

# **Draft submission to the NSW land management and conservation reforms**

June 2016

# Table of contents

|  |           |
|--|-----------|
| <b>Opening</b>   | <b>3</b>  |
| <b>Background</b>  | <b>4</b>  |
| <b>Biodiversity Conservation Bill 2016</b>                   | <b>4</b>  |
| General  | 4         |
| Purpose and objects of the Act                               | 4         |
| ‘Avoid, Minimise, Offset’ principle                          | 5         |
| Areas of outstanding biodiversity value (AOBV)               | 5         |
| Biodiversity assessment and approvals under Planning Act     | 5         |
| Biodiversity Assessment Methodology (BAM)                    | 6         |
| Sensitive Values Map (SVM)                                   | 9         |
| Investment strategy and private land conservation agreements | 9         |
| Biodiversity offsets   | 10        |
| Biodiversity certification                                   | 11        |
| Biodiversity Conservation Trust                              | 11        |
| <b>Local Land Services Amendment Bill 2016</b>               | <b>11</b> |
| Urban SEPP   | 11        |
| Native vegetation regulatory map                             | 12        |
| Codes  | 12        |
| Set-Asides   | 12        |
| <b>Implementation of reforms</b>                             | <b>13</b> |
| Resourcing and assistance to councils                        | 13        |
| Compliance   | 13        |
| <b>Conclusion</b>  | <b>13</b> |
| <b>Issues and recommendations</b>                            | <b>14</b> |

## Opening

Local Government NSW (LGNSW) is the peak body for councils in NSW, representing NSW general-purpose councils and associate members including special-purpose county councils and the NSW Aboriginal Land Council. In essence, LGNSW is the organisation for all things local government in NSW. LGNSW facilitates the development of an effective community based system of local government in the State.

LGNSW welcomes the opportunity to provide input into the proposed land management and conservation reforms which will impact on the management of biodiversity across NSW. The reforms include draft legislation: the Biodiversity Conservation Bill 2016 and Local Land Services Amendment Bill 2016 and require the repeal of the *Native Vegetation Act 2003*, the *Threatened Species Conservation Act 1995*, the *Nature Conservation Trust Act 2001* and parts of the *National Parks and Wildlife Act 1974*.

The supporting Regulations, Native Vegetation Regulatory Map and associated State Environmental Planning Policy (SEPP) for vegetation clearing in urban areas, are all key elements of the reform which will directly impact on the success of the new framework, but are yet to be drafted. These reforms are complex, involving a major overhaul of legislation and existing practice. The materials made available through this public consultation phase lack the significant detail required for stakeholders to fully understand and provide informed comment. LGNSW reserves the right to clarify or modify its position once all of the details of the proposed reforms are released.

While these comments are on behalf of NSW local government, the submission does not override or negate any submission made by an individual council. LGNSW has actively supported and encouraged councils to make individual submissions, or provide input to the LGNSW submission.

This submission is provided in draft form, pending endorsement by the LGNSW Board. LGNSW will advise the NSW Government of any changes to the submission arising from the Board's consideration.

### Consultation with local government

LGNSW, as a key stakeholder, was invited by the NSW Government to participate in a consultation phase prior to public exhibition of the reform package. These meetings provided a very valuable opportunity to discuss particular elements of the reform in a confidential process, contributing local government perspectives on relevant elements of the reform. Positive changes to the package were made as a result and LGNSW commends the agencies involved for this. The confidential nature of the discussions did not allow for direct consultation and council input at the time. During the recent public consultation phase, the Office of Environment and Heritage (OEH) supported by the Department of Planning and Environment (DPE) held a series of workshops across 10 locations, involving 215 participants from 75 councils. Feedback from these sessions, while positive in relation to the opportunity provided for detailed discussion, also saw councils raise concerns in relation to the short time frame to review a complex and extensive change in legislation. A webinar targeted at senior council staff and providing a more general overview of the reforms included over 90 participants from the local government sector.

An 8 week public consultation phase for such a significant and extensive reform package was considered inadequate by councils to prepare detailed, endorsed submissions.

## Background

Biodiversity management and protection is a key area of responsibility for local government and of great interest to local communities. As established in the Charter of the *Local Government Act 1993*, a council is *'to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development'*, firmly placing biodiversity management issues as a core function for councils.

Councils' planning and approval processes are a key influence on local biodiversity management. The *Environmental Planning and Assessment Act 1979* includes objects to encourage *'the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats'* as well as reference to *'ecologically sustainable development'*. Councils have worked with their communities to identify and plan for the protection of their local biodiversity while creating opportunities for sustainable development.

Councils have a clear legislative mandate to manage the on-going challenge of development pressure and maintenance of environmental values. Over time, councils have responded to this challenge through improved knowledge of and strategic planning for their local biodiversity including; undertaking mapping and assessments, developing biodiversity strategies and policies and processes, and building the capability of staff.

