative framework.

#### **4 Draft Biodiversity Conservation Regulation 2017**

1. Clause 5.2. The fees payable in relation to Biodiversity Stewardship Agreements (BSAs) appear to have increased markedly. It is recognised that OEH need to cover the real costs incurred from establishing and modifying agreements, but the costs stated appear excessive and will inhibit landowners from participating in the scheme.
2. Clause 5.8 states that the Minister may terminate a Biodiversity Stewardship Agreement (BSA) when a mining or petroleum authority is granted over a Stewardship site. Mining or petroleum authorities should not be permitted to extinguish BSA's, but as that is unlikely to be accepted by the Government, alternatively, BSA's should only be extinguished if the mining activities are likely to destroy the biodiversity values of the Stewardship site. This would mean BSAs aren't unnecessarily extinguished and mining/petroleum companies would not be required to pay any monies for the site unless they impacted it. The current arrangement whereby mining or petroleum leaseholders are required to agree to BioBank sites being established within their lease results in numerous BioBank sites not being established, and excludes potentially valuable biodiversity assets from being conserved. Mining and petroleum companies generally dismiss requests for BioBank site establishment without thought. It is recommended that in future they should be required to justify their position, giving thought to the likelihood of it affecting their operations.





3. Clause 6.2 Offset rules under the biodiversity offsets scheme set out the biodiversity conservation measures potentially available to offset or compensate for impacts (of development, clearing or biocertification proposals) after avoidance and minimisation measures. Options under clause 6.2 of the Regulation include, in any combination:

- a) Retire like-for-like biodiversity credits
- b) Retire credits under Variation rules
- c) Fund an action [listed in the BAM] to benefit species or ecological community impacted
- d) Major mine site rehabilitation
- e) Pay to the Biodiversity Conservation Fund instead [per BC Act s. 6.30].

This infers a proponent can use option (e) without needing to confirm if offsetting is possible. We would advocate that the other alternatives in clause 6.2 be restricted unless the proponent can demonstrate like-for-like credits are not available. We recommend that the Regulation prescribe prerequisites and safeguards before the proponent is eligible to use the other alternatives in clause 6.2. There is a perception by practitioners that weak offsets undervalue and interfere with price signals in the offset market. This has the potential to threaten the ability of the BOS to maintain meaningful environmental protection in NSW.

4. Sub-clause 6.2(5) deals with 'biocertification'. To ensure that ecological integrity is a fundamental consideration in biocertification, we would advocate that biocertification impacts may only be offset by like-for-like credits, where they are available, before having the option of using other offsets (under clause 6.2 of the Regulation).
5. Clause 6.2(2)(c) of the Regulation allows funding of Biodiversity Conservation Actions where the costs are equivalent to purchasing the like-for-like credits as determined by the Offsets Payment Calculator. Given the over-pricing of credits by the Calculator (as pilot tested by practitioners) outlined below, it may be unlikely any developer would take up this option. Although funding of conservation actions is supported as an option, particularly if like for like credits are not available, there needs to be an ecologically rigorous process for determining the appropriateness and usefulness of the actions proposed, and for understanding their benefit when compared with retiring credits. Any Actions that are implemented must be monitored to determine their success, and then modified if required.
6. The Regulations allow for mine site rehabilitation to generate credits, but no detail is provided about how this would be assessed. Clause 6.2(2)(d) states rehabilitation of the mine site has the same credit value (determined in accordance with the biodiversity assessment method) as the retirement of like-for-like biodiversity credits. Although the generation of credits from mine site rehabilitation is supported as it will incentivise ecologically functional rehabilitation on mine sites, it is not appropriate to provide the same credit value as non-rehabilitated PCTs, or at least not until the identity of the PCT and the ecological function can be demonstrated after a considerable time period (i.e. 20 plus years).
7. 6.3 Like-for-like biodiversity credits. There appears to be no location requirements for offsetting threatened plants and animals categorised as 'species credit' species such as koalas and squirrel gliders (i.e. whose presence cannot be reliably predicted by vegetation type). EIANZ would advocate clause 6.3(4) include location requirements for 'species credit' species so that like-for-like offsets should be in the same (or nearby) IBRA sub-region, or a distance be applied.
8. 6.4 Variation rules under biodiversity offsets scheme. EIANZ is concerned the application of variation rules has the potential to undermine the integrity of the biodiversity offsets market, however we do recognise the regulation's requirement for "The proponent who is to retire the biodiversity credits has taken reasonable steps to obtain the requisite like-for-like biodiversity credits" will hopefully manage this issue with adequate regulatory oversight.



