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The 2016 NSW biodiversity reforms: 6 things you need to know

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The NSW Government has proposed a legislative and policy package that removes many of NSW's long-held environmental protections.

These reforms propose significant and complex changes to laws and policies designed to regulate land clearing and protect our biodiversity. The Government has put 25 documents – around 657 pages – on public exhibition.

If you don't have the time or inclination to trawl through all these complicated documents, but are wondering what the reforms may mean for the NSW environment, EDO NSW has summarised six key issues you may like to know about, in addition to our top 10 concerns with the reforms published on 13 May 2016.

Check out our 6 issues below and find out how you can get involved.

1. Land clearing and the rationale for reform

A key rationale for the NSW Government's biodiversity reform package seems to be that our current vegetation laws are not working. We disagree with this rationale.

To understand why we disagree with the Government's rationale, we need first to understand the key law relating to vegetation and land clearing, the *Native Vegetation Act 2003*.

The current regime
The current *Native Vegetation Act* was introduced to address systemic failures in managing land clearing. Its predecessors – a state environmental planning policy introduced overnight in 1995 (SEPP 46), followed by the *Native Vegetation Conservation Act 1997* – both failed to prevent inappropriate clearing by allowing broad and cumulative exemptions, and poor enforcement. This failure was recognised by the Audit Office of NSW.

The *Native Vegetation Act* was developed in close consultation with farmers and conservationists in response to failures of previous regulatory regime to prevent inappropriate land clearing.

A key foundation of the current Act is to 'ban broadscale clearing unless it maintains or improves environmental outcomes.' The Act is also underpinned by a scientific

Environmental Outcomes Assessment Methodology (EOAM) that ensures not just biodiversity, but soil, salinity and water impacts of clearing are scientifically assessed.

The introduction of the Act was also accompanied by a significant investment for private land conservation through property vegetation plans (PVPs). A $430 million package was made available to catchment management authorities (CMAs) to assist farmers in repairing the landscape. A minimum of $120 million was earmarked to help farmers maintain or improve native vegetation for biodiversity, water quality, soil and salinity outcomes for four years following the introduction of the Act.

The public register shows that between 2005 and 2015, over 1,000 PVPs were put in place across NSW. The Act allows farmers to do whatever they like with regrowth vegetation and to undertake routine farming activities without approval. But importantly, it does sometimes ban inappropriate clearing.

Since the Act came into force, land clearing has reduced from up to 21,500 ha per year to 11,000 ha per year. Commentators have recently estimated the Act has directly led to conservation or rehabilitation of 250,000 ha of land.[1]

The current system worked well – until, that is, funding cuts to CMAs after the initial four-year investment caused delays in land clearing approvals and making property vegetation plans.

But this doesn't mean the current laws are not working, merely that the system has not been resourced to work effectively.

The proposed regime – the Draft Local Land Services Amendment Bill

The proposed Local Land Services Amendment Bill would replace the *Native Vegetation Act* and assessment methodology with:

- Four new self-assessable codes (for 'management', 'efficiency', 'equity' and 'farm planning'), which allow significant amounts of clearing, even in endangered ecological communities. The codes assume that landholders have ecological expertise to determine their own code-based clearing, and they allow landholders to set aside areas that might be managed or replanted to justify clearing elsewhere on the property.
- An expanded range of allowable activities.
- Discretionary clearing approvals administered by Local Land Services (LLS). However, it is likely that a significant amount of clearing will be accomplished under the codes and allowable activity exemptions, without requiring LLS assessment.

A new Land Use Map will determine whether land clearing rules apply. The Map will categorise land as:

- Category 1 – Blue = Exempt land – No approvals are required for clearing in these areas.

[1] Data from Perry, 2016, The NSW government is choosing to undermine native vegetation and biodiversity, The Conversation, and Environment Protection Authority, 2015, State of the Environment Report 2015

- Category 2 – Yellow = Regulated land – Landowners can self-assess intended clearing through codes or get LLS approval to clear.
- Category 3 – Grey = Excluded – Regulated by other laws (relates to areas such as national parks and urban areas).

A mock-up of a land map provided as part of the reforms

We explore implications for urban biodiversity under issue four below. For land likely to be categorised as blue (exempt), we're currently analysing whether the mapping process would create an 'amnesty', by allowing previously illegally cleared areas that weren't prosecuted to become blue unregulated areas.

We have concerns about land categorised as regulated (the yellow category). In the draft reforms, there are no clear environmental baselines, aims or targets for land in this category. There is no ban on broadscale clearing, no mandatory soil, water and salinity assessment, and no 'maintain-or-improve' standard to ensure environmental outcomes – either at the site scale or at the landscape scale. Significant clearing can be done on these areas under the proposed codes.

The proposed regime therefore significantly loosens the environmental checks and balances that exist in the current system: it is less stringent, less evidence-based, less accountable. The new system is therefore likely to result in significant clearing increases in NSW.

The effect of the reforms: increased land clearing

The NSW Government has been unable to estimate how much land clearing will occur under the new, more relaxed system, and in particular under the new self-assessable codes. The proposed legislation includes updated offences and penalties, but there is no indication who will undertake compliance and enforcement responsibilities.

We believe the proposed reforms are likely to lead to a significant increase in land clearing, and consequently a reduction in native vegetation and biodiversity in NSW. No one can

perfectly predict the future, but Queensland provides clear evidence of what can happen when clearing laws are relaxed. It has been estimated that there was a huge pulse of 275,000ha of land clearing after Queensland's land clearing laws were relaxed in 2013-14.[2]

There is nothing in the proposed NSW reform package to prevent similar clearing occurring here. Farmers may set aside areas for conservation or revