



Better Planning Network Inc.

21 April 2023

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Review of the Biodiversity Conservation Act 2016

About BPN

Better Planning Network (BPN) is a state-wide Not for Profit, grassroots volunteer-based organisation founded in 2012. Our aim is for a robust and visionary planning system for NSW - one that fosters best practice environmental, heritage, social sustainability and design outcomes; and make sure best practice planning is achieved through a collaborative and authentic community partnership engagement approach.

Submission

This submission to the Biodiversity Conservation Act 2016 (BC Act) Statutory Review supports the many detailed comments already made by other environment groups that have been able to look into the issues in greater depth, and which are based on practical experience of the regime in operation. The submission emphasises the need for stronger protections for our precious native species, populations and communities in NSW and to adapt our biodiversity protection mechanisms to a changing climate.

Statutory Review Process

We submit that it does not make sense to conduct the review of Part 5A and Schedules 5A and 5B of the Local Land Services Act 2013 (LLS Act) separate from the review of the BC Act. Part 5A and Schedules 5A and 5B of the LLS Act were introduced concurrently with the BC Act as part of broader Land Management and Biodiversity Conservation reforms. Section 212(2) of the LLS Act explicitly states that the review of Part 5A of the LLS Act is to be undertaken in conjunction with the review of the BC Act. When introduced it was acknowledged that the Land Management and Biodiversity Conservation reform package “may lead to some increased clearing at a property scale, but that checks and balances such as set asides, biodiversity offsets and investment in private land conservation would ensure the impacts of that clearing are managed”. It is not clear how the terms of reference for either the review of Part 5A of the LLS Act or the review of the BC Act intend to examine the legislative framework as a whole and determine whether checks and balances across the framework are sufficient.

Objects and Purpose

- The objects of the BC Act lack ambition and will not reverse current trends of declining biodiversity. They are not in line with national and international policy ambitions to halt and reverse biodiversity loss.
- The entire biodiversity conservation framework in NSW will only be successful where ministers are under a statutory duty to protect biodiversity and to recover threatened species and decision makers are required to act in accordance with such duties.
- The BC Act should match international and national ambition, including to halt extinctions and protect and conserve land.
- In particular, in order to overcome baseline decline and prevent further extinctions, the objects must require improvement in the condition of biodiversity (e.g. maintain and improve, conserve and enhance, or no net loss or better).
- The objects of the BC Act should be better operationalised within the Act. This could be achieved by: - A new provision that outlines how the objects will be achieved; and/or - Specific provisions that require through imposing duties on decision-makers to make decisions consistent with the objects of the Act; and/or - Specific standards and goals embedded in the Act (for example, the standards underpinning the Biodiversity Offsets Scheme).

Key elements of the BC Act

- The BC Act does not effectively respond to climate change. Despite object b) of the BC Act being “to support biodiversity conservation in the context of a changing climate”, the BC Act framework fails to effectively build in effective mechanisms to achieve this.
- In this regard, the BC Act could be strengthened by, for example:
 - requiring the Biodiversity Conservation Program to respond to the impacts of climate change on threatened species and ecological communities.
 - requiring the Biodiversity Conservation Investment Strategy to respond to the impacts of climate change.
 - requiring the Minister to consider climate change in developing the Biodiversity Assessment Method

Conserving threatened species and ecological communities

- **Offences for harming native plants and animals:** The range of offences and penalties under the BC Act are supported. However, some offences should be made strict liability offences to reflect the serious nature of the offence and the risk of undermining the objectives of the BC Act.
- **Threatened species and ecological communities listing processes:**
 - **Option to list specific populations:** The option to list specific populations under the former Threatened Species Conservation Act 1995 (NSW) (TSC Act) was repealed and not reintroduced under the BC Act. The ability to recognise distinct local populations is essential for conserving and retaining genetic diversity - a fundamental component of biological diversity.
 - **Application of provisional listing provisions:** Importantly, NSW is the only jurisdiction in Australia with provisional listings provisions. These provisions provide an important safeguard for species that need to be listed on an emergency basis. These provisions could be strengthened by explicitly providing for the use of provisional listing provisions following a major event that has significantly impacted on the conservation status of a species (e.g. bushfire).