9. 6.4 Variation rules for species credit species. The EIANZ is concerned about the option to substitute 'flora for flora' or 'fauna for fauna' (of same or higher threat status) under the variation rules for species credits (clause 6.4(1)(c)). This is very broad. The majority of practitioners (and the intent of the Act) would be that such offsets should benefit the same species. This should be considered, even if the potential to vary where in NSW the offsets are located, or other species specific conservation measures (via Clause 6.2) be entertained instead of offsetting different species.
10. 6.6 Offset and other rules applying to Biodiversity Conservation Trust applying Fund money towards securing biodiversity offsets. There seems to be opportunity in this clause for funding towards broader strategic conservation measures which are not articulated.
11. Clauses 6.8-6.10 Biodiversity assessment reports. EIANZ advocate that the regulation require that biodiversity development assessment reports document whether *all reasonable steps have been taken to avoid and minimise impacts* before biodiversity offset options have been considered (this reflects the aims of the BOS and the requirements of the BAM) to assist the consent authority assess the development.
12. 7.2 Clearing of area of land that exceeds threshold. EIANZ welcomes the clarity of the method used to calculate the thresholds outlined and believes that it should be made available for review before the reforms are implemented.

## 5 Draft Local Land Services Amendment Regulation 2017

1. A positive aspect is that the Native Vegetation Regulatory (NVR) Map Categories are simple and clear. Category 2 – regulated land, appears to be the default classification of land where clearing is regulated by LLS.
2. It appears there are relatively clear transition provisions preventing clearing of land that isn't mapped.
3. The regulation provides for land *unlawfully* cleared from 1990 then later *lawfully* cleared after vegetation has regrown to be re-categorised from Category 2 to Category 1. It seems counter intuitive for a regulatory scheme to be accommodating land clearing without regulation, even where there is a history of illegal clearing on that land.
4. Offence of contravening certain requirements of approvals or certificates: "It is a defence to a prosecution for an offence against this clause if the person charged is not a landholder of the land to which the clearing relates and establishes that the person was not aware of the relevant instrument." EIANZ is concerned that ignorance of the instrument is deemed to be a valid defence. Normally this is not the case.
5. Excluded land and exempt land are terms that are very likely to be confused.
6. The Vegetation SEPP will apply to excluded land but is not yet available. EIANZ is concerned that the government considers it appropriate to consult and then pass certain laws and regulations without having provided the full detail of the proposed changes. This also applies to the native vegetation regulatory map and the 'grassland and other groundcovers vegetation assessment tool', both of which are still in development.
7. The emphasis of the codes and legislation appears to be streamlining rural land clearing with less oversight. This will potentially degrade the past 20+ years of conservation gains in NSW and reverse the emphasis. This is supported by the seeming ease at which land may be re-categorised downwards (Category 2 to Category 1) and the minimal oversight required by LLS.
8. EIANZ is concerned LLS will not possess adequate technical skill to properly assess biodiversity impacts that have previously been the domain of properly trained ecologists and regulators that specialise in these issues.



9. Threatened Ecological Communities appear to be open to clearing throughout most of the Codes. The codes allow clearing of Threatened Ecological Communities, albeit with set aside ratios up to 8:1 (though generally more around 2:1 on average). EIANZ is concerned this degrades the fundamental designation of Threatened Ecological Communities and could easily lead to the erosion of several decades of strategic landscape scale conservation planning over both private and public land. There is a high risk that when set asides are proposed that neither the landowner nor LLS would have sufficient ecological knowledge to ensure the most appropriate placement and management of set asides in perpetuity. EIANZ question whether the use of code-based clearing for vegetation at very high risk of extinction (threatened ecological communities) is fundamentally appropriate and question why the conservation of such vegetation is seemingly no longer a serious regulatory priority.