While the interaction between planning decisions and biodiversity management is a critical one, local government has a broader more holistic approach to biodiversity management as public land managers and through community education and engagement activities.

The NSW Government has designed these reforms to meet three core objectives: to cut red tape, to facilitate ecologically sustainable development and to conserve biodiversity.

## Biodiversity Conservation Bill 2016

### General

The proposed legislation has significant implications for biodiversity across both urban and rural lands. It is unclear if the reforms will create a simpler, streamlined system or meet the objectives of the Government's reform agenda.

The links between the proposed biodiversity legislation and the planning legislation are complex and with the detail provided to date, the framework appears difficult to administer. It is likely this will leave local government administering even more complex, time consuming and confusing processes than currently exist. This could have significant resource implications.

### Purpose and objects of the Act

The first objective of the Act relates to the conservation of biodiversity and ecological integrity at bioregional and state scales. No reference is made to the site and local scale where decisions on protection and loss are being made, and the impact of these decisions on the local community.

The objects of the draft Bill should also recognise the importance of conserving biodiversity and native vegetation to maintain and improve other natural resources such as soils, water quality and quantity, and to mitigate climate change.

### **‘Avoid, Minimise, Offset’ principle**

One of the underlying principles of the tools used to assess biodiversity impact is the ‘avoid, minimise, offset’ approach which informs the use of the Biodiversity Assessment Methodology (BAM). This key principle should also be reflected in the objects of the Act to establish the premise that impacts on biodiversity must in the first instance be avoided and minimised, prior to moving to the offsetting methodology.

Establishing this approach in the objects of the Act will reinforce the intent of the NSW Government to only use offsetting when impacts are unable to be avoided and minimised, and not as a first step in the development process. A clear legislative intent is needed to provide councils with the statutory backing to work with proponents to address this requirement early on in the development approval process.

### **Areas of outstanding biodiversity value (AOBV)**

Details on the criteria for prescribing areas of outstanding biodiversity value are to be provided in the regulations (undrafted). AOBV will be declared by the Minister and will guide the investment areas identified in the ‘Biodiversity Conservation Investment Strategy’. Councils seek mechanisms for inclusion of local knowledge in the process of determining the AOBVs and the opportunity to identify areas for investment.

AOBV should be a consideration in determining serious and irreversible impact, referred to later in the submission.

### **Biodiversity assessment and approvals under Planning Act**

The reforms intend to create simpler, streamlined legislation which cuts red tape, facilitates ecologically sustainable development and conserves biodiversity. However, much of the detail missing relates to the assessment and approval process (Part 7) of the Bill. This includes supporting regulations, the Urban SEPP and criteria for interpreting some of the concepts in this part of the Bill, all of which are critical to the success of the legislation.

#### Part 5 exemption

There is no reason why land held by the state should not be included in the new system. The rules that apply for the protection of threatened species and biodiversity values should apply equally to public and private land.

The new system excludes Part 5 applications, lodged by public authorities and usually applying to crown or public land. As such, the development applications of public authorities avoid the BAM and the opportunity to use a consistent approach to biodiversity offsets (as applied to private development). Councils are also Part 5 developers and support the view that the legislation should apply to Part 5 development along with the same standard of vegetation assessment and offset (if required) as Part 4. Consistency between Part 4 and 5 assessments would ensure a more robust and transparent approach to biodiversity management and acknowledge that many Part 5 developments may have significant environmental impacts.

#### Test of Significance

The test of significance still applies to land where development with clearing is proposed. The test is modelled on the existing 7 part test. Councils have expressed concern with relying on this test, which has received mixed reviews in relation to its effectiveness. There is also concern in relation to the ability for proponents to seek consultants’ reports which do not trigger significance.

The test of significance is proposed to move from the current 7 part test to a 5 part test with the removal of the parts relating to key threatening processes and endangered populations. The removal of key threatening processes is not supported given the value of applying this part of the test to the protection of biodiversity, particularly in urban areas. For example, Parramatta City Council used the key threatening processes part of the test of significance to include conditions of consent for an approval in relation to the impact of stormwater on an Endangered Ecological Community.

### **Biodiversity Assessment Methodology (BAM)**

The BAM establishes a consistent approach to the consideration of biodiversity in development applications under the EP&A Act. Councils welcome simplifying the systems currently being used across NSW for biodiversity assessment, which includes biobanking, biocertification and the species impact statement (SIS), to create a consistent method to be robustly applied. The inclusion of the principles of avoid and minimise impact is also supported.

