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Biodiversity Reforms - Have Your Say

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PLANNING INSTITUTE OF AUSTRALIA NSW DIVISION (PIA NSW) SUBMISSION ON THE DRAFT BIODIVERSITY CONSERVATION BILL

The Planning Institute of Australia NSW Division (PIA NSW) welcomes the opportunity to make a submission on the draft Biodiversity Conservation Bill and supporting products.

The Planning Institute of Australia (PIA) is the peak body representing professionals involved in planning Australian cities, towns and regions. The Institute has around 5,000 members nationally and around 1,200 members in New South Wales. PIA NSW plays key roles in promoting and supporting the planning profession within NSW and advocating at all levels in relation to key planning and public policy issues.

This submission focuses on matters principally as they impact on urban and regional planning decisions. PIA has also provided some comments on environmental planning considerations particularly as they relate to land clearing proposals.

Overview

The proposed new Biodiversity Conservation Act has been prepared to replace the Threatened Species Conservation Act 1995 and part of the National Parks and Wildlife Act 1974 and amend other Acts. A new land management framework under the *Local Land Services Act 2013* (LLS Act) proposes ways NSW landholders can manage land with native vegetation.

Urban and regional planners in both the public and private sectors have considerable involvement with biodiversity legislation in their day-to-day work. PIA NSW commends the Government on working to improve the legislative and policy framework for biodiversity conservation and native vegetation management in New South Wales. However given the current state of the draft Biodiversity Conservation Bill, and the lack of Regulations associated with this draft Bill, it is recommended that this legislation be placed on hold until a number of potentially conflicting issues are addressed in more detail.

In its present form, the Biodiversity Conservation Bill conflicts with many of the changes proposed under the draft Planning Act (Planning Bill 2013) and planning practice in NSW.

At present parts of the Bill appear to be inconsistent with long standing planning practices and changes mooted for planning legislation which aim to bring the planning system in NSW up to international best practice standards. We suggest that further discussion is required and details provided to ensure compatibility and consistency.

PIA is supportive of the objectives of ecologically sustainable development and the ability of authorities to consider the economic, social and environmental impacts and outcomes of policies and legislation. PIA NSW is supportive of maintaining and enhancing biodiversity in NSW. The comments below are concerns that PIA NSW members have identified with the current Bill.

The proposed Biodiversity Conservation Bill potentially provides a pathway for a more consistent approach to biodiversity management in NSW for both land development and the agricultural sector. There are some positive changes under the proposed Bill including the potential for only one biodiversity assessment methodology. The use of strategic biodiversity certification is supported in principle, however, there are several issues that need to be addressed. Similarly, the payment of money for the purchase of significant environmental lands is also supported, but this is not guaranteed in legislation and is subject to change of Government policy. It also fails to require a rational framework to be in place at a regional level to manage the process, such as is provided by the Far North Coast Regional Conservation Plan.

In the absence of guaranteed funding and a coherent framework there is concern that the Act will not achieve its purpose in relation to land clearing because it:

- removes the requirement to 'maintain or improve biodiversity' leading to a decline in environmental outcomes, climate change, soil health, water quality, salinity and increases the threat of flora and fauna extinctions;
- expands the use of 'self-assessable' codes allowing landholders to clear trees, not least those with hollows or remnant habitat, with little oversight;
- reduces the role of the Environment Minister in important biodiversity decisions, with the primary regulatory role for land clearing sitting with the Local Land Services and Minister for Primary Industries;
- increases the scope for Ministerial discretion, including in relation to the application of offsets for which there are no clear environmental baselines, aims or targets;
- limits important safeguards, such as 'red flag' areas for environmentally sensitive areas; and
- increases the use of biodiversity offsets, with variations to 'like for like' offsetting and allowing proponents to clear trees in exchange for paying money into a fund.

Issues and Concerns in relation to planning

- Much of the new Act increases responsibilities for council staff. It is questioned whether councils will have the resources to deal with these increased workloads and whether the specialist knowledge required currently exists within councils. It

is suggested that Development Assessment Planners need further guidelines and support.