## 6 Explanation of Intended Effect for the *State Environmental Planning Policy (Vegetation) 2017*

1. Need to clarify what the actual name, objectives and scope of this SEPP are. Is it SEPP (urban vegetation) as used in the Act and Regulations, or is it vegetation.
2. The Vegetation SEPP will provide an assessment pathway for clearing of native vegetation on urban land and land in environmental zones that *does not require development consent*. The BOS threshold will be used to identify when a BAM assessment is required for this kind of clearing. The SEPP needs to articulate **exactly** what types of clearing proposals it covers rather than just saying "*that do not require consent*". For example, we expect it may need to cover activities such as:
  - Councils clearing native vegetation for infrastructure, maintenance, safety reasons, erection of signage etc.
  - Utilities, public authorities clearing native vegetation for infrastructure, maintenance, safety reasons (outside of Part 5).
  - Bush fire hazard reduction clearing, clearing adjacent to urban bushland reserves by RFS and others.
  - Clearing in environmental zones by private landholders for various reasons, incremental clearing that does not require consent, or where a landowner may try to gradually clear smaller patches that should be assessed together using the BAM.
  - Relevant Clearing permitted by other environmental SEPPs
3. A significant concern is potential clearing that may be allowed as a consequence of exempt development or bush fire hazard reduction purposes. How does this interact with RFS and the Rural Fires Act 1997.
4. The SEPP needs to provide more detail about the interaction with LEPs and other SEPPs to be an effective instrument.
5. *Should all clearing of native vegetation in urban areas and environmental zones require development consent if it exceeds the BOS thresholds? The Clause 5.9 Preservation of trees or vegetation* of most Council LEPs normally requires something like:
  - A person must not ringbark, cut down, top, lop, remove, injure or wilfully destroy any tree or other vegetation to which any such development control plan applies without the authority conferred by:
    - (a) development consent, or





(b) a permit granted by the Council.

Our view would be that clearing of native vegetation in urban areas and environmental zones should require development consent (or tree permit) whether it is under or if it exceeds the BOS thresholds, unless specifically exempted via a SEPP or approved by an alternative pathway. In cases exceeding thresholds, clearly some form of 'approval' is required (whether from a consent authority under the Planning Act; or from the NV Panel, or indeed the council, under the Vegetation SEPP and LLS Act) in any case.

6. *Should the NV Panel delegate urban and e-zone clearing decisions to Councils? What involvement do you think councils should have in assessing clearing applications above the BOS threshold? (e.g. notified, review, delegation).* The majority of EIANZ practitioners consulted would agree councils should be asked to review or comment on clearing applications above the BOS threshold, however they are not generally viewed as currently having the capacity to act in the role of the Native Vegetation Panel if it was delegated (as questioned in the Explanation of Intended Effect). Of course this technical capability varies across LGAs. However in the case of the SEPP, the proponent may be Council.

