

EDO NSW Key Issues Summary
Biodiversity Certification: Upfront planning for conservation & future impacts
1 November 2017

1. Biocertification: Quick guide and EDO NSW analysis

What is Biocertification?

Biocertification (short for Biodiversity Certification) is an optional, upfront assessment of an area's biodiversity values and development potential. It may assess multiple parcels of land together. This upfront 'landscape-scale' study replaces later, site-level impact assessments.

When an area of land is biocertified, it switches off the need for site-by-site assessment of *biodiversity impacts* when development applications are made under the *Environmental Planning and Assessment Act 1979* (only if they comply with the Biocertification conditions). It does not replace the need for developers to assess other impacts like traffic or pollution.

New legislation: Biodiversity Conservation Act 2016

The Biocertification Scheme was formerly under *Threatened Species Conservation Act 1995* (NSW), Part 7AA. It is now given effect under the *Biodiversity Conservation Act 2016* (NSW), Part 8. Existing biocertification agreements and obligations will continue.

How has it changed?

The *Biodiversity Conservation Act 2016* expands the Biocertification scheme to:

- remove the requirement for Biocertification to 'maintain or improve' biodiversity values;
- apply a new *Biodiversity Assessment Method* to determine loss or potential gain;
- allow *biodiversity offsets* via new rules and variations, including an option for developers to pay money to a new *Biodiversity Conservation Fund* instead of securing the offsets;
- impose a general requirement to avoid or minimise 'serious and irreversible impacts' as a result of Biocertification (but only as a matter for consideration, not a prohibition);
- allow *non-government applicants* to apply for Biocertification – applicants can be planning authorities such as local councils (as now) or private land owners and developers (individual or combined);
- include a new 'Strategic' *Biocertification* category for public planning authorities (where weaker or more flexible environmental rules apply to conservation measures); and
- apply Biocertification to *urban or rural* lands (e.g. rural landholders' properties can be assessed and certified together as an alternative to the native vegetation clearing laws).

We provide further detail below.

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2. What are the main steps for Biocertification under the BC Act?

Biocertification needs to follow the process outlined in Part 8 of the *Biodiversity Conservation Act 2016 (BC Act)* and Part 8 of the Biodiversity Conservation Regulation 2017 (**BC Regulation**). Many of the same steps will apply if Biocertification is later extended or modified.¹

The Government has summarised the Biocertification process in five steps:²

- Step 1 – Plan and design project (pre application)**
- Step 2 – Apply the BAM, prepare and submit application**
- Step 3 – Undertake required consultation and public notification steps**
- Step 4 – Minister for the Environment considers and determines application**
- Step 5 – Ongoing review and compliance for biodiversity certifications.**

EDO NSW information and analysis is below.

Why bio-certify?

When an area is biocertified, it switches off the need for site-by-site assessment of biodiversity impacts of development applications (where the DA complies with the Biocertification conditions).³

How does it happen?

The NSW Environment Minister may confer (approve) biocertification of an area by publishing an order in the Government Gazette.

In summary, the Minister must:

- ensure that the applicant has notified and consulted on the proposal
- consider impacts identified in the Biodiversity Certification Assessment Report
- identify whether the proposal could have *serious and irreversible impacts on biodiversity values* (and if so, consider whether harm minimisation is required)
- identify approved conservation measures to offset the biodiversity impacts and
- be satisfied the measures adequately deal with the impacts on biodiversity.⁴

Additional criteria apply before the Minister can declare a 'strategic' biocertification, a more flexible category available to government planning authorities only.

Applications for Biocertification – and who can apply

An applicant can be a public planning authority or a private entity that owns land (i.e. a company or individual landowner, or their agent with the consent of all owners).

¹ See for example *Biodiversity Conservation Act 2016* (NSW) sections 8.3(4), 8.7(3) and 8.8(3).

² See: <http://www.environment.nsw.gov.au/biodiversity/biodivcertification.htm>, accessed October 2017.

³ *Biodiversity Conservation Act 2016* (NSW), section 8.4.

⁴ See *Biodiversity Conservation Act 2016* (NSW) sections 8.2 and 8.7.