#### Thresholds

Thresholds are proposed to determine when a proponent must use the BAM. These thresholds are problematic and can be quite arbitrary when applied locally. They are a blunt tool when used to determine whether a BAM is required, targeting larger sites and ignoring smaller sites that may have been identified as hosting valuable biodiversity not picked up by the threshold. The area-based thresholds are also not appropriate for some parts of NSW, particularly in the coastal areas of NSW where lot sizes are small and pressure for development strong. Greater flexibility in developing and applying thresholds tailored to local government areas or regional approaches to thresholds would achieve a better outcome.

An alternative model to fixed area thresholds is proposed and is based on percentage vegetation cover to be cleared. This would include setting a maximum hectare sized area to be cleared and the avoidance of mapped sensitive value vegetation. The use of the holding size rather than minimum lot size would improve the model.

Whatever approach is used, it is strongly suggested that thresholds should be tested across councils before they are applied. Alternatively, a sample of case studies from previous land clearing developments should be reviewed to assess whether the thresholds are reasonable.

Clarification is required as to how to manage land that is cleared, which is under the 'thresholds'. It is unclear to councils whether the owner can clear up to the threshold over successive years. Many councils raised concerns about how this will be managed. The compliance issues associated with this are unclear from councils' perspective.

Monitoring of clearing undertaken under the thresholds is necessary to assess incremental impact. More details are required on how this will be undertaken. The monitoring data should be made publically available.

#### BAM Calculator and BAR

An independent assessor is required to undertake the BAM process for development requiring approval. The decisions resulting from the BAM process are included in a Biodiversity Assessment Report (BAR) to the consent authority. Local government seeks a requirement for proponents to also consult with local government early in the BAM process to ensure the timely application of local policy in relation to locally sensitive areas or high conservation values. Local constraints should be explored early in the process, rather than leaving these considerations to the development assessment process.

The detail behind the BAM calculator and attributes for assessment must be available to consent authorities to assist them in the decision making process and ensure that all relevant information has been considered. Councils may have local information to contribute to the BAM calculator on things such as species sightings, or more detailed local biodiversity mapping. A mechanism to capture this in the BAM/BAR process is needed.

Consent authorities will receive a BAR detailing how the proponent intends to avoid and minimise impacts and any offset obligations in biodiversity credits submitted with the DA. This will need to be assessed based on the information provided prior to making a decision. Local government staff will require considerable support and training to build their skills and capacity to adequately assess these reports.

As a consent authority, council will be expected to make a decision based on the information provided, including the concept of 'serious and irreversible' impact, which remains undefined in the Bill. Councils can refuse an application based on local biodiversity impact however it would be better to ensure local impacts can be built into the system at an earlier stage and avoid any unnecessary costs for the proponents, such as consultants' fees and other investigations.

Councils seek flexibility in implementing the outcomes provided in the BAR, apart from the offset requirements (referred to in the section on discounting), in recognition of council's right to apply the avoid and minimise hierarchy and to reflect council's local biodiversity policies and plans.

#### Accredited Assessors

The local government sector has had very mixed experience with systems involving accredited assessors, and while we acknowledge that these schemes will remain, there is value in separating the proponent from the independent assessor for biodiversity assessment. To provide more transparency, and avoid bias by the proponent, a system could exist whereby the council employs the accredited assessor to undertake the BAM and provide their report to council for consideration with a DA. All costs associated with such an approach would be recovered from the proponent.

In addition, councils expressed concern that some areas of the state may not have enough accredited assessors available to them. Questions have been raised as to whether council officers can become accredited assessors and whether council officers could undertake a simpler training course based around analysing completed BARs.

#### Serious and irreversible impact

The BAR will provide detail on whether the development will have a serious and irreversible impact, however the consent authority as part of their assessment will need to interpret this. Clear criteria and guidance to ensure consistency in applying this definition is needed. The application of serious and irreversible impact can result in a Part 4 application being refused. As mentioned previously, Part 5 development should also be subject to the same rules, or at the very least be subject to public consultation and third party appeal rights.

The criteria used to identify serious and irreversible impact are fundamental to the success of the legislation and should be developed in consultation with the consent authorities responsible for their implementation (local government and LLS). Approval authorities should have discretion to set additional triggers for serious and irreversible impacts on local biodiversity as they see fit. The definition of serious and irreversible impact should include biodiversity values which are unable to be offset.

LGNSW is concerned that councils may require assistance from technical experts to make an assessment on this fundamental element of the process. It may be appropriate to include a

provision enabling councils to refer applications triggering a serious and irreversible impact to OEH for technical input.

#### Standard conditions of consent

The consent authority will make a decision on the proposed development based on the information provided in the DA and BAR, and can apply appropriate conditions of consent. Clear guidance and standard conditions are sought to ensure the legislation is applied consistently across the state.

Section 80A of the *Environmental Planning and Assessment Act 1979* allows council to impose conditions, but does not give council free rein. The legislation will need to ensure that provision is made to enable councils and other consent authorities to have the mandate to apply appropriate conditions of consent.