## 7 Land Management (Native Vegetation) Code

1. EIANZ is concerned that the inclusion of significant clearing rules with a Code rather than an Act suggests that the process has been designed to allow for greater flexibility, presumably in favour of clearing, and to avoid the scrutiny of parliament for future changes.
2. The Code would be administered by NSW Department of Primary Industries meaning that management of substantial areas of sensitive vegetation, including EECs (but not CEECs) will now come under the direct regulation by DPI rather than OEHL, which we perceive as a regulatory constraint. This suggests a fundamental shift in thinking about native vegetation within NSW.
3. It is unclear what advantage the provision of 16 separate Codes for different types of land clearing confers over the previous regime under the Native Vegetation Act 2003. It is recognised that the Independent Biodiversity Review Panel advocated the repeal of this act due to "...difficulties in implementation and the inequitable distribution of the costs involved..." however the proposed Code does not appear to make implementation substantially simpler.
4. EIANZ supports that the Code does not allow harm to a threatened animal species, providing the clearer is aware of their presence. As outlined above though, it is unusual for ignorance to be a valid defence.
5. The Code appears to allow for the (substantial) freedom in re-categorising land set out in the regulatory mapping. The Code states that changes to the Code will not affect any previously agreed re-categorisation. This seems to be aimed at providing comfort to landowners, but is missing an equivalent degree of comfort for conservation i.e. there are far fewer avenues for land to be given greater protection. The process of allowing re-categorisation appears to be very much in favour of recategorising rural farming land downwards (Category 2 to Category 1).
6. The limit of clearing on land is seemingly arbitrarily decided by the local LLS office at the point where they decide there would be significant adverse impacts upon biodiversity on the land. EIANZ are concerned this process is open to potential abuse and differential application across the state depending on the nature of individual LLS offices and officers. There is no objective threshold of significant impact, despite the bulk of the remainder of the legislation being aimed at this very premise.



7. The provision of set asides is seemingly highly in favour of landowners (over conservation objectives) in that:
  - The Code only requires that landowners apply 'reasonable' efforts to maintain 'vegetation integrity' in set asides. EIANZ would advocate more defined conservation thresholds be included here.
  - The inclusion or change of management actions in a mandatory code compliant certificate must be extensively consulted on with the landowner. This seemingly provides for the landowner to negotiate for reduced management requirements without complementary representation for conservation objectives.
8. The provision of set asides appears to only be required concurrent with clearing, with the location of the set aside being up to the discretion of the landowner. This does not support the substantial work undertaken in NSW over several decades to identify high value conservation land under private ownership with a view to strategic conservation of biodiversity hotspots and critical movement corridors. EIANZ would advocate a more rigid pre-planning with LLS and preferably including the involvement of conservation staff at OEH.
9. If land is legally cleared under one of the following codes then this land may be re-categorised from Category 2 to Category 1:
  - Property Vegetation Plan Transition Code
  - Equity code: Removing native vegetation from paddock tree areas
  - Equity code: Removing native vegetation from small areas
  - Equity code: Removing native vegetation from regulated rural areas (regulated land set aside area)
  - Farm Plan Code: Removing native vegetation from paddock tree areas (exempt land set aside area)
  - Farm Plan Code: Removing native vegetation from regulated rural areas (exempt land set aside area)
  - Land that has been cleared in accordance with a property vegetation plan prior to the repeal of the Native Vegetation Act

There are few examples of land qualifying for automatic re-categorisation in the other direction i.e. in favour of conservation from Category 1 to Category 2. Such re-categorisations are typically only available for set aside areas, such as under the Farm Plan Code. EIANZ is concerned the persistent downward (Category 2 to 1) re-categorisation of land, without the requirement for associated set aside areas or other offsetting, risks slowly eroding substantial parts of the state towards Category 1 over time in a 'death by a thousand cuts' scenario, hence endangering long term conservation objectives at a landscape scale.

10. The Code provides a list of 'invasive native species' though this list is not provided in the consultation draft (Schedule 1). The lack of this list makes it impossible to consider the ecological impacts of potentially allowing vegetation clearing under Part 1 of the Code.
11. The Code provides for a list of 'Set aside area management strategies' (Schedule 4). This is also not provided in the draft document and again makes it impossible to comment on the ecological merit of these strategies.





## 8 Biodiversity Assessment Method (BAM)

EIANZ welcome the following positive changes:

