

THE NEW DEAL - BIODIVERSITY OFFSET REFORMS IN NSW

EIANZ annual conference

CLAYTON UTZ

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WHAT WE WILL COVER TODAY

- ▶ Biodiversity impact assessments and offsets
- ▶ Snapshot of biodiversity conservation reforms
- ▶ Key features of
 - » biodiversity impact assessment scheme
 - » biodiversity offsets scheme
- ▶ Transitional arrangements
- ▶ Update on Cth-State bilateral agreement



NEW LAWS AT A GLANCE

- ▶ Legislated biodiversity impact assessment and offset schemes
- ▶ Builds on 2006 legislation, and locks in new scheme
- ▶ Broad application to project types
- ▶ Prescribed form and process for assessment
- ▶ New assessment method - (from BBAM to BAM)
- ▶ Focus on biodiversity credits and credit-equivalent payments
- ▶ Stricter requirements for nature, scope and timing of offsets

LEGISLATIVE CHANGES

REPEAL

Native Vegetation Act 2003

*Threatened Species
Conservation Act 1995*

*Nature Conservation Trust
Act 2001*

*Parts of the National Parks
and Wildlife Act 1974*



ENACT

*Biodiversity Conservation Act
2016*

*Amended Local Land
Services Act 2013*

WHEN DO THE NEW SCHEMES APPLY?

- ▶ Biodiversity scheme bolts on to planning approval pathways
- ▶ State significant development / infrastructure (major projects)
 - » applies unless DPE and OEH determine the project is not likely to have any significant impact on biodiversity values
- ▶ Part 4 development (local / regional development)
 - » applies to development which is likely to significantly affect threatened species
- ▶ Division 5.1 (or former "Part 5") activities
 - » applies to development that is likely to significantly affect threatened species
 - » proponent can choose whether to opt in
- ▶ Test of significance of impact

IMPACT ASSESSMENT SCHEME

- ▶ Biodiversity development assessment report (BDAR) required
- ▶ BDAR must
 - » assess biodiversity values of land which is subject to the proposed development
 - » assess impact of proposed development on biodiversity values of that land
 - » set out the measures which the proponent proposes to take to *avoid* or *minimise* the impact of the proposed development
 - » if offsets required for *residual* impacts - specify number and class(es) of required offset credits
- ▶ Only an accredited assessor can prepare a BDAR
- ▶ BDAR must be prepared in accordance with the Biodiversity Assessment Method (BAM)
- ▶ BDAR must be prepared using the BAM as at ≤ 14 days pre-lodgement

SERIOUS AND IRREVERSIBLE IMPACTS

- ▶ Sall = likely to contribute significantly to risk of extinction
- ▶ State significant development / infrastructure (major projects)
 - » approval authority must consider additional and appropriate measures to minimise impacts, in addition to offset credits
- ▶ Part 4 development (local / regional development)
 - » approval authority must refuse consent
- ▶ Division 5.1 (or former "Part 5") activities
 - » determining authority must consider additional and appropriate measures to minimise impacts, in addition to offset credits