Ensuring compliance with conditions of consent is time consuming and costly for the consent authority, and adequate resourcing of councils to undertake this role effectively is essential.

#### Independent review or referral

The proposed reforms have removed any referral or concurrence role for OEH, requiring consent authorities to make independent decisions. Given the flexibility proposed in the approval system including: the option of discounting offsets, interpreting serious and irreversible impact and applying conditions of consent, councils are seeking an option for independent review of a DA by an appropriate expert. Such a review would be for instances of contentious development, or where councils have limited in-house skills and experience.

This option would support councils and provide the expert and independent advice required at times in complex and sometimes controversial development assessment processes. Not all councils would be seeking this level of support, however it would ensure a more robust process for development which may trigger significant and irreversible impacts or include a BAR which requires closer scrutiny. This role would be best undertaken by the OEH.

#### Unregulated land

LGNSW seeks consistency in the application of offsets on both regulated and unregulated land when development approval is required through the planning system. The Bill currently creates some disparity in the biodiversity assessment requirements for developments with biodiversity impacts on land of varying status. Councils seek further review and consideration of how to simplify this approach so that it leads to more consistent decision making and offsets requirements.

#### Discounting

The proposed system allows some discretion for the consent authority to lower the offset obligation provided in the BAR through the consideration of ESD principles as per section 79C of the EP&A Act.

Most councils were uncertain how this discretion would be applied and what matters would be relevant to the consideration of reducing the offsets required.

At this stage LGNSW opposes this approach as it is unexplained and appears to be contrary to the scientific approach of applying offsets under the BAM. Nevertheless, there may be many reasons for councils to reduce the obligations of the offset scheme because of the benefit of the proposed development at a local level.

Discounting of offsets required under the BAR should only be further considered by the state government when draft guidelines have been prepared and circulated to councils for feedback.



Such guidelines would provide the planning criteria for approving discounts, and should consider issues such as the need for clear guidance and criteria as to when offsets could be discounted and a system whereby the consent authority should publish reasons addressing those criteria. The degree of accountability of the consent authority to the public in cases of discounting also needs to be outlined, including where the reasons for discounting are to be published and whether the decision can be challenged.

Given that guidance on discounting has not been prepared, we oppose the approach at this stage.

#### Biodiversity data management

Quality biodiversity data will continue to be generated through the development process. A simple and effective mechanism is needed to ensure data generated in a BAR through any additional assessment work contributes and updates existing biodiversity knowledge and data. A BAR report should be in a format to facilitate a direct link to appropriate databases, and build on biodiversity knowledge. State-based databases should link to local databases where possible.

#### **Sensitive Values Map (SVM)**

The reforms include the development of a sensitive values map (detail not yet defined). Currently the reforms do not provide detail on inclusions for the sensitive values map, or the role of local government in contributing locally relevant information. In our view the SVM should include:

- locally relevant information to create LGA-specific maps.
- flexibility to include local and regional datasets, where available, rather than creating a rigid framework to meet minimal requirements.
- the development of a mechanism to update the map with new ecological assessment information sourced through the BAM process and for these updates to be timely and accurate.
- regional corridor mapping, wildlife corridors, vegetation community mapping (including EEC), koala mapping, important wetlands, temperate grasslands, steep lands, over cleared lands and locally rare vegetation, local biodiversity overlays, waterway buffers, and threatened species habitat, and other relevant local and regional information.
- areas of biodiversity value of local relevance but not defined as threatened species or that meet the higher AOBV criteria.

Where data is lacking, OEH or the relevant councils should be provided with the resources to update sensitive values mapping and / or undertake data collection to contribute to the SVM. The SVM should be a 'living' document captured in spatial software and subject to periodic review. The map must reflect losses as incurred, which may also impact or elevate the importance of other areas on the map. Review processes for map updates must be efficient and ensure that the best available biodiversity information is made accessible to assist decision making processes.

#### **Investment strategy and private land conservation agreements**

The protection of biodiversity on private land is a key element of this reform and significant incentives and assistance will be provided to land managers. Tier 1 agreements (Biodiversity Stewardship Agreements) are permanent agreements registered on title, whereas Tier 2 (Conservation Agreements) can be either permanent, or for an agreed period of time. Both must be registered on title and run with the land.

Landholder agreements should be included on zoning certificates (section 149 certificates) and resources should be available to councils to assist this process.

Local government supports the provision of agreements being tenure blind, ensuring that public land can be subject to conservation agreements, and that incentives for the management of these sites are also made available to land managers, including local government.

LGNSW does not support the provision of rate rebates for land subject to a conservation agreement unless councils are reimbursed for this loss of rating income. Without such compensation, the provision of rate rebates is a direct cost shift to councils which is unacceptable.