1. Additional requirements to avoid and minimise, which need to be justified in the report.
2. Additional requirements to consider geology, soil, waterways, hydrological impacts, vehicle strikes, wind farm turbine strikes, subsidence, impacts on rocks, caves, human structures and threatened species habitat in exotic vegetation. These direct/indirect impacts are not included in the calculator but must be considered in the report.
3. The additional requirements to consider and document indirect impacts, i.e. on vegetation on adjoining land and waterways.
4. The new dynamic weighting of flora plot attributes, according to each vegetation community benchmark. This changes the sensitivity of the credit calculator depending on the floristic components which are expected to be present, rather than a general weighting (e.g. not every vegetation community has fallen logs or tree hollows).
5. The additional field work components:
  - count number of trees and assess diameter at breast height; and
  - 1x1m plots to assess litter cover.
6. OEH has done a lot of research to align framework with other states and countries.
7. Many additional field surveys have been done by OEH to refine benchmark data for vegetation communities.
8. Mapping of areas of outstanding biodiversity (AOBV) and sensitive biodiversity value land.
9. Candidate list of ecological communities and threatened species under Serious and Irreversible Impacts (SAIL). Impacts on these communities or species cannot be authorised for Part 4 assessments and have to be considered for major projects, Part 5 activity, State significant infrastructure and developments.
10. Stewardship sites now require a mandatory 20-year management plan and permanent survey flora plots.
11. Accredited assessors under the current scheme will not automatically be re-accredited under the BAM 2017. Some additional conditions will apply to get accredited, such as a code of conduct, continued professional development, requirement of academic qualifications and relevant experience.

EIANZ practitioners have expressed concern over the following perceived negative changes:

1. Biometric Vegetation Types (BVT) are replaced by Plant Community Types (PCT), which eliminates local differences in vegetation communities in different catchments.
2. Relaxation of offset rules was unfortunately necessary due to credit trading being concentrated on a minority of vegetation communities and a very small geographical area, i.e. Hunter and Western Sydney.
3. The offset payment calculator relies on a limited trading history, but also a very limited geographical distribution of traded credits, i.e. the current offsetting mechanism has only been applied and tested on a fraction of vegetation in NSW.
4. The Biodiversity Conservation Strategy has yet to be designed. It will regulate manage conservation outcomes and how funds are allocated. This might constitute a time gap where offsets are not achieved.



5. Missing information, not available during the consultation period are:
  - Native Vegetation Regulatory Map
  - Vegetation SEPP
  - Biodiversity Conservation Investment Strategy
  - Thresholds of self-assessment codes for land holders
  - Thresholds for Serious and Irreversible Impacts
  - Accreditation and training course for consultants
  - Training courses for Local Government and LLS staff.
6. Some limited testing seems to suggest that the BAM credit calculator generates a much larger range of impact to offset ratios of credits per hectare when vegetation benchmark values are used. The calculator seems to reward stewardship sites in good condition even less than the old one, which might provide incentive for land holders to poorly manage the site before using it as an offset.
7. Thresholds for Serious and Irreversible Impacts are missing. Furthermore, the current list of candidate ecological communities and threatened species is relatively limited. This creates uncertainty.
8. Offset liability forms part of consent conditions. The consent authority is meant to check compliance (minimise actions, credit retirement, biodiversity actions, payments into fund). EIANZ is concerned BAM knowledge is lacking in LGAs for this to occur effectively at present.
9. The Biodiversity Assessment Method (BAM) appears likely to increase the offset ratios for development projects in NSW, as a result of imposing a 20 year threshold on biodiversity gain that can be credited to an offset site. Although an increased offset is a better environmental outcome it needs to be ecologically appropriate, and balanced against costs to development. As gains in biodiversity values are likely to increase beyond 20 years in reality (i.e. hollows will continue to develop beyond 20 years) this threshold should be removed or modified. It is noted that biodiversity stewardship sites would be able to be reassessed after 20 years and may generate further offset credits at that time.

## 9 Accreditation Scheme for the Application of the Biodiversity Assessment Method

1. EIANZ supports the accreditation of assessors using the BAM.
2. It is understood accredited assessors under the current scheme will not automatically be re-accredited under the BAM 2017. Some additional conditions will apply to get accredited, such as a code of conduct, continued professional development, requirement of academic qualifications and relevant experience. We agree that any accreditation scheme should ensure that each BAM assessment is completed by an individual or individuals with the appropriate range of skills.
3. EIANZ support the mechanism for auditing of reports and for random audits.
4. EIANZ would be interested in participating in the establishment of an accreditation scheme, and supports the consideration of ethical standards (e.g. via a code of conduct etc.) as well as technical standards for using the methodology.



