



Biodiversity Certification: what it is, how it works

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- Community legal centre
- Independent from Government
- “Protecting the environment, advancing the law”
- Servicing all of NSW
 - Free Legal Advice Line
 - Further Advice and Casework (public interest matters)
 - Policy & Law Reform
 - Community Legal Education and Outreach
 - Indigenous, Scientific and International programs.
- Extensive submissions to Govt on biodiversity law reforms.

What is biodiversity?

- The diversity of life on Earth.
 - Ecosystems
 - Species (plants, animals, fungi)
 - Genetic diversity.



- Australia: 1 of 17 ‘megadiverse’ countries in the world.
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
 - Australian Cth law – matters of national environmental significance.
- State environmental and planning laws also protect/affect biodiversity
 - in the context of Ecologically Sustainable Development.

Biodiversity in NSW

- NSW has ~1000 **Threatened Species**
 - Also **Threatened Ecological Communities**
 - **Threatened Populations**



Image: birdsinbackyards.net

- Protected under *Biodiversity Conservation Act 2016* (NSW)
 - Similar listing process to former *Threatened Species Conservation Act 1995*
 - **Vulnerable** = high risk
 - **Endangered** = very high risk
 - **Critically Endangered** = extreme risk of extinction
- Bio. Con. Act also changes the **impact assessment process for development** in planning system (EP&A Act 1979).

Challenge for govt, policy-makers and community

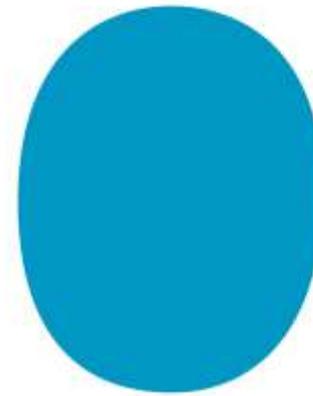
Focus group comment (*Who cares about the Environment?* OEH 2015, p. 82)

When government are trying to promote things, sustainable living, whatever, it's probably important to look at the way you're messaging it – because if they're going to use all the words, 'biodiversity' and this and that, and 'ecosystem' – if people are just going 'yeah, blah blah, blah, blah, whatever, big words, don't know what that means...'

And a lot of people just go yep. They can't relate to it I suppose.

- Coffs Harbour, 45+ years group

Biodiversity Certification (or Biocertification)



What is biocertification?

- A **biodiversity impact assessment and planning process** for areas of land that are proposed for development.
- Allows large-scale, upfront assessments of **biodiversity values** and impacts.
- Identifies land that is appropriate for development, and land that should be conserved to **offset** the impacts on biodiversity.
- Not a new concept: *Threatened Species Conservation Act 1995* (repealed)
- Revised scheme: *Biodiversity Conservation Act 2016* , Part 8

[Example map](#)

Effect of biocertification

Where a development or activity is proposed to be carried out on 'biodiversity certified' land... there is no further need to assess site-level impacts on biodiversity

- **State significant infrastructure**
 - No requirement for assessment of impacts on biodiversity.
- **Other forms of development**
 - No requirement for assessment of impacts on biodiversity
 - Consent authority not required to consider the impact of the development on biodiversity.
- **Activities for Govt infrastructure or utilities**
 - Taken to be an activity that is not likely to significantly affect threatened species, ecological communities or their habitat.
 - Determining authority not required to consider the effect of the activity on biodiversity.

Who grants biocertification?

The Minister for Environment can confer biodiversity certification on specified land by publishing an order in the NSW Government Gazette.

THREATENED SPECIES CONSERVATION ACT 1995

Section 126H

Order Conferring Biodiversity Certification – Brimbin.

Under section 126H of the *Threatened Species Conservation Act 1995* (the Act), I Mark Speakman MP, Minister administering that Act, confer biodiversity certification on the specified land.

Under section 126P of the Act I have determined on the basis of a biodiversity certification assessment that the overall effect of biodiversity certification is to improve or maintain biodiversity values.

Under section 126Y of the Act, I specify the measures listed in Schedule 3 as approved measures under this biodiversity certification.

Under section 126ZA of the Act, biodiversity certification of the specified land takes effect from the date of publication of this order in the Government Gazette and remains in force indefinitely.

Definition

In this order “specified land” means the land described in Schedule 1 to this order that is also marked as “certification area” shown in pink on the map in Schedule 2.

Signed at Sydney, this 1st day of October 2015

MARK SPEAKMAN SC, MP
Minister for the Environment

Schedule 1 Description of the specified land

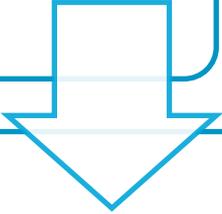
Roads and Railway

All internal unformed roads within the Biodiversity Certification Area owned by the applicant but excluding roads and railways on Crown land being the closed old Taree to Port Macquarie Road, the existing Landsdowne Road and the existing Sydney to Brisbane railway.