Some councils have raised issues associated with land that is affected by potential mining activity which complicates the capacity to apply biodiversity stewardship agreements on these lands, effectively limiting large tracts of land from offsetting opportunities.

### **Biodiversity offsets**

A key element of the reform package is the introduction of a consistent biodiversity offset system across NSW (Part 6 of the Bill). LGNSW supports greater transparency and consistency in the application of offsets across NSW. However, offsets should be used as a final option once opportunities to avoid and minimise impact are exhausted. Further detail of the offset system will be included in a regulation (undrafted).

The following features are considered necessary:

- Based on the 'like for like' principle.
- Flexibility to determine locally specific 'like for like' rules.
- Local offsets should be encouraged as a first option and disincentives built into the system for offsets sites which are further away from the site of impact.
- Utilise the considerable local biodiversity and community knowledge of councils to assist in identifying appropriate local offset sites.
- Build triggers into the system to prevent time lags between a proponent making a payment to the Biodiversity Conservation Trust (BCT) and finding an appropriate offset.
- Ensure notifications are built into the process to advise councils of when the offset obligations have been discharged.
- Suggest changing zoning when land is offset to ensure highest level of protection.
- The creation of a public register that includes the retirement of biodiversity offset credit sites.
- Clear monitoring of management actions associated with offsets that are reviewed and reported on with information available in a publicly accessible register.
- Spatially record impact, values lost and offset sites. Capture this data in state-wide databases that link to council databases. More consultation with local government is needed on integrating the BAM databases and biodiversity offset registers with council databases.

Local government is cautious about flexibility being built into the offset rules, effectively creating a hierarchy of offsets through the use of variation rules. If biodiversity is to be lost then a high bar should be set regarding acceptable offsets. Councils have identified circumstances where a plant community type could be completely cleared at a local to regional scale under the current rules. The intent of the reforms is to protect biological diversity, which presumably would not result in the extinction of a species in an area. Variation rules which diminish the

strength of the offset and even suggest the use of biodiversity conservation actions in place of an offset credit are not supported by councils.

Discharging offset obligations through a payment to the BCT should be used as a final option. In these instances, offsets should still be 'like for like' where available and sourced locally as a preferred option. Disincentives such as adding a premium for proponents opting to cash in their offset obligations could be included in the offset framework.

### **Biodiversity certification**

Support to councils to undertake strategic biodiversity certification is welcomed (Part 9 of the Bill). The opportunity to simplify assessment in the longer term and provide for biodiversity protection is supported, and while councils have expressed an interest in this, only a few have been able to embark on the process given the expense and time lag to recoup costs from the upfront planning.

The Bill also provides for non-strategic certification of land, which may include individual properties. The costs associated with non-strategic certification should be borne by the owner, and a formal requirement built into the process to consult with council. A concurrence role may be appropriate provided councils are adequately resourced to assume this role in recognition of local government's strategic planning role at the local level.

### **Biodiversity Conservation Trust**

LGNSW is supportive of the creation of a Biodiversity Conservation Trust (BCT), as described in Part 10 of the Bill, with a mandate to encourage private land conservation and identify and discharge biodiversity offsets. An expertise based board is appropriate and we support the inclusion of a member with skills and experience in 'land use planning and the operation of local councils' as identified in the draft Bill.

The BCT includes three trust funds for investment. While there is a considerable emphasis on private land conservation, assistance to councils through a specific local government fund would provide much needed resources to the sector to assist in implementing elements of the reform. This could include assistance to councils in the provision of rate rebates if these are required by the legislation.

## **Local Land Services Amendment Bill 2016**

### **Urban SEPP**

Vegetation clearing decisions in urban areas, areas zoned E2, E3 and E4 (E zones) and R5 zones will be delivered through an Urban SEPP, which will replace councils' current Tree Preservation Order permit system. LGNSW notes that the Urban SEPP will be released for public comment later this year, and DPE has indicated a willingness to engage with LGNSW through its development. Without further detail, LGNSW is unable to fully assess the intended effects and reserves the right to comment further once all of the information is available.

However, the consultation materials include a question in relation to whether the LLS or local council should be responsible for issuing permits in E zones and R5 zones. This question was raised during the consultation workshops where councils widely supported taking on this role, provided that adequate resources were available to assist this process. Nevertheless, we are aware that E zones may be under review across NSW and this must be clarified prior to further development of the SEPP.

While the creation of an additional SEPP may not be simplifying the process, it could provide a mechanism for the protection of locally important biodiversity, which councils support. Clarity is still sought to ensure that councils' current biodiversity controls are incorporated in the SEPP and not extinguished.