A biocertification application must include a range of matters set out in the Act and Regulations.⁵ For example, the application has to be in the required form, identify the land that is to be biocertified, and the land where proposed conservation measures would apply. The application needs to state who is formally involved (parties to the agreement) and who is responsible for making sure the conservation measures are carried out.

What environmental protections apply?

Importantly the Minister's order will specify the **approved conservation measures** that are a condition of the biocertification.⁶ These are actions required to compensate for the impacts on biodiversity identified – such as the destruction of native vegetation, the loss of habitat, and the death of native animals and plants, including threatened species and ecosystems (i.e. those listed at risk of extinction).

Approved conservation measures may include *biodiversity offsets* – that is, creating or purchasing 'biodiversity credits' which represent a gain in biodiversity elsewhere. Other approved conservation measures can be specified in the BC Regulation.⁷ An expanded range of measures can be approved for **strategic biocertification**, below.

The biocertification order may also specify **other approved measures**, including requirements to avoid and minimise the impact of vegetation clearing and habitat loss.⁸ The order can also specify timeframes, monitoring, reporting and auditing.⁹

As noted, actions that meet the biocertification conditions won't need biodiversity assessment at the site-level. However, biodiversity impacts from **other actions** that are not approved under the biocertification order, or that do not meet the conditions of the order, may require separate assessment and development approval.

Environmental assessment

Biocertification applications need to include an environmental impact assessment upfront, called a Biodiversity Certification Assessment Report (**BCAR**).¹⁰ The BCAR involves an accredited assessor applying the new Biodiversity Assessment Method (**BAM**) to document the biodiversity values of the land being certified, assess the impacts of developing that land (including offset credits and other conservation measures).¹¹

As for major projects, the Minister must take the results of the BCAR into account,¹² but need not impose an equivalent level of offsets or biodiversity credits as a condition of biocertification if the proposal is approved.

⁵ See *Biodiversity Conservation Act 2016* (NSW) section 8.5.

⁶ See *Biodiversity Conservation Act 2016* (NSW) section 8.3; see also the Regulation clause 8.1.

⁷ See *Biodiversity Conservation Act 2016* (NSW) section 8.3(2).

⁸ Biodiversity Conservation Regulation 2017, clause 8.1. As authorised by s. 8.3(3)(c) of the Act. We read these other measures as being different to approved conservation measures under section 8.3.

⁹ See *Biodiversity Conservation Act 2016* (NSW) section 8.3(3).

¹⁰ See *Biodiversity Conservation Act 2016* (NSW) sections 6.13 and 8.5(4).

¹¹ See *Biodiversity Conservation Act 2016* (NSW) s. 6.16; Biodiversity Conservation Regulation 2017, clause 6.9.

¹² See *Biodiversity Conservation Act 2016* (NSW) sections 8.7(2).

Consultation and notification

If a private landowner wants their land biocertified, they need to consult with the local council first, before public exhibition.¹³

Before the Environment Minister makes a decision, the Minister has to consult with the Minister for Planning, and ensure the application has been properly exhibited.¹⁴

The exhibition requirements are generally the applicant's responsibility. They include:

- Publishing a notice in a state-wide newspaper and on an approved website, inviting submissions from the public (an exhibition period of at least **30 days**);
- Making the documents available on the website and other places as directed;
- Giving the Minister a report that responds to public submissions duly made.

The proposal to biocertify the land can be exhibited at the same time as a rezoning application.¹⁵ Rezoning may be required to enable certain types of development and use of the land that the biocertification proposal would facilitate, via upfront assessment.

The applicant can vary their biocertification application for any reason, including in response to public submissions. They don't need to re-advertise the revised application unless the Minister directs them to.¹⁶

Strategic Biocertification

A separate category called **strategic biocertification** is available for planning authorities only. Strategic biocertification allows more flexible (in our view, weaker) environmental standards. Requirements are also set out in the Act and Regulation.¹⁷

An expanded range of **approved conservation measures** can be authorised for strategic biocertification. For example, these measures may include:

- reserving land for new or expanded national parks,
- adopting development controls that conserve or enhance the environment (e.g. this may include restrictive zoning or development conditions),
- paying money for green infrastructure,¹⁸ or
- 'any other measure determined by the Minister', including measures that the biocertification applicant asks the Minister to sign-off on.¹⁹

¹³ See *Biodiversity Conservation Act 2016* (NSW) section 8.6(1).

