THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EP&D:GUlb:1167260

28 June 2016

Biodiversity Reforms - Have your Say
NSW Office of Environment and Heritage
PO Box A290
Sydney South NSW 1232

Dear Sir/Madam,

Biodiversity Conservation and Land Management in NSW

The Law Society of NSW appreciates the opportunity to comment on the consultation package for reforms to biodiversity conservation and land management in NSW.

This reform process represents the most significant opportunity this decade to address threats to biodiversity while maintaining flexibility for land holders to manage their land effectively.

These reforms propose significant and complex changes to laws and policies designed to regulate land clearing and protect our biodiversity.

The Law Society welcomes some aspects of the reform package. We support increased funding for biodiversity conservation purposes and agree with the principle of increasing engagement with private landholders in achieving positive biodiversity outcomes.

The Law Society has serious concerns, however, about some of the proposed reforms as outlined below.

1. Repeal of the Native Vegetation Act, and associated environmental standards

The Local Land Services Amendment Bill replaces the *Native Vegetation Act 2003* and its assessment methodology with:

- Four new self-assessable codes, which allow significant amounts of clearing. The codes assume that landholders have the ecological expertise to determine their own code-based clearing. The codes allow landholders to justify clearing by setting aside other areas that might be managed or replanted.
- An expanded range of allowable activities.
- Discretionary clearing approvals administered by the Local Land Services ("LLS"). However, it is likely that a significant amount of clearing will be accomplished without requiring LLS assessment, under the codes and as allowable activity exemptions.

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The Law Society has concerns about land categorised as "regulated" under the Land Use Map, which categorises land as either "exempt", "regulated" or "excluded". Significant clearing can be done on these areas under the proposed codes. There is no prohibition on broad-scale clearing, no mandatory assessments for soil, water and salinity and less accountability. There do not appear to be the environmental protections measures that exist in the current regime.

If the proposed reforms lead to a significant increase in land clearing, there could be a reduction in native vegetation and biodiversity in NSW. Landholders may access an expanded offset market, or set aside other areas for regeneration, but this may be at the expense of environmental outcomes.

2. Private land conservation and funding

Under the proposed reforms, proponents will be able to discharge their offset requirements by making payments into the Biodiversity Conservation Fund with the amount derived by using the proposed offsets payment calculator for ecosystem credits and species credits. The new Biodiversity Conservation Trust will then be responsible for securing, retiring and managing offsets in perpetuity.

The three types of costs that the Trust will incur and the calculator model will consider are:

1. The expected credit purchase price – direct cost of acquiring the credits;
2. The cost of operating the fund; and
3. The actual credit purchase costs and administration expenses.

It does not appear that the reforms propose that the Trust actually purchases the freehold title in land, but rather compensates the landowner for giving up its right to use biodiversity offset land in perpetuity.

The Law Society has a number of concerns relating to the offset model, as set out in the following section of this submission.

A key element of the reforms package is a funding commitment to support private land conservation. This is welcome. However, it appears that reliance is being placed on budgetary commitments rather than binding environmental protections enshrined in law.

3. Offsets and ecologically sustainable development

A key goal of the biodiversity reforms is to help deliver ecologically sustainable development in NSW. The primary way of doing so, under the reform package, is by use of biodiversity offsets and expanding the biodiversity offset market.

Offsetting already occurs in NSW, under a variety of legal regimes and policies. The Law Society has a number of concerns with the proposed reforms:

- under the new biodiversity assessment method ("BAM"), the direct "like for like" offsetting requirements under current schemes, are relaxed and could be circumvented;
- the BAM does not include salinity, soil and water assessment modules like the current scheme;

- there is no guarantee that the Biodiversity Conservation Trust will actually be able to offset as required;

- this new option for developers to pay a single payment into an offset fund administered by the new Biodiversity Conservation Trust, rather than managing a direct offset, allows proponents to offset clearing even where there is no "like for like" offset available. This is antithetical to the nature of an offset scheme; and

- the proposal to be able to contribute funds to the Biodiversity Conservation Trust, as an alternative to retiring biodiversity credits, is also concerning. The proposal does not require the Trust to secure the equivalent offsets immediately. There is a risk that such offsets may never be secured because, for example, the class of offsets required may not be available.

The overall effect of these concerns is that the new regime appears to represent a less rigorous regime of offsetting rules, which may significantly reduce the ecological integrity and effectiveness of offsetting in NSW.

4. Public consultation

The Law Society considers that public consultation in relation to important aspects of biodiversity and land management legislation is crucial. We support aspects of the legislation that provide for public consultation and facilitate access to information by the public. The following matters need to be addressed, however, to ensure that these provisions give effect to facilitate this consultation and public availability of information:

Section 9.2(4) provides:

> (4) Detailed provisions of a public consultation document may be summarised instead of being set out in full if the person making the document is satisfied that the summary provides sufficient details for public consultation.

The public ought to be able to critically assess documents placed on public exhibition. This provision provides too great a discretion on the part of the decision-maker to limit access to details of the document. It undermines the purpose of public consultation and should be removed.

Section 9.2(5) provides that a failure to comply with the requirement for a proposed public consultation does not prevent the document being made or amended, or invalidates it once it is made. Again, this provision undermines the role of public consultation.

