



Nature
Conservation
Council



NATIONAL PARKS ASSOCIATION OF NSW
protecting nature through community action



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Briefing Note: Biodiversity Legislation Review

Implications of the proposed changes

The extensive analysis conducted by the Stand up For Nature Alliance has concluded that the proposed new legislation will:

- add extinction pressures to the state's 1000 threatened species;
- threaten clean, reliable water supplies and degrade fertile farmlands through erosion and salinity;
- put landmark trees and bushland in towns and suburbs at greater risk;
- reduce tree coverage and undermine Australia's efforts to cut carbon pollution;
- rely on the expansion of a flawed offsets scheme to try to recreate bushland cleared under the new laws

1. KEY COMPONENTS OF NEW BIODIVERSITY CONSERVATION LAWS THAT WILL PROTECT NATURE

The following key issues are critical components of the reform process essential to halting the continued decline in biodiversity:

1. Ensure there is no return to broadscale land clearing by retaining land clearing laws
2. Legislate a clear commitment to improving outcomes for nature (i.e. the 'maintain or improve' test)
3. Create a level playing field for all development (no special favours for big developers like miners)
4. Ensure important habitat is clearly identified as off limits to development (i.e. 'red flags')
5. Strengthen biodiversity offsetting rules (the major offsets policy cannot protect nature – see below)
6. Invest in accurate vegetation mapping to identify important habitats (current methods cannot reliably identify plant communities)
7. Close the loopholes that allow under-the-radar clearing (e.g. repeated code-based clearing)
8. Ensure clear requirements for regional planning
9. Invest in private land conservation (in order to compensate farmers for the retention of strong land-clearing laws)
10. Ensure there is rigorous monitoring, compliance and enforcement
11. Provide sufficient resources to do the job properly

For further information, see *New Deal for Nature* available at www.nature.org.au/campaigns/nature-laws/

Repeal of the Native Vegetation Act

- The current *Native Vegetation Act* 2003 was the direct result of a report from the Wentworth Group of Concerned Scientists (setting out broad principles) and extensive negotiation between farmers and environmentalists about mechanisms and important farm management issues

- Agreement was reached between stakeholders on key issues such as cost burdens, red light areas and regrowth vegetation (where clearing is not subject to consent). In addition a large fund of several hundred millions of dollars from NSW and the Commonwealth was provided to assist farmers in restoration activity.
- The *Native Vegetation Act 2003* has led to over 4 million hectares of native vegetation being protected on farmland or under improved management, with more than 950 property vegetation plans developed. Figures from the NSW Auditor General's office, analysed by WWF-Australia found that 116,000 native mammals have avoided death due to agricultural clearing each year since the introduction of the NVA¹.
- Research by WWF has shown that the majority of farmers are either happy with the current regulations or indifferent to them, because native vegetation does not impose a cost burden to them. Only a small proportion are not content. This identifies a problem with the Native Vegetation Act: that it has placed most of the burden of costs on a small proportion of farmers. However, this also indicates a simple solution: society helps the small number of farmers shoulder that burden in return for not clearing native vegetation.

2. THE NEED FOR STRONG BIODIVERSITY AND CONSERVATION LAWS

- Over the last 200 years NSW has experienced a marked decline in biodiversity with over 100 plant and animal species becoming extinct. Currently over **989 species of plants and animals, 49 populations and 107 ecological communities are threatened with extinction in NSW**. Between 2009 and 2012 an additional 35 species were listed as threatened.
- **Koalas are at risk of extinction in parts of NSW** unless there is a better commitment to maintaining their habitat. They are listed as vulnerable to extinction in NSW and Queensland because their populations have declined by 42 per cent in the past 20 years. The major cause of the koala's decline is land clearing.
- **Strong protections against land clearing also provide an abundance of other economic benefits**, including providing shelter for stock and crops from wind and weather; pest control and pollination; health and recreation benefits; climate moderation; and protection from erosion, waterlogging and salinity.
- **Our existing legislation has played a crucial role in the protection of biodiversity** by improving the knowledge about biodiversity; the independent listing of threatened species; creation of an objective test of environmental impacts and use of the 'maintain and improve' test.
- However the continuing loss of biodiversity demonstrates that much more needs to be done. **The review of biodiversity laws is timely because there is an urgent need to strengthen them.**