## 10 Serious and irreversible impacts guidance

The *Draft guidance and criteria to assist a determining authority determine a serious and irreversible impact* is intended to assist determining authorities determine whether an impact on biodiversity values is likely to be a serious and irreversible impact (SAII), as per Section 6.5 of the Biodiversity Conservation Act 2016 (BC Act). EIANZ welcomes the guidance which:

- identifies 'candidate' species and ecological communities for SAII. Any impact on a candidate threatened species or ecological community in excess of thresholds, where relevant, is a potential SAII
- outlines a decision-making framework for decision-makers when considering potential SAII
- provides the decision maker with guidance on determining whether or not an impact is serious and irreversible.

Species and ecological communities that need to be considered are called 'candidate entities' and are determined through 'criteria' that enable application of four principles (Appendix 1 of the *guidance*). These criteria have been applied to all threatened species and threatened ecological communities listed under the BC Act. Entities that meet one or more of the criteria are identified on the lists of 'candidate entities' at Appendix 2 (for species) and Appendix 3 (for ecological communities). The 'principles' refer to threatened species or ecological communities which are:

1. observed, estimated, inferred or reasonably suspected to be in a rapid rate of decline
2. observed, estimated, inferred or reasonably suspected to have a very small population size
3. observed, inferred or estimated to have very limited geographic distribution, or
4. unlikely to respond to management and are therefore irreplaceable.

### Concerns are as follows:

1. Section 3.1 of the guidance states that "for state significant development/state significant infrastructure (SSD/SSI) proposals, Part 5 activities and biodiversity certification proposals, the decision maker is also required to determine if there are any additional and appropriate measures that will minimise this impact". EIANZ question why this approach should not be applied to ALL developments.
2. The principles in the Regulation uses terms such as 'inferred' or 'reasonably suspected', but these are too subjective and will result in inconsistencies between different offices of the consent authorities. The list needs to be determined by OEH or clear quantified benchmarks need to be provided.
3. Although consent authorities can consider whether a proposal will result in a SAII on non-candidate species or communities, it is not a requirement, but this approach should be implemented for ALL threatened species and communities. If non-candidate species or communities are to be included then this should be done at the design stage of a project so that developers are aware of their requirements prior to commencing the assessment process (i.e. when SEARs are provided). A consultation process should be allowed for to enable species to be added or removed as candidate entities.
4. The Guidance does not provide detail on what "additional and appropriate measures to minimise impacts" would be. These need to be clearly defined so that there is consistency between the different consent authorities.





## 11 Offsets payment calculator

1. The Offset Funds Calculator appears to be at a preliminary stage and is unlikely to be developed adequately for implementation with the regulations. It is recommended that the Calculator not be released until it is fully developed and can be tested comprehensively.
2. After testing a number of scenarios in the calculator it appears that the Calculator generates unrealistically high credit prices. Additionally, the Administrative Cost (Annex 2), which is not finalised nor available for review, will further increase the generated credit price by an unknown amount. The higher costs are caused by the following situations/issues:
  - In situations where previous sales of a PCT are not available the price is based on previous sales in the relevant IBRA subregion, and if the average price of the subregion is high because most sales have been from TECs or highly limited PCTs (i.e. Cumberland Plain Woodland in the Cumberland Plain IBRA subregion) the Calculator unnecessarily drives up prices for non-TEC PCTs.
  - This issue may also work in reverse for TEC PCTs where IBRA sub regions have previous sales of cheaper non-TEC PCTs.
  - The pricing appears to be based on a very limited data pool.
  - The amount of BioBanking credit sales has been very limited to date and concentrated in the Sydney region where land prices are relatively higher to other areas. As a result of a small credit market the prices of credits to date are probably inflated. Therefore, relying solely on previous credit sales, at least in the short-term, is likely inflate credit prices.
3. It is understood that OEHL need to ensure they have sufficient funds to purchase credits, or establish Stewardship Sites themselves, but if the factors in the Calculator are too conservative this will result in unnecessarily high credit prices being generated. Credit owners will then use credit values from the Calculator in sale negotiations, and this could result in a self-perpetuating cycle of ever-increasing credit prices. OEHL need to modify the calculator so that unrealistically high credit prices are not generated and make it very clear to users about the limitations of the Calculator.
4. The operation of the offset payment calculator will depend on the interactions between the BAM calculator, the offsetting rules, and consent authority approval conditions. At this stage, it is not clear how this may work. However, it is likely that the default option for providing biodiversity offsets for all but the largest land developers will be to pay a financial contribution to the Biodiversity Conservation Fund. If this is the case, then the payment calculator will continue to be based on a small number of trades and will not reflect the true cost and value of establishing and managing biodiversity offset sites.
5. NSW regional markets identified in the calculator are inappropriate and do not reflect reality. They should not be based on bioregional boundaries, but on the actual and likely future need for offset land. This is directly related to where development is expected to occur.
6. Market regions identified bear little relationship to where offsetting has occurred. In practice, significant offsetting has occurred in the Hunter Region, but outside the scope of the BioBanking credit market. Therefore, the actual amount of offsets and values are reflected in the land market and not the BioBanking credit market. The grouping of regions and the values are not realistic. For example, the Yengo and Upper Hunter areas are nearby and have many similar characteristics but are included in separate regions.