- **Key threatening processes:** The broader regulatory framework could be strengthened to ensure KTPs are better taken into consideration in decision making. For example, require planning authorities to consider and not make decisions that would increase the impact of key
- **Biodiversity Conservation Program:**
 - **Land use rules undermine Biodiversity Conservation Program:** The SoS program plays an important role in managing impacts on threatened species and conserving and restoring important habitat, however it operates separately to the legal frameworks regulating activities on land. The result is that conservation efforts under the SoS program may be undermined by inadequate regulatory frameworks that continue to allow activities that greatly impact on threatened species and their habitat.
 - **Strengthening interaction between Biodiversity Conservation Program and rules regulating land use:** More could be done to improve the interaction of the SoS program and the legal frameworks regulating activities on land such as urban development and land clearing. For example, the BC Act should:
 - The Act should impose duties on developers and development decision makers to act consistently with SoS conservation priorities;
 - The Act should require environmental assessments to state whether approving the development will contribute to key threatening processes listed under the BC Act, and if so, how this will be minimised, and any alternatives available for the decision-maker to consider;
 - The Government should be able to declare that SoS sites (outside national parks and reserves) are AOBVs; and fund these AOBVs for protection and make them off-limits from harm – including from mining interests (which otherwise continue to override biodiversity protection).
- **Areas of Outstanding Biodiversity Value:**
 - No new AOBVs have been declared: AOBVs are intended to identify the most valuable sites for biodiversity conservation in NSW outside of the national reserve system, and were flagged as a key safeguard in the Land Management and Biodiversity Conservation reforms. However, no new AOBVs have been declared since the BC Act came into effect in August 2017. The 5-year statutory review should interrogate why there has been no uptake of this mechanism and what improvements need to be made to the AOBV process or the BC Act more broadly to ensure valuable areas are being protected, as intended.
 - Barriers to third-party nomination: One significant barrier to third parties nominating an area for declaration as an AOBV is the requirement to demonstrate landholder support. This is not a legislative requirement, but a procedural step in the nomination process. Requiring a person nominating an AOBV to provide landholder consent places an undue obligation on nominators, and may create an obstacle for nominations.
 - There should be new classifications of AOBV added that include *Regional Areas of Outstanding Biodiversity Value* and *Local Areas of Outstanding Biodiversity Value* to reflect the significance of local and regional biodiversity. This is of particular consideration in urban areas where populations may be isolated - local or regional designation will offer greater protection for these important ecosystems.

- **Serious and irreversible impacts mechanism:**
 - The SII mechanism is discretionary for major projects: The requirement to refuse proposals that will have SII on biodiversity must also extend to major projects, not just to local projects. That is, major projects with serious and irreversible impacts on biodiversity should be refused.
 - The SII mechanism could be further strengthened to more accurately reflect the principles of ecologically sustainable development: For example:
 - the standard should be serious ‘or’ irreversible, not ‘and’;
 - the test should be objective, rather than subjective;
 - references to extinction risk should be clarified to refer to an appropriate scale and scope; and
 - consent authorities should be required to have regard to the precautionary principle and cumulative impacts on threatened species.
- **Indigenous Knowledges:**
 - Despite object c) of the BC Act being “to improve, share and use knowledge, including local and traditional Aboriginal ecological knowledge, about biodiversity conservation”, the BC Act framework fails to effectively build in effective mechanisms to achieve this.
 - Object c) should be better operationalised in the BC Act. This could be achieved by, for example, provisions that explicitly require or provide opportunities for Aboriginal ecological knowledge to be incorporated into planning and programming, e.g. the Biodiversity Conservation Program.
 - As part of the review, the independent experts and Government should consult with First Nations people about how the legislation can better incorporate Aboriginal ecological knowledge