- One of the major concerns with this draft bill is the requirement for automatic refusal of a DA under the Environmental Planning and Assessment Act (EP&A) for 'serious and irreversible' biodiversity impacts, without any consideration of the economic and social impacts of a proposal. This goes against the objectives of this Bill but also against the objectives of the current EP&A Act in NSW.
- It has been a long standing tenet of the planning system in NSW to have appeal rights built into the system. The draft bill identifies that where there are 'serious and irreversible' biodiversity impacts then a DA will be automatically refused and there are no appeal rights. This has implications for administering the legislation and responding to the rights of objectors. PIA believes that this should be considered in more detail.
- There is potential for the strategic planning process to identify a site for future growth in an area but then after significant resources are put into the rezoning process (including council's time and resources) the matter is an automatic refusal at the DA stage. It is a serious flaw in the legislation that the biodiversity 'significance' of the site in terms of an ill-defined 'serious and irreversible' impact can manifest itself so late in the planning process. While there are potential linkages with strategic biodiversity certification and the planning process in Sydney through the Greater Sydney Commission Act these legislative provisions do not apply at present outside of Sydney.
- It is our understanding that 'thresholds' are based on the size of land clearing not necessarily the 'impact' that a proposed development will potentially have. As such, smaller landholders may be required to undertake biodiversity assessments by an accredited assessor at significant cost to them based on a metric number rather than the 'biodiversity value' of the land. Consideration should be given as to how this will work in practice for small landowners.
- It is considered that strategic biodiversity certification should not be limited to 'planning authorities' but should be open to other interested parties (e.g. multiple landowners or multiple developers).
- It is also identified that many councils in NSW do not have any policies and / or processes relating to biobanking / biocertification and many do not have policies on Voluntary Planning Agreements. As there is a significant emphasis and role in the draft Bill on local government, the Office of Environment and Heritage (OEH) will need to consider this as most councils will, more than likely, require external assistance on this matter.
- We are supportive of independent assessors undertaking BAM assessments, however, it is unclear whether these assessors will be accredited by an

independent body or by OEH. We would recommend an independent body or association to ensure there are no conflicts of interest, and that the independent body can make recommendations to remove an accreditation rather than OEH, should this be necessary.

- The use of terms such as ‘serious and irreversible damage’ should be defined in the Act and not left to the Regulations (which have not been released). It is inappropriate given the potential impact these terms have on other Acts such as the Environmental Planning and Assessment Act.
- The maps prepared as part of this legislative package (Native Vegetation Regulatory Maps) should be based on more rigour than the biodiversity maps included. For example, some LEPs in southern NSW are not kept up-to-date and in a significant proportion of cases do not correspond with vegetation on the ground.
- Consolidation of the offences, processes and protections into the one Act is considerably easier to navigate. It is definitely an improvement on the current situation where offences are in the National Parks & Wildlife Act with the assessment processes and listings are in the Threatened Species Conservation Act. The penalties proposed are given as \$ values, and not in penalty units. This makes the penalties static in time, and not responsive to the changes in penalty unit values over time.
- The proposed amendments to the Local Land Services (LLS) Act include a proposal for a new SEPP to replace the standard clause in the Standard Instrument for LEPs in relation to trees and vegetation. It is not particularly clear how this will operate – and whether it is a substantive change from the current clause in LEPs. We recommend that it also addresses matters covered by SEPP 19 Urban Bushland.
- The savings and transitional provisions in the Native Vegetation Act retain the provisions of the Native Vegetation Conservation Act in relation to ‘protected land’ – steep slopes and some riparian land. It is not clear how this will be dealt with in the new framework. The *Native Vegetation Regulatory Map Method Statement* appears to consider these. However, this is only relevant to areas subject to the LLS Act. It is not clear how these will be dealt with in ‘urban’ areas.
- PIA NSW believes that there will need to be consideration of how credits are bought and traded. There is a real issue if a proactive mining company or other singular body can pay extremely large amounts of money for biodiversity sites and influence the ‘market’. There needs to be some oversight of the process to ensure developers (including small developers) are able to access ‘offsets’ (be that land or monetary options), otherwise the affordability of housing may be affected in the longer term in NSW should there be one or two several large players in this ‘market’. While we do not oppose an offset policy there needs to be some recognition of the impact of potential players involved in this ‘market’.

- For credits that have never been traded before, the proposed Trust will set the price. How the Trust values the credits will take into account the risk that they will not be able to find suitable offset sites within a designated timeframe (refer to point above as well). Further clarity is requested in this regard as (similar to above) some understanding of the future ‘traders’ in this space needs to be considered to ensure housing affordability does not worsen. The Trust is proposed to have ‘business rules’, e.g. time limits for discharging offset obligations. The Trust has the potential to distort the market – therefore the ‘business rules’ will be important, and further clarity is sought in this regard.
- Urban and regional planners engage with ecologists on a regular basis during both strategic and statutory planning processes. In this context, the issue has been raised of ensuring the description of listings drafted by the Scientific Committee are appropriate and detailed to ensure there is no confusion. We would not wish to see current agricultural and productive land caught up in definitional issues around Areas of Outstanding Biodiversity Value.
- We note that further consultation on more detailed components of the package will take place between now and the commencement of the proposed legislation including making the Native Vegetation Regulatory Map available and providing landholders with an opportunity to seek a formal review of the map for their property if they believe it has been mapped incorrectly; exhibiting a draft SEPP (Urban Tree Removal) by the end of 2016; and exhibiting draft instruments such as the Biodiversity Assessment Method and the Land Management Codes from early 2017. We suggest that this consultation takes place as early as possible, to ensure consistency in the new legislation package and with related legislation.

The Institute welcomes ongoing engagement on the consultation package of reforms to land management and biodiversity conservation in NSW and is happy to elaborate on any of the matters covered in this submission.

Yours sincerely



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President NSW Division**