5. Public register

The reform package requires less information to be placed on public registers compared to the current regime, particularly in relation to land clearing. As a result, it will be difficult for community members to monitor environmental outcomes.

6. Compliance and enforcement

The NSW Government has been unable to estimate how much land-clearing will occur under the new system, and in particular, how much clearing will occur under

the new self-assessable codes. The proposed legislation includes updated offences and penalties, but there is no indication who will undertake compliance and enforcement responsibilities.

The Biodiversity Conservation Bill's objects include improving and sharing knowledge (including drawing on local and Aboriginal knowledge) and the Biodiversity Panel's report hinged on high-quality environmental data, monitoring and reporting. However, the legislation does not set clear requirements for these essential elements so it will be difficult to determine how much biodiversity is being lost under the relaxed rules.

7. Biodiversity certification of land

There are some particular issues with the proposed legislation's process for the biodiversity certification of land. These issues make the regime more cumbersome than it needs to be. These issues can be briefly described as follows:

- An application for biodiversity certification of land may be made by all the owners of the land proposed for biodiversity certification (or by any other person with the approval in writing of all those owners): section 8.5(b). However, not all neighbouring landowners may be willing to participate. This may become a problem because there is no explicit provision allowing discontiguous land to be the subject to a single conferral of biodiversity certification. Section 8.5(b) should be revised so that it is consistent with the provision for biodiversity stewardship sites in section 5.7(1).

- The Minister for the Environment is not obliged to confer biodiversity certification on land, even if the Minister is satisfied that the adverse impacts are fully offset (section 8.7(1)). That is, the Minister is free to make decisions to refuse biodiversity certification on political or other grounds unrelated to the government's biodiversity assessment method. This is undesirable.

- There will be an appeal right (to the Land and Environment Court) in relation to a decision by the Environment Minister to suspend, revoke or modify the biodiversity certification (section 8.21(1). However, no corresponding right of appeal is proposed for a decision by the Minister to refuse to confer biodiversity certification in the first place. We think there should be such an appeal right.

- There is no requirement that a private sector applicant for biodiversity certification be identified by the Minister as a party to the biodiversity certification (section 8.9(2)). This may adversely affect the rights of that applicant.

- There is no appeal right (to the Land and Environment Court) from a decision of the Minister to order a party to a biodiversity conversation agreement to carry out work or other actions to rectify a contravention of the agreement (section 8.18). This is anomalous, given that there is such an appeal right in relation to a decision by the Minister to require the party to a biodiversity certification to rectify a failure to comply with a conservation measure required by that certification (section 8.15). An appeal right should exist for the former, in line with the latter.

- An apparent drafting error in section 8.25(a) seems to allow the Premier to definitively resolve disputes between private sector parties and the Minister for the Environment. This appears to be an error as the relevant provision is titled 'Intra-government dispute resolution arrangements'.

- A biodiversity certification agreement may require (under section 8.16(2)(f)) that a person provide security for the performance of any of the person's obligations in connection with biodiversity certification. This has the potential to be burdensome. The need for security may be reduced or removed if a biodiversity certification agreement is able to link required actions to the issue of construction, subdivision and/or occupation certificates. Such provisions would be equivalent to the provisions under the *Environmental Planning and Assessment Act 1979* ("EP&A Act") (section 109H(2), section 109J(c1) and clause 146A of the *Environmental Planning and Assessment Regulation 2000*).

- The list of matters that may be included in a biodiversity certification agreement (section 8.16(2)) does not enable provisions to be inserted that impose obligations on the Minister for the Environment. Such provisions are commonplace in planning agreements, and generally include obligations to act reasonably and respond promptly when decisions are required under an agreement, to provide access to land, etc. The proposed provisions should be in-line with the provisions for biodiversity stewardship agreements (section 5.6(2)).

- A successor-in-title may have a biodiversity certification agreement enforced against it as if it were the original party to the agreement, but does not have any explicit reciprocal rights itself to enforce the agreement (section 8.17(1)). This is in contrast to the rights conferred on successors-in-title in relation to biodiversity stewardship agreements (section 5.13(1)). A successor-in-title should have an explicit right to enforce the agreement (as well as being bound by it).

- A party to a biodiversity certification agreement is not entitled to bring proceedings in the Land and Environment Court against the Minister for the Environment (or anyone else) to remedy or restrain a breach of the agreement without the written consent of the Minister: section 13.15(1)). This is perverse. We note that a similar problem arises in relation to private land conservation agreements under section 13.14(1). Biodiversity certification agreements and private land conservation agreements, like planning agreements, should be capable of being enforced in the Land and Environment Court by members of the public at large.

- Biodiversity certification agreements are not proposed to be purely voluntary:

  a) The Minister may require an applicant for biodiversity certification to enter into a biodiversity certification agreement even if the application satisfies the biodiversity assessment methodology without such an agreement. The provisions should be in-line with the approach to planning agreements that exists under section 93I(2)-(3) of the EP&A Act.

  b) The biodiversity assessment methodology may mandate that biodiversity certification agreements be entered into in some or all circumstances. The provision should be in-line with the approach to planning agreements that exists under section 93I(1) of the EP&A Act.

If you have any questions in relation to this submission, please contact Liza Booth, Principal Policy Lawyer, by email by email to liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours sincerely,

Gary Ulman
President