Private land conservation and investment

- Private land conservation can play a critical role in achieving the objects of the BC Act and conserving biodiversity in line with national and international commitments.
- The framework in Part 5 of the BC Act can be strengthened to ensure that the investment strategy and private land conservation agreements are delivering the best possible outcomes for biodiversity. For example, the framework under Part 5 should:
 - Establish a process for public consultation for reviews of the Biodiversity Conservation Investment Strategy.
 - Recognise and regulate biodiversity stewardship agreements for what they are i.e. offsets agreements. For example, these should be called offset agreements, and must be regulated in accordance with best-practice offsetting principles – they should have effect in-perpetuity and should not be able to be terminated.
 - Expand the purpose for which a Conservation Agreement or Wildlife agreement can be entered into, including, for example managing the so as to protect its natural heritage (and any cultural heritage associated with the natural heritage); or protecting areas containing scenery, natural environments or natural phenomena worthy of preservation.
 - Mining should not be undertaken on private land subject to a Biodiversity Stewardship Agreement or Conservation Agreement or on a Wildlife Refuge where the land includes declared AOBVs or threatened species, populations or ecological communities, or their habitats.
 - The terms of a Biodiversity Stewardship Agreement, Conservation Agreement or Wildlife Refuge should include mandatory monitoring, reporting and auditing requirements.

Biodiversity Offsets Scheme

- The BOS does not align with best practice. The BOS permits an inappropriate level of variation to ‘like-for-like’ rules, and does not contain the ecologically necessary limits to prevent extinctions.
- The BOS must be strengthened in order to meet best practice and deliver improved outcomes for biodiversity. Key recommendations for reform include:
 - The BOS must adopt a clear and objective environmental standard to improve biodiversity outcomes (e.g. maintain and improve or better).
 - Legislate a scientifically-robust set of principles that govern the operation of BOS. - Areas of high conservation value must be off-limits to offsetting.
 - Require genuine attempts to avoid and minimise impacts on threatened species and ecological communities be demonstrated before the BOS can be applied. Clear guidance on the required steps and evidence of steps taken should be developed. - Like-for-like offsetting requirements must be tightened. Variation rules and the use of indirect offsets must be strictly limited.
 - There must be stricter parameters around the payment of money to the Biodiversity Conservation Trust (BCT) in lieu of offsets, including requiring the BCT to refuse to accept an offset liability for a proponent where it would not be possible for them to obtain a like-for-like offset.
 - Do not allow future mine rehabilitation to generate offset credits and be counted as an upfront offset. - Remove the ability to discount offsets. However, if a discounting mechanism is retained, it should be strictly limited – e.g. any discounts should only be allowed if based on ecological reasons, and if reasons are provided for decisions.
 - Formulas used to determine credit pricing must incorporate an appropriate risk factor to ensure that like for like offsets can be sourced and managed in perpetuity and that increasing scarcity of biodiversity is embedded in the pricing mechanism in a non-linear fashion (to ensure that it becomes increasingly expensive to purchase credits for increasingly scarce species and ecosystems).