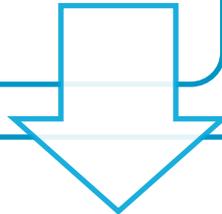
Lots within deposited plans	
DP Number	Lot
DP 10304	1, 3, 4, part 6, 7, 10, 12, 13, 14
DP 1084130	1, 2
DP 14182	1, 2, 3, 28
DP 174722	1
DP 314748	1

Process

Application submitted to OEH –
accompanied by a Biodiversity Certification
Assessment Report (details shortly)

A blue-outlined downward-pointing arrow indicating the flow from the first step to the second.

Public notification and consultation

A blue-outlined downward-pointing arrow indicating the flow from the second step to the third.

Determination (to certify or not)

Who can apply for biocertification of land?

Any planning authority

- Minister for Planning,
- Greater Sydney Commission
- local council
- determining authority under Part 5 of the Planning Act
- Secretary of the Planning Dept
- Local Land Services

The owners of the land

- all the owners of the land proposed for biodiversity certification
- any other person with owners' written approval.

An application may also be made jointly by 2 or more planning authorities, owners or approved persons.

Applications for biocertification – what to look for

- General requirements:
 - must be made in the approved form and contain the required information
 - must identify the land proposed for biocertification
 - must identify land for the proposed conservation measures
 - must identify who is responsible for carrying out those measures.
- **Biodiversity certification assessment report**



Biodiversity Certification Assessment Report

- Study of the land must be prepared by an **accredited person** appointed by the applicant:

www.environment.nsw.gov.au/biodiversity/assessors.htm

- Assessor applies the Biodiversity Assessment Method (**BAM**)
 - Identifies the **biodiversity values**
 - Identifies the **impacts** of the proposed actions on biodiversity
 - Specifies the **number** and **class** of **biodiversity credits** to be 'retired' (secured) as an offset
 - May propose other **conservation measures** to offset biodiversity impacts

Conservation measures

- Conservation measures are meant to offset the impacts on biodiversity values on biocertified land (i.e. clearing, loss of habitat)
- Approved conservation measures can include:
 - **Securing biodiversity credits**
 - **based on like-for-like rules or weaker ‘variation rules’.**
 - **Payment to the Biodiversity Conservation Fund**
 - based on the Offsets Payment Calculator.
 - Other related matters:
 - timing of conservation measures
 - monitoring, reporting or auditing.

Like-for-like offset rules

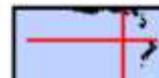
- Put simply: protect the same species (plant or animal), habitat or ecosystem BUT
- Regulations set out *legal meaning* of like-for-like offsets – quite flexible. E.g.
 - protect same Threatened Ecological Community at a site within 100km;
 - in some cases (e.g. koalas), protect same species at an offset site anywhere in NSW.



This map may contain data which are
©Commonwealth of Australia
(Geoscience Australia), ©PSMA 2010

[Coordinates](#)

Buffer: 100.0Km



Variation rules (after reasonable steps to find L-4-L offsets)

- If like-for-like credits can't be bought or established by willing landowners (reasonable steps taken), offsets don't need to be the same species/habitat.
- E.g.
 - Impact one **threatened ecological community or veg. type**; offset it with **certain others** (same veg. *formation*; in same *bioregion* or within 100km of site).
 - Clear **hollow-bearing trees**; offset with **artificial hollows**.
 - Impact **one animal species**; and offset it with **another animal species** at **equal or higher risk** of extinction (in same or nearby subregion).

Special rules for ‘strategic biocertification’

- Minister can declare a biocertification application (by a planning authority) as a ‘strategic’ application. Must **first consider** the following factors:
 - size of the land
 - any regional or district plans
 - advice from the Planning Minister, and
 - social, economic, environmental outcomes that biocertification ‘could facilitate’.
- Strategic biocertification can use an expanded range of approved **conservation measures** (beyond offsets or Fund payments) including:
 - reserving land for new or expanded national parks,
 - adopting development controls to conserve or enhance the environment, or
 - ‘any other measure determined by the Minister’.

Public notification and consultation

Notification

- Applicant must publish notice of their application:
 - in a statewide newspaper
 - on a website approved by the Environment Minister
- Notice must state where the application will be exhibited
- **must invite the public to make submissions** by a closing date
- Local council must be given a copy of the application.

Consultation

- The application must be exhibited:
 - on the applicant's website
 - any other place required by the Environment Minister
- **Public must have at least 30 days to make submissions**
- Local council has at least 42 days to make a submission.

If the application is then **modified**, further notification is only required if the Minister directs

Public notification can be undertaken in conjunction with a planning proposal (i.e. rezoning)

Determination (grant or refusal) of Biocertification

- Environment Minister must consult the Planning Minister before granting or refusing biocertification.
- Environment Minister must be **satisfied** that the **approved conservation measures** adequately address the likely impacts on biodiversity values.
- If the Minister believes that **serious and irreversible impacts** on biodiversity are likely:
 - required to **consider** those impacts in the decision, and
 - required to determine whether there are any **additional & appropriate measures** that will minimise those impacts.

In determining the **approved conservation measures** (including the number of credits required to be retired), the Minister is to *have regard* to the biodiversity certification assessment report, but *is not bound by that report*.