The inclusion of E zones in the urban SEPP is supported as it excludes these lands from clearing under the codes (as defined in the LLS Act) and provides local government with the opportunity to ensure appropriate clearing controls are implemented. This approach is supported and is an improvement on previous legislation which did allow Routine Agricultural Management Activities (RAMAs) to apply.

### **Native vegetation regulatory map**

The Native Vegetation Regulatory Map will identify rural land as either regulated or unregulated. Unregulated land is exempt from the new land management framework and regulated land will need to comply with the requirements of the Local Land Services Act for clearing through an allowable activity or code, or seek approval from Local Land Services (LLS).

A map review process will be available to landholders to ensure their land is appropriately categorised, however there is no provision for local government to present additional information and seek a review of the regulatory map. Many councils have detailed mapping and strategic biodiversity and land use management plans which could present information to assist in ensuring accuracy in the regulatory map process. It is appropriate to seek council input to the maps prior to exhibition, to ensure all local data is included.

### **Codes**

Allowable activities defined through codes detail the extent of clearing for rural infrastructure. Coastal councils in particular have concern in relation to the maximum authorised clearing in their areas being inappropriate, leading to vegetation loss without controls.

### **Set-Asides**

The LLS Amendment Bill and the accompanying information about the Codes provide for set-aside areas to be provided in certain circumstances and for the set-aside areas to be managed in perpetuity. Further consultation should be undertaken on the Codes when they are drafted. A stronger protection for set-asides would be to change their status to excluded land under the legislation (rather than regulated land), which would ensure a more appropriate level of protection.

Some of the Codes allow the clearing of endangered ecological communities (EEC) and in some cases EECs can be cleared without a requirement to offset this impact. Local government does not support the clearing of EECs without an offset. In cases where a set-aside area is required, a 50% increase in the set-aside area applies. The increased set-aside requirement is supported as it could potentially discourage the clearing of EECs (as a smaller set-aside area would be required if the land owner avoided clearing an area of EEC). A 50% increase for set-aside areas should be applied to any proposed clearing of over-cleared vegetation types.

## Implementation of reforms

### Resourcing and assistance to councils

Local government will require assistance in building capacity to deliver the reform package. A suite of resources including training, guidelines and other relevant tools and materials are needed to assist councils and provide guidance on:

- reviewing the BAR and applying s 79C EP&A Act in consideration of development decisions
- the 'assessment of significance' application by council. Criteria are required, to avoid subjectivity.
- 'serious and irreversible' impact including criteria to assess this.
- discounting, including clear criteria on the rationale and application of discounting.
- standard 'conditions of consent' and training on how these should be applied.

Training for council assessment staff on using the BAM is essential, with a particular focus on assessing BAR reports. Councils also need resources to convert data into the format needed by the mapping to make this useful in the new system.

### Compliance

Local government has a keen interest in the compliance mechanisms of the new legislation. This includes compliance in relation to vegetation clearing in rural and urban areas, on regulated and unregulated lands. Councils remain the first point of contact for many in the community who report suspicious clearing activity, and under the current legislation these reports are referred to the OEH. However, unless the areas involved are substantial there has been some reluctance in pursuing compliance action.

There is some concern amongst councils that the onus will be on councils to determine if the BAM is required after a DA is lodged and to prove whether or not a threshold was met to trigger the BAM. There are also questions as to how councils will track the clearing of land on a lot over time in the case that timeframes for clearing are introduced.

While a challenging and sensitive issue, a clear compliance framework must be created to ensure that adequate penalties apply and actions are taken to enforce breaches of the legislation.

### Conclusion

Local Government supports the streamlining and modernisation of biodiversity legislation in NSW. To ensure good planning and biodiversity outcomes, the legislation must be unambiguous and able to be consistently applied.

The aim of the independent biodiversity review undertaken in 2014 include 'to establish simpler, streamlined and more effective legislation that will:

- facilitate the conservation of biological diversity
- support sustainable development and
- reduce red-tape.'

Councils are mostly optimistic that the proposed reforms have the potential to streamline and strengthen biodiversity conservation in NSW. Nevertheless, councils have strong reservations about how the process will be implemented, and given the lack of information on certain key aspects of the new process, and concerns around its effective delivery at a local government level.

More work is needed to resolve the details to ensure that local biodiversity values are appropriately protected and are not inadvertently overlooked in the new approach. Also trialling of thresholds to trigger the BAM and work around the implementation of this new approach is necessary to ensure councils are fully equipped to administer this process. In addition, there is still some ambiguity around the level of discretion councils have in determining a DA where native vegetation is proposed to be cleared and how the BAR will be considered in light of councils' section 79 considerations. This raises the question for councils as to whether they can oppose clearing, or part thereof, on local biodiversity assessment criteria.