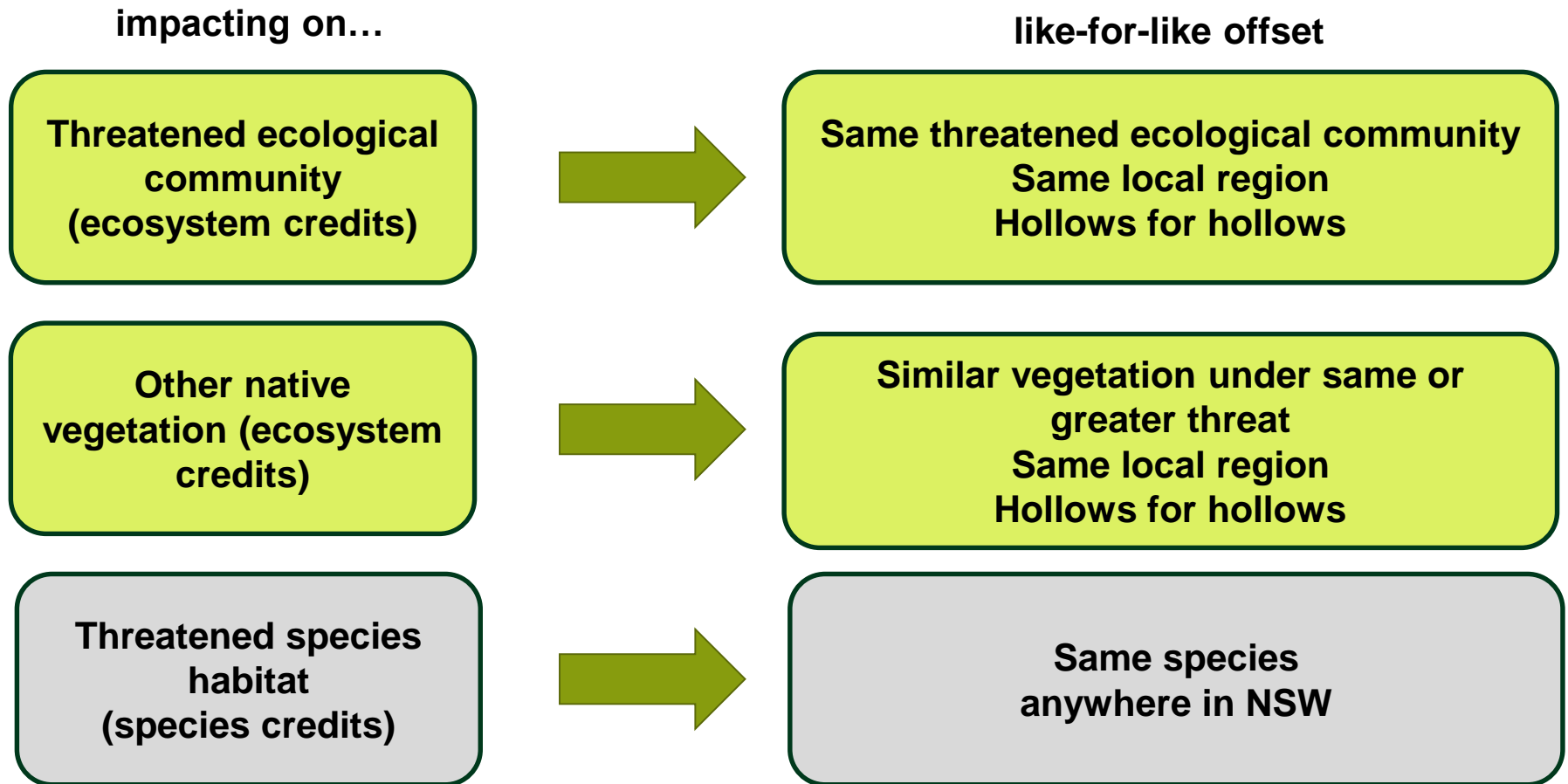
BIODIVERSITY OFFSET CONDITIONS

Planning pathway	Considerations for approval authority	Biodiversity conditions	When credits must be retired
Part 4 (local / regional)	<p>Must consider BDAR</p> <p>May also separately consider impact on biodiversity values</p>	<p>Must impose credit obligations as per BDAR</p> <p>May vary BDAR credit requirements up or down having regard to project's environmental, social and economic impacts (if reasons given)</p>	Before development which would affect biodiversity values is carried out
SSI / SSD	<p>Must consider BDAR</p> <p>May also separately consider impact on biodiversity values</p>	May impose credit obligations as per BDAR or otherwise	Before development which would affect biodiversity values is carried out
Part 5	Must consider BDAR	May impose credit obligations as per BDAR or otherwise (if reasons given)	Before development which would affect biodiversity values is carried out