Serious and irreversible impacts

- An impact is *serious and irreversible* if it is likely to contribute significantly to the risk of a threatened species or ecological community (EC) becoming extinct because:
 - it will cause a **further decline** of the species or EC that is in a **rapid rate of decline**, or
 - it will further reduce the population size of the species or EC that has a **very small population size**, or
 - it is an impact on the habitat of the species or EC that has a very limited **geographic distribution**, or
 - the impacted species or EC is **unlikely to respond** to measures to improve its habitat and vegetation integrity and therefore its members are **not replaceable**.

After Biocertification – what happens next?

- Minister's Order published
 - identifies the land, timeframe, conservation measures, conditions etc.
- Identified development land
 - can be developed
- Identified conservation land
 - conservation actions done as per Order and Agreement
 - offsets may be found elsewhere (by parties to Agreement or BC Trust)
- Site-by-site development applications
 - can proceed over time
 - assessed for impacts as normal (traffic, pollution, amenity, heritage, etc)
 - but no further site-level biodiversity assessment required.

Compliance with biocertification conditions

- If a party fails to comply with approved conservation measures, the Minister may order them to:
 - carry out the conservation measure within a given time, or
 - carry out an **equivalent conservation measure** within a given time.
- If a party fails to comply with an order:
 - Minister can order them to pay a penalty to cover the costs of carrying out the conservation measure.
- Biodiversity Certification Agreements are enforceable by the Minister
 - or someone else with the Minister's permission.

Suspending or revoking biocertification

- Minister can suspend or revoke biodiversity certification for various reasons by order in the Gazette
- E.g. if:
 - approved **conservation or other measures** have **not been complied with** to the satisfaction of the Minister,
 - Minister believes a party to biocertification has **failed to comply** with a ministerial **order**,
 - Minister believes that a biocertification agreement has been **breached**, or
 - The Minister is **no longer satisfied** that the approved conservation measures adequately address the likely impacts on biodiversity values.

Modification of approved biocertification

- The Minister can modify any biodiversity certification by:
 - extending or limiting the certified land area
 - changing the approved conservation or other measures.
- If modification will **extend** the area, the application to modify must:
 - Identify the land proposed to be added to the biocertification, and
 - Identify whether any of that land was subject to approved measures to avoid or minimise the biodiversity impacts on the biocertified land
 - i.e. will the expansion interfere with previously agreed measures?
 - Include a **revised Biodiversity Certification Assessment Report** (unless equivalent conservation measures are proposed).
- Various procedures in the Act apply again to modifications.

Disputes, appeals and reviews



- No right for community objectors to appeal **‘on the merits’** if they do not agree that an area should have been biocertified, or believe the conditions are inadequate.
- But if a **private applicant** for biocertification is **dissatisfied** with a refusal or conditions of a biocertification, they can challenge decision within 3 months.
- Failure to comply with **procedural requirements** does not affect the validity of an order that confers, extends or modifies biodiversity certification.
 - i.e. ‘privative clause’ to prevent challenges.
- Minister’s biocertification Order can require a review of any related matter.
- Minister is to undertake periodic reviews of any biodiversity certification.

Conclusion

- Biodiversity has intrinsic values
 - as well as social, economic and broader environmental benefits for Western Sydney and its residents
- Biodiversity Certification
 - an upfront planning and impact assessment pathway under NSW laws
 - *Biodiversity Conservation Act 2016*
 - *Environmental Planning and Assessment Act 1979*
- *Biodiversity Conservation Act* sets out:
 - what a Biocertification Application must include
 - a minimum required public consultation process (**have your say!**)
 - available conservation measures (offsets, compensation)
 - Environment Minister must be satisfied measures 'adequate'
 - Agreement details, changes, reviews & enforcement options.

Biocertification (2016 scheme)

Pros

Upfront assessment – better planning, more certainty?

Impacts on biodiversity can be avoided/minimised

Cumulative impacts can be considered

Cons

No longer required to 'maintain or improve' biodiversity outcomes

Weak 'variation rules' for biodiversity offsets

New 'Strategic biocertification' category – highly discretionary

A few (other) things are happening at once

- Commencement of *Biodiversity Conservation Act 2016* etc. (August 2017)
- Amendments to *Environmental Planning and Assessment Act* (passed Parliament 16 October)
- *Draft Greater Sydney Region Plan* consultation (by 15 December)
- *Future Transport Strategy* consultation (by 3 December)
- State Environmental Planning Policies (**SEPPs**):
 - Koala SEPP review and NSW Koala Strategy (see our 2017 [submissions](#)... new policies TBC)
 - Vegetation in Non-Rural Areas (commenced August 2017 – BAM or DCPs regulate tree-clearing)
 - Draft Environment SEPP consultation (consolidates urban bushland, waterways, regional enviro plans)
 - Draft Agriculture SEPP consultation (consolidates and changes, due 18 December)
- Western Sydney Sustainability Plan / Biocertification (TBC).
- **These will interact and influence each other.**

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 - <http://www.givenow.com.au/edonsw>