Further complexities that need to be resolved are:

- the responsibilities that fall between different consent authorities for different clearing applications
- the system of thresholds to trigger the BAM and issues around how the new system will be implemented
- how the new test of significance will work in practice in comparison to the current test (which has many critics)
- expectations on consent authorities to manage 'serious and irreversible impact'
- the benefit of including Part 5 development in the scheme.
- how councils will be resourced to implement the new system and the capacity of OEH to provide training and a 'help desk' especially in the early stages of implementation.
- the details outlined in the regulations and Urban SEPP.

Please refer to the extended list of issues and recommendations at the end of this submission.

LGNSW will continue to offer support to the NSW Government in the development of further components of the system and essential supporting material to transition to the new system. This detail is essential in ensuring that the new system will meet its aims and deliver biodiversity conservation and sustainable development outcomes in a more streamlined way.

## **Issues and recommendations**

### **Objects of the Act**

1. LGNSW seeks inclusion of conservation of biodiversity at a site and local scale in the objects of the Act.

### **Avoid and minimise principle**

2. LGNSW seeks the inclusion of the 'avoid, minimise, offset' principle and intent of the Bill in the purpose and objects. This would establish a clear legislative intent to avoid and minimise biodiversity losses.

### **Areas of outstanding biodiversity value**

3. Councils seek a mechanism for the inclusion of local knowledge in the process of determining the AOBVs.

## **Part 5**

4. The reforms should be applied consistently across Part 4 and Part 5 development to ensure a more robust and transparent approach to biodiversity management.

### **Test of significance**

5. The test of significance should retain key threatening process assessment as a consideration.

### **Thresholds**

6. Greater flexibility in developing and applying thresholds specific to local government areas or regional approaches to thresholds are more appropriate. An alternative model to fixed area thresholds would be percentage of vegetation cover to be cleared, capped at a maximum hectare size area to be cleared and avoidance of mapped sensitive value vegetation. The inclusion of the holding size rather than minimum lot size would also improve the model.
7. Proposed thresholds should be tested on a sample of case studies from previous land clearing developments to see if they are suitable.
8. Timeframes for clearing under the thresholds, and notification to new owners of land if a BAM threshold has been reached, need to be included in the reform package.
9. Monitoring of clearing undertaken under the thresholds is necessary to consider incremental impact in areas. This data should be publicly available.

### **Biodiversity Assessment Methodology**

10. Local government seeks a requirement for proponents to consult with local government early on in the BAM process to ensure the timely application of local policy in relation to sensitive areas or high conservation values in the local area.
11. The detail behind the BAM calculator and attributes for assessment must be available to consent authorities to assist them in the decision making process and ensure all relevant information has been considered.
12. Councils may have local information to contribute to the BAM calculator on things such as species sightings, or more detailed local biodiversity mapping. A mechanism to capture this in the BAR process is needed.
13. Provide support and assistance to local government staff to build their skills and capacity to adequately assess a BAR.
14. Explore the option of council employing the accredited assessor to undertake the BAM and provide their report to council for consideration with a proponents DA. All costs associated with such an approach would be recovered from the proponent.

### **Serious and irreversible impact**

15. Clear criteria and guidance to ensure consistency in applying 'serious and irreversible' impact is needed.

### **Conditions of consent**

16. Clear guidance and standard conditions are sought to ensure the legislation is applied consistently across the state.
17. Ensuring compliance with conditions of consent is time consuming and costly for the consent authority, and adequate resourcing of councils to undertake this role is needed.

### **Independent review or referral**

18. Given the flexibility proposed in the approval system including the option of discounting offsets, interpreting serious and irreversible impact and applying conditions of consent, councils are seeking an avenue for independent review of a DA by an appropriate expert.

19. Include an option to refer developments to an independent expert for instances of contentious development, or where councils have limited in-house skills and experience to undertake the assessment. This role would be best undertaken by the OEH.

### **Unregulated land**

20. LGNSW seeks consistency in the application of offsets on both regulated and unregulated land when development approval is required through the planning system.

### **Discounting**

21. If discounting remains there must be clear guidance and criteria for when offsets could be discounted and a system created whereby the consent authority should publish reasons addressing those criteria.

### **Biodiversity data management**

22. A simple and effective mechanism is needed to ensure data generated in a BAR through any additional assessment work contributes and updates existing biodiversity knowledge and data. The format of a BAR report should facilitate a direct link to appropriate databases.