Offsetting under the new act

The new Act will dramatically broaden the use of offsetting, and the proposed framework for use under the new Act is the Major Projects offset scheme. There are many flaws to offsetting, but the central issue is that **effective offsetting relies on an ability to recreate nature**. In the absence of our ability to do this, offsetting cannot compensate for the loss of habitat through development. In addition, the biodiversity review recommended that in the absence of a like for like, a monetary payment would suffice. I.e. there is no requirement to identify 'red flag' (no go) areas, meaning that no matter how greatly reduced a habitat, it is available for development².

¹ WWF-Australia: Native wildlife at risk if NSW Native Vegetation Act is repealed, available at: http://awsassets.wwf.org.au/downloads/fl017_native_wildlife_at_risk_9apr15.pdf

² <https://independentaustralia.net/business/business-display/koalas-for-coal-has-it-come-to-this-in-nsw,7745>

The Major Projects offsets scheme was independently assessed by a leading Australian scientist in the field as **meeting only two of 12 criteria that define an effective offset policy**. The new framework has neglected to include the recommendations of this review into the new Act. Major flaws include:

- 'Supplementary measures' (e.g. paying into a fund) can be used where a direct offset is not available. This will most likely be the case with Threatened Ecological Communities (TECs) and threatened species as finding a like for like will be difficult;
- Trading can occur between species in the same Order. Besides reducing species to another form of currency this means that, for example, a developer can swap a Superb Fairy Wren for an Eastern Whipbird;
- Important habitat elements, such as tree hollows, can be offset by other elements that recover more quickly, like groundcover. There is thus little ecological relevance to the policy;
- The like for like principle is therefore subverted which will undermine outcomes;
- Uncertainty in offset outcomes is not accounted for. I.e. It is assumed that offsets work, which is not a safe assumption;
- It is not clear how monitoring of the scheme (including compliance) will occur and whether there will be public oversight.

How the new scheme will work

- Land clearing will now require development consent under Part 4 the *Environmental Planning and Assessment Act 1979*. This will **apply uniformly across the State (including urban and coastal areas) and to all types of development (e.g. agricultural, major projects, urban development)**. This will mean there is an **increased role for local councils** (as consent authorities) for assessing and determining land clearing applications. This is a concern as many councils do not possess ecological expertise, nor is there any commitment by government to require them to.
- Some agricultural land management activities will be **regulated by the Local Land Services** as either exempt or code based activities under the *Local Land Services Act 2013*. Some code based activities will require notification or certification.
- Consequently, **important areas of vegetation that were protected or off limits to clearing are now under threat with a comprehensive reopening of the system**. This particularly applies to areas along the coast and central west, with a wide range of threatened ecosystems, including small but important patches of vegetation.
- Existing processes for biodiversity assessment, biodiversity offsetting, biodiversity banking and bio-certification will be consolidated into **one single biodiversity assessment methodology** that will apply to all development under the EPA Act. The current offsetting rules predetermine the loss of biodiversity as they do not identify 'red light areas' where development should not occur, nor enforce a 'like for like' offset regime.
- The new law will cover urban and rural areas, but there is also **no clear guidance whether these weaker approaches will overrule current environment protection zonings, tree preservation orders or other such well-developed mechanisms**.
- The new scheme will be underpinned by a **new regulatory map of the entire state** and classify all land into two broad categories: Category 1 – low conservation value land (no approval required) and Category 2 – potentially significant vegetation (LLS Act or EPA Act applies). There are no proposals to map important habitats outside the protected area network that are off limits to development, nor areas where conservation covenants apply or which are identified offset sites.