¹⁴ See *Biodiversity Conservation Act 2016* (NSW) section 8.6(2).

¹⁵ That is, a 'planning proposal' under Part 3 of the *Environmental Planning and Assessment Act 1979* (NSW) (**Planning Act**). See *Biodiversity Conservation Act 2016* (NSW) section 8.6(6).

¹⁶ See *Biodiversity Conservation Act 2016* (NSW) section 8.6(4)-(5). However, for comparison see the *Ryan* case (2015) which considered public exhibition requirements and subsequent amendments to a 'planning proposal' for a Local Environmental Plan under the 1979 Planning Act: *Michael Ryan v The Minister for Planning, Lismore City Council & others*. Case summary at: http://www.edonsw.org.au/aboriginal_communities_cases. Judgment available at: <https://www.caselaw.nsw.gov.au/decision/556cf253e4b06e6e9f0f60f5>.

¹⁷ *Biodiversity Conservation Act 2016* s. 8.5(2); *Biodiversity Conservation Regulation 2017* cl. 8.2-8.3.

¹⁸ i.e. 'State infrastructure contributions' under the Planning Act 'that conserve or enhance the natural environment'.

¹⁹ Biodiversity Conservation Regulation 2017, clause 8.2.

This means the Minister has very broad discretion to say what approved conservation measures are sufficient for strategic biocertification.²⁰

The Minister must take listed criteria into account when declaring a biocertification as *strategic*. The Minister must consider the size of the land, any regional or district plan that applies, any advice from the Planning Minister, and the triple-bottom-line outcomes (social, economic, environmental) that biocertification ‘could facilitate’.²¹

These criteria are not very informative or directive.²² Once they are taken into account, the decision to declare strategic biocertification appears highly discretionary, allowing those broader environmental conditions and compensation options to apply.

The Minister’s decision

Before the Minister can confer (approve) a biocertification, they must be satisfied that the *approved conservation measures* ‘adequately address the likely impacts on biodiversity’ identified in the Biodiversity Certification Assessment Report (**BCAR**). As noted, the Minister must take the results of the BCAR into account, including when deciding what offsets may be required, but isn’t bound by it.²³

Serious and irreversible impacts

The Minister also needs to consider whether a biocertification proposal could have **serious and irreversible impacts on biodiversity values**,²⁴ as is required for other development proposals assessed under the Biodiversity Conservation Act.

If serious and irreversible impacts are indeed likely, the Minister must take those impacts into account in their decision and consider whether any additional, appropriate measures exist that will minimise those impacts. The same process applies to decision-making on development applications for major projects (State Significant Development or Infrastructure).

This means that biocertification (and major projects) can proceed even if they will have serious and irreversible impacts on biodiversity. By contrast, ordinary development must be refused if it will cause serious and irreversible impacts. The former biocertification scheme adopted a ‘maintain or improve environmental outcomes’ test in order to avoid and minimise such impacts,²⁵ but there is no equivalent test under the new biocertification rules.

²⁰ See *Biodiversity Conservation Act 2016* (NSW) ss 6.2(5) and 8.3(2); and Biodiversity Conservation Regulation 2017, clause 8.2.

²¹ Biodiversity Conservation Regulation 2017, clause 8.3.

²² For example they don’t require principles of *ecologically sustainable development* to be considered.

²³ See *Biodiversity Conservation Act 2016* (NSW) section 8.7(2).

²⁴ See *Biodiversity Conservation Act 2016* (NSW) section 8.8.

²⁵ See the former *Threatened Species Conservation Act 1995* (NSW), sections 126K and 126P.

Biocertification Agreements

The Minister 'may' enter a binding agreement with the biocertification applicant or other listed parties.²⁶ The Agreement is enforceable by the Minister (or someone else only with the Minister's consent).²⁷ Agreements may contain important details, and must be published by the Office of Environment and Heritage on its website.²⁸

Appeals and disputes

There is no right for community objectors to appeal 'on the merits' of the Minister's decision if they do not agree that an area should have been biocertified, or believe the conditions are inadequate. The Act also attempts to limit court challenges when the legal procedures for biocertification (Part 8 of the Act) haven't been followed. However Governments can't exclude judicial oversight of their decisions altogether.²⁹

By contrast, if a private sector *applicant* for biocertification is dissatisfied with a refusal or conditions of a biocertification, they can mount a legal challenge within 3 months of the decision.³⁰ Applicant merit appeals are heard by the NSW Land & Environment Court. These appeal rights also apply to State owned corporations.