### **Sensitive Values Map**

23. A sensitive values map should include:
- locally relevant information to create LGA-specific maps.
  - flexibility to include local and regional datasets, where available, rather than creating a rigid framework to meet minimal requirements.
  - the development of a mechanism to update the map with new ecological assessment information sourced through the BAM process and for these updates to be timely and accurate.
  - regional corridor mapping, vegetation community mapping (including EEC), koala mapping, important wetlands, temperate grasslands, steep lands, over cleared lands and locally rare vegetation, local biodiversity overlays, waterway buffers and threatened species habitat, and other relevant local and regional information.
  - areas of biodiversity value of local relevance but not defined as threatened species or that meet the higher AOBV criteria.
24. Where data is lacking, OEH or the relevant councils should be provided with the resources to update sensitive values mapping and / or undertake data collection to contribute to the SVM.
25. The SVM should be 'living' documents captured in spatial software and subject to periodic review. The map must reflect losses as incurred, which may also impact or elevate the importance of other areas on the map.
26. Review processes for map updates must be efficient and ensure that the best available biodiversity information is made accessible to assist decision making processes.

### **Investment strategy and private land conservation agreements**

27. LGNSW does not support the provision of rate rebates for land subject to a conservation agreement unless councils are reimbursed for this loss of rating income.

### **Biodiversity Offsets**

28. LGNSW supports greater transparency and consistency in the application of offsets across NSW. However, offsets should be used as a final option once opportunities to avoid and minimise impact are exhausted
29. The following features are considered necessary:
- Based on the 'like for like' principle.
  - Flexibility to determine locally specific 'like for like' rules.



- c. Local offsets should be encouraged as a first option and disincentives built into the system for offsets sites which are further away from the site of impact.
  - d. Utilise the considerable local biodiversity and community knowledge of councils to assist in identifying appropriate local offset sites.
  - e. Build triggers into the system to prevent time lags between a proponent making a payment to the BCT and finding an appropriate offset.
  - f. Ensure notifications are built into the process to advise councils of when the offset obligations have been discharged.
  - g. Suggest changing zoning when land is offset to ensure highest level of protection.
  - h. The creation of a public register that includes the retirement of biodiversity offset credit sites.
  - i. Clear monitoring of management actions associated with offsets that are reviewed and reported on with information available in a publicly accessible register.
  - j. Spatially record impact, values lost and offset sites and capture this data in state-wide databases which link to council databases. More consultation with local government is needed on integrating the BAM databases and biodiversity offset registers with council databases.
30. Variation rules that diminish the strength of the offset and even suggest the use of biodiversity conservation actions in place of an offset credit are not supported by councils.
31. Discharging offset obligations through a payment to the BCT should be used as a final option. In these instances, offsets should still be 'like for like' where available and sourced locally as a preferred option. Disincentives such as adding a premium for proponents opting to cash in their offset obligations could be included in the offset framework.

### **Biodiversity certification**

32. The Bill also provides for non-strategic certification of land which may include individual properties. The costs associated with non-strategic certification should be borne by the owner, and a formal requirement built into the process to consult with local government. A concurrence role may be appropriate provided councils are adequately resourced to assume this role in recognition of local government's strategic planning role at the local level.

### **Biodiversity Conservation Trust**

33. Assistance to councils through a specific local government fund of the BCT would provide much needed resources to the sector to assist in implementing elements of the reform.

### **Urban SEPP**

34. DPE should consult with LGNSW and our member councils on the development of the Urban SEPP.
35. Councils should be responsible for issuing permits in E zones and R5 zones provided that adequate resources are available to assist in implementation.

### **Native vegetation regulatory map**

36. Include provisions for local government to participate in the map review process where councils have detailed mapping, strategic biodiversity and land use management plans, which could assist in ensuring the accuracy of the regulatory map.

### **Implementation of reforms**

37. Local government will require assistance in building capacity to deliver the reform package. A suite of resources including training, guidelines and other relevant tools and materials are needed to assist councils and provide guidance on:
- a. reviewing the BAR and applying s 79C EP&A Act in consideration of development decisions

- b. the 'assessment of significance' application by council. Criteria are required, to avoid subjectivity.
- c. 'serious and irreversible' impact including criteria to assess this.
- d. discounting, including clear criteria on the rationale and application of discounting.
- e. provision of standard 'conditions of consent' and provide training on how these should be applied.

Training for council assessment staff on using the BAM is essential, with a particular focus on assessing BAR reports. Councils also need resources to convert data into the format needed by the mapping to make this useful in the new system.

### **Codes**

38. Further analysis of maximum authorised clearing needs to be refined for coastal areas of NSW to ensure clearing distances are appropriate and further vegetation loss without controls is limited.

### **Set Asides**

39. The use of set asides as a mechanism to protect vegetation would be strengthened if set asides were identified as excluded land under the legislation, providing them with appropriate levels of protection.

### **Compliance**

40. A clear compliance framework must be created to ensure that adequate penalties apply and actions are taken to enforce breaches to the legislation.

For further information on this submission, please contact:

Susy Cenedese  
Strategy Manager LGNSW  
[susy.cenedese@lgnsw.org.au](mailto:susy.cenedese@lgnsw.org.au)  
02 9242 4080