Biodiversity Certification

- **Overriding site specific assessment:** Upfront strategic land use planning is an important planning tool that can help manage land use conflicts and identify high conservation areas for protection. However, it should not, as biodiversity certification does, comprehensively remove the need for individual site assessment at the development assessment phase. Doing so does not allow the impacts of individual projects to be assessed, once the details are better known. Also, it does not allow more up-to-date information about biodiversity values and potential impacts of development to easily be taken into account down the track.
- **Ability to deliver biodiversity gains:** It is unclear whether biodiversity certification will deliver proposed biodiversity in the long-term. In the case of standard biodiversity certification, reliance on the BOS is problematic, as there are ongoing concerns about the ability of the BOS to deliver effective biodiversity gains. In the case of strategic biodiversity certification, new provisions are untested and the significant discretion and lack of scientific rigour around ‘additional conservation measures’ is concerning.
- **Inadequate safeguards:** Safeguards, such as the serious and irreversible impacts (SII) mechanism, are not strictly applied (the Minister only has to consider SII, rather than refuse proposals that will have SII).
- **Implementation and enforcement of strategic biodiversity certification plans:** The issuing of the first strategic biodiversity certification (for land covered by the Cumberland Plain Conservation Plan (CPCP)) has highlighted issues regarding implementation and enforcement. While specific to the CPCP, many of these concerns would relate to the implementation and

enforcement of strategic biodiversity certification more broadly. These include: multiple agencies and levels of government being responsible for delivering actions; uncertain language adopted in commitments and measures, which will make compliance difficult to measure, and enforcement action difficult to take; the applicant (NSW Department of Planning and Environment) and the regulator (the Environment Minister) are essentially the same (the NSW Government); and civil enforcement requires the consent of the Minister (meaning there is no “open standing” to remedy or restrain a breach of the CPCP).

Regulating impacts on, and caring for, native animals and plants

- The outstanding review of the wildlife licensing regime must be finalised.
- Conservation stakeholders engaged in the review of wildlife licensing have raised concerns about the deregulation of the framework, and the ongoing keeping of native animals as pets.

Compliance and enforcement

- As with all regulatory regimes, accountability and enforcement are vital for ensuring laws are properly implemented and the aims and objectives of the laws are being met.
- While there are some positive elements of the compliance and enforcement framework (e.g. reasonable penalties and civil enforcement provisions), there are key opportunities for strengthening the compliance and enforcement framework to better achieve the objectives of the BC Act. For example:
 - Third-party appeal and civil enforcement powers are a key accountability mechanism and must be readily available across the Land Management and Biodiversity Conservation framework, and not unduly restricted.
 - Privative clauses (clauses that purport to prevent the Court from invalidating the administrative decision in question even where it finds that a jurisdictional error had been made) should be removed from the BC Act.
 - Transparency should be improved. For example, public registers under both the BC Act and interrelated legislation must be required, and information available on those registers must be comprehensive and readily accessible. This includes registers of approvals for development, clearing and forestry, offset and biodiversity conservation agreements, biodiversity certifications etc.
 - While not regulated, directing under the BC Act, improving reporting and monitoring of compliance with consent and approval conditions to ensure conditions are met and biodiversity outcomes are achieved. This can include, for example, monitoring and reporting on set aside obligations under clearing laws, biodiversity offsets obligations under development approvals and clearing approvals, and mitigation measures under biodiversity certificates.
 - A number of key policies designed to conserve biodiversity in NSW, such as the NSW Koala Strategy, are not legally enforceable. Consideration should be given to giving such key documents legal status.
 - Compliance and enforcement policies should identify and promote opportunities to seek remedies for unlawful activities that include the restoration and enhancement of habitat.

Other important matters

- **Vegetation in non-rural areas:** The former State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017 (now Chapter 2 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Chapter 2, Biodiversity and Conservation SEPP) was also introduced as part Land Management and Biodiversity Conservation reform package. It regulates tree clearing

(not associated with development) in non-rural areas, and is also a key component of the State's biodiversity conservation response. Chapter 2 of the Biodiversity and Conservation SEPP should be considered as part of this review process as it sets out interdependent policy settings linked to the objectives of the BC Act. In particular, the review should consider:

- To what extent local councils have updated Development Control Plans to declare the SEPP applies, and how effectively local councils are regulating tree clearing on non-rural land.
- Policy settings that have led to the NVP having not assessed any applications under Chapter 2 of the Biodiversity and Conservation SEPP, and whether this has implications for the conservation of biodiversity in NSW.

We have no objection to this submission being made public in full and unredacted.

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