A separate dispute resolution process applies between government bodies, such as if the Biocertification applicant is a local council or Greater Sydney Commission.³¹

Certification period, extensions and reviews

The Biodiversity Conservation Act sets out rules and processes around timeframes, extensions, modifications and review of biocertification.³²

Many of the same steps will apply if biocertification is extended or modified. For example, the order is to specify approved conservation measures; ministerial considerations in conferring biocertification apply; as do 'serious and irreversible impact' considerations.³³ However, it is not clear to us whether the standard public consultation requirements for biocertification applications also apply to *extensions*.³⁴

The certification period may be specified in the Minister's order. Otherwise the biocertification period may be indefinite (applying until the order is revoked).³⁵

²⁶ See *Biodiversity Conservation Act 2016* (NSW) Part 8 Division 5 (sections 8.16-8.20).

²⁷ *Biodiversity Conservation Act 2016*, s. 13.16. Note the *Biodiversity Conservation Act* allows any person to enforce a breach of the Act or Regulations in Court, via 'civil proceedings' (s. 13.14). However, s. 13.16 states that the Environment Minister's consent is needed before any other person can bring civil proceedings to remedy or retrain a breach of a Biocertification Agreement.

²⁸ Biodiversity Conservation Regulation 2017 cl. 8.5. The Act sets out what they may contain (s. 8.16).

²⁹ See *Biodiversity Conservation Act 2016* (NSW), s. 8.26(1). This sort of clause, which attempts to exclude legal challenges, is known as a 'privative clause'. In practice, the Courts will usually interpret privative clauses to have a narrow meaning and to retain judicial oversight of Executive Government decisions (even if it requires an action in the Supreme Court of NSW).

³⁰ See *Biodiversity Conservation Act 2016* (NSW), s. 8.23.

³¹ See *Biodiversity Conservation Act 2016* (NSW), s. 8.25.

³² See *Biodiversity Conservation Act 2016* (NSW) Part 8 Division 3 (sections 8.10-8.12).

³³ See for example *Biodiversity Conservation Act 2016* (NSW) sections 8.3(4), 8.7(3) and 8.8(3).

³⁴ See *Biodiversity Conservation Act 2016* (NSW) section 8.6 (*Consultation and public notification...*).

³⁵ See *Biodiversity Conservation Act 2016* (NSW) section 8.10.

The Act requires 'periodic reviews' of any biocertification.³⁶ Unfortunately it does not specify a timeframe. Nor does it require a review to occur before biocertification is extended or modified.³⁷ The order for Biocertification may specify additional matters to be covered in a review.

Transitional provisions for the Biodiversity Conservation Act and Offsets Scheme

The new Act and Regulation commenced on 25 August 2017. At the time of writing, the Government intended to allow certain in-progress biocertification proposals to be assessed under the former *Threatened Species Conservation Act 1995* scheme.³⁸ Initially, application of the new Biocertification scheme may be subject to this notice.

More generally, there is a 12-month delay in applying the Biodiversity Offsets Scheme to development applications in several Western Sydney local government areas.³⁹ In the rest of NSW, applicants have 3 months to submit a development application under the previous biodiversity assessment system. At the time of writing, the purpose and justification for the selective delays had not been clearly explained.

Commonwealth protections – Environment Protection and Biodiversity Conservation (EPBC) Act 1999

The EPBC Act (Cth) protects Matters of National Environmental Significance, such as nationally-listed threatened species and World Heritage areas.⁴⁰ The Biocertification scheme could only assess these Matters if the Commonwealth 'accredits' the NSW scheme under the EPBC Act.⁴¹ Developers may not need federal assessment or approval if they comply with an accredited NSW program.