7. Other key issues with the calculator are:

- Management costs and risks are not sufficiently recognised and need to be priced into the calculations.
- If it is to work, then rules need to be established to prevent gaming of the system through low value transfers, thereby reducing the cost of later credits.
- The price should include the cost of purchasing suitable equivalent land. Currently the calculation is based only on past trades, and does not take into account future supply and costs of land.
- A credit/land area calculator needs to be included so that potential purchasers of offset land can investigate the feasibility of purchasing land to establish biodiversity stewardship sites.

Given the significant risks associated with the calculator, appropriate transition arrangements need to be established to allow implementation to be phased in over time and appropriately monitored and amended as necessary. The calculator should not be released until it has been fully developed, tested and further opportunity to respond has been provided.

## 12 Conclusion

The proposed biodiversity legislation represents a radical change to regulation of key environmental resources in NSW. The overall thrust of the package appears to be to facilitate offsetting, vegetation clearing (particularly rural clearing) and development, rather than biodiversity conservation. EIANZ is concerned the biodiversity changes reduce protection to native species and communities as well as significantly increasing the bureaucratic burden.

The EIANZ hope that the comments above will be viewed by the State Government as opportunities to improve the package. EIANZ recommends that the proposed legislation and assessment methodology should not proceed without substantial revision and pilot testing.

We note that there are a number of areas where detail has not yet been finalised or made public. EIANZ recommend that the scheme does not commence until:

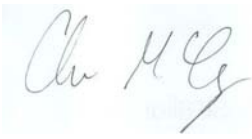
- key instruments and rules have been consulted on and finalised
- there has been sufficient time for assessors to be trained and accredited
- there has been sufficient time for agencies and Councils to be resourced and trained
- there has been sufficient time for LLS staff to conduct outreach for landholders
- mapping is accurate and comprehensive.

One of the single biggest issues with the scheme currently is the time it takes OEH to process BioBanking applications. The concern is that the new scheme is more complicated than the one it is replacing and this will put further resourcing stress on the authorities processing the applications, adding further delays to those currently experienced. The NSW Government must ensure the authorities tasked with processing BARs, Biodiversity Stewardship Agreements and the BOS are all adequately resourced.

The 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 Policy and Practice Lead: [cmcevoy@niche-eh.com](mailto:cmcevoy@niche-eh.com) or mob 0407 060 163.



For and on behalf of EIANZ NSW Division.



Chris McEvoy  
Policy and Practice Lead  
EIANZ NSW Division

## Authors

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

- Martin Fallding - Land & Environment Planning
- Alison Martin - Greenloaning Biostudies Pty Ltd
- Rhidian Harrington - Niche Environment and Heritage
- Ariane Weiss - Ariane Weiss Environmental Consulting
- Jamie McMahon - AECOM
- Chris McEvoy - Niche Environment and Heritage