SATISFYING AN OFFSET OBLIGATION

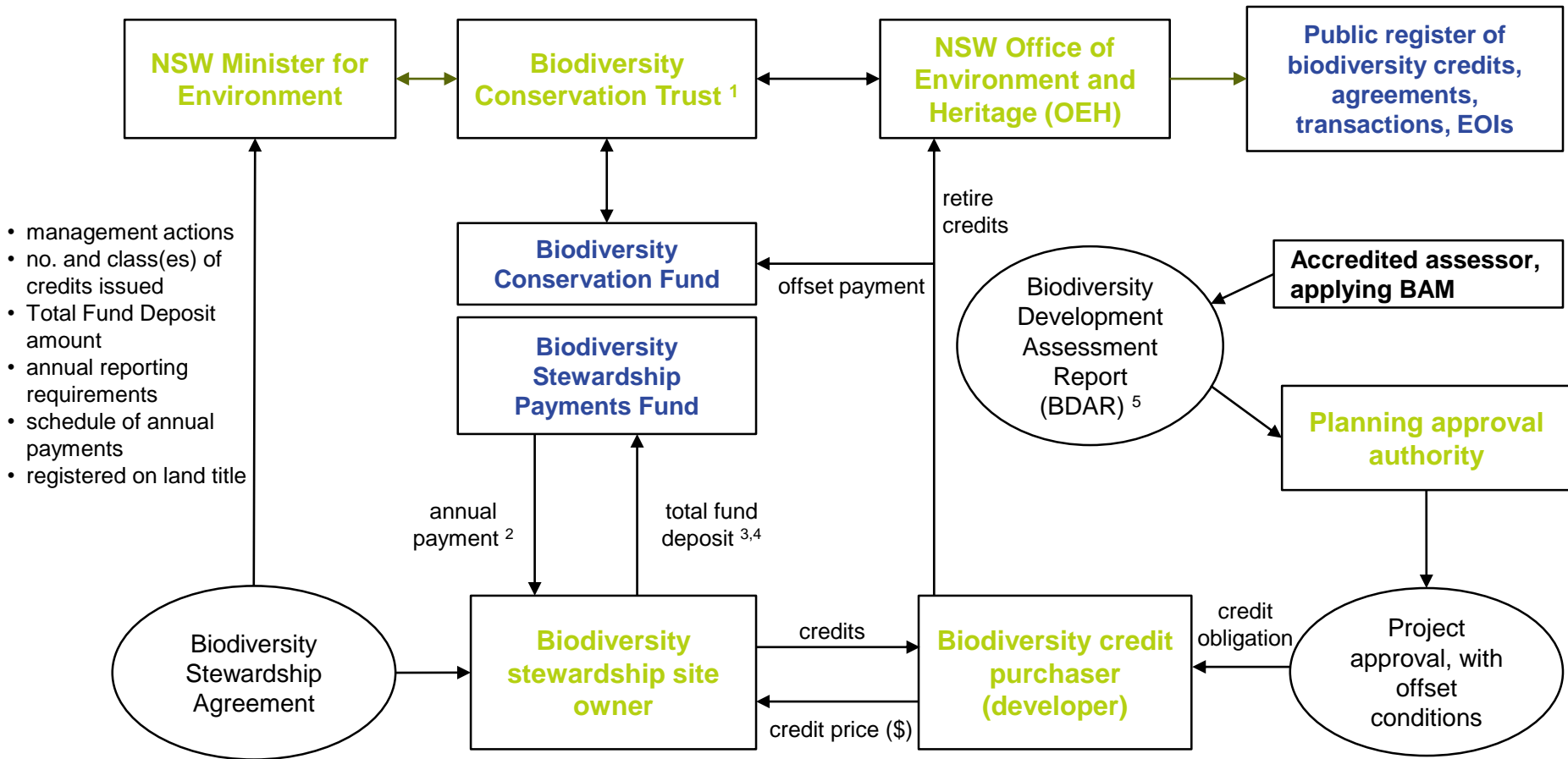
- ▶ Retire credits in accordance with approval condition
 - » how strict is the "like for like" requirement?
 - » variation rules in the Biodiversity Conservation Regulations
- ▶ Pay into Biodiversity Conservation Fund
 - » offsets payment calculator determines amount of payment
 - » amount payable is higher than assessed market price for credits, to provide some incentive for retiring credits
 - » Biodiversity Conservation Trust uses funds to
 - › acquire and retire credits, applying like for like rules and variation rules
 - › pay for other biodiversity conservation measures or actions
- ▶ Mine rehabilitation can be used as an alternative form of offset
- ▶ VPAs can provide for credit retirement, incl. deferred retirement

LIKE-FOR-LIKE OFFSET RULES



Same local region means same IBRA subregion, adjacent IBRA subregions, or IBRA subregions within 100km of the site
IBRA means Interim Biogeographic Regionalisation of Australia (ie. recognised bio region classification)

BIODIVERSITY OFFSET CREDITS



¹ Biodiversity Conservation Trust administers most of the offset scheme

² Annual payment as per schedule in biodiversity stewardship agreement, paid over 20 years

³ Based on present value of estimated total management cost

⁴ In practice, credit purchaser pays total fund deposit amounts ("Part A payment") into Fund to ensure registration of credit transfer

⁵ Sets out assessment of offset obligation and no. and class(es) of credits for offset obligation

TRANSITION FOR MAJOR PROJECTS

Situation	Deadline to make application under previous legislation
Applications made before 25 August 2017	N/A (applications already made)
Secretary's Environmental Assessment Requirements (SEARs) were issued before 25 August 2017	<p>25 February 2019 (ie. within 18 months of commencement of the BC Act)</p> <p>If SEARs are re-issued this timeframe resets to 18 months after the SEARs were reissued, but only up to 25 August 2020</p>
Substantial environmental assessment undertaken before 25 August 2017 (as determined by DPE Secretary)	Within 18 months of Secretary's determination
For mining applications where conceptual project development plan submitted before 25 August 2017, as determined in writing by the Secretary by 25 November 2017	25 August 2019

TRANSITION FROM BIOBANKING

Existing biodiversity credits



Remain valid under BC Act
A conversion may be necessary to ensure equivalence with BC Act credits. Credit holders/proponents should contact OEH.

Existing biodiversity credit obligations



Biobanking agreements



Remain in place and will be administered as Biodiversity Stewardship Agreements.

Biobanking agreement applications



Can be submitted up to 25 February 2018, if relevant information collected before 25 August 2017. Must be finalised by 25 February 2019.

UPDATE ON NSW / CTH BILATERAL

- ▶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act)
- ▶ Specified approval triggers, based on matters of national significance - most likely threatened species and ecological communities
- ▶ No statutory requirement for offsets, but allows for offset conditions
- ▶ Important to avoid duplication of assessment and offset obligations
- ▶ Bilateral agreement accredits specified State assessment methods
 - » not yet updated to refer to Biodiversity Conservation Act 2016
 - » NSW and Cth agencies are negotiating amendments
- ▶ Cth Department can accredit individual projects on a case-by-case basis, outside the bilateral agreement

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