The two levels of Government may seek to accredit the revised NSW Biocertification scheme under the EPBC Act. This would require the scheme to meet federal standards. Under the previous Biocertification scheme,⁴² specific proposals have been accredited such as the Western Sydney South-West and North-West Growth Centres Program.⁴³

³⁶ See *Biodiversity Conservation Act 2016* (NSW) section 8.12.

³⁷ This could, however, be required by government policy.

³⁸ To be confirmed by the Environment Minister by way of notice in the NSW Government Gazette. See www.environment.nsw.gov.au/biodiversity/transitional.htm, accessed 1 November 2017.

³⁹ Local government areas of Camden, Campbelltown, Fairfield, Hawkesbury, Liverpool, Penrith and Wollondilly. See: www.environment.nsw.gov.au/biodiversity/transitional.htm, accessed October 2017.

⁴⁰ Under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), Matters of National Environmental Significance include (among other things) World Heritage areas, National Heritage Places, internationally-protected (Ramsar) wetlands, nationally-listed threatened species and ecological communities, and listed migratory species including birds and whales.

⁴¹ The EPBC Act (Part 4) allows 'bilateral agreements' to accredit state assessment and approval stages, subject to certain safeguards. A separate process called Strategic Assessment (Part 10) 'switches off' the EPBC Act, leaving assessment, approval and enforcement to the State process.

⁴² Under Part 7AA of the former *Threatened Species Conservation Act 1995*.

⁴³ In 2012 the then Commonwealth Environment Minister, The Hon Tony Burke, accredited the Western Sydney South-West and North-West Growth Centres Program (valid to 2041). The Growth Centres Program assesses and addresses the impacts of development on Matters of National Environmental Significance normally protected by the EPBC Act. Federal approval is not required.

What's the difference between Biocertification and the Biodiversity Offsets Scheme?

Development applications that have impacts on biodiversity (including native plants and animals, threatened species and habitat) may need to satisfy the new Biodiversity Offsets Scheme and related assessment requirements.⁴⁴

Biocertification is an alternative assessment pathway under Part 8 of the *Biodiversity Conservation Act 2016*. It is higher-level, can involve multiple properties and occurs earlier in the planning process. Biocertification may give more flexibility around conservation outcomes (including wide ministerial discretion around 'strategic biocertification'), and more upfront certainty about where development can occur.

The new Offsets Scheme already gives developers a lot of flexibility in compensating for the biodiversity impacts of their actions. For example, making upfront payment to the Biodiversity Conservation Fund instead of finding ecologically relevant offsets;⁴⁵ variation of offset rules if like-for-like offsets can't be found; or the dubious option of receiving biodiversity credits for future mine site rehabilitation. These options remain available as *approved conservation measures* under the Biocertification scheme.⁴⁶

Overall, we note four differences between the Offsets Scheme and Biocertification:

- For Biocertification, a ***Biodiversity Certification Assessment Report*** is prepared instead of the ***Biodiversity Development Assessment Report*** required for site-scale development applications. Both reports use the Biodiversity Assessment Method to assess biodiversity values at the relevant scale.
- The Environment Minister must consider (but is not bound by) the results of a ***Biodiversity Certification Assessment Report***. The Minister must instead be satisfied that the approved conservation measures 'adequately address the likely impacts' of biocertification 'on biodiversity values...'.⁴⁷
- ***Strategic biocertification*** allows *other approved conservation measures* to compensate for impacts, instead of the offset rules and variations.⁴⁷
- If development proposals in a biocertified area meet the conditions of the biocertification order, no site-by-site assessment of relevant biodiversity values is required (and no specific site-based offsets will be required for individual development applications).

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This information is an overview of relevant environmental laws as at November 2017.
It is not a substitute for legal advice, which will depend on particular circumstances.
While we make every effort to provide correct information, if you have any suggestions, comments or
feedback please email us at [edonsw\[at\]edonsw.org.au](mailto:edonsw[at]edonsw.org.au).

⁴⁴ See *Biodiversity Conservation Act 2016* (NSW) Parts 6 and 7.

⁴⁵ Payments to the Fund are determined using the Biodiversity Offsets Calculator tool made by OEH.

⁴⁶ Except the option to fund supplementary 'biodiversity conservation actions' (research, surveys etc).

⁴⁷ See Biodiversity Conservation Regulation 2017, clause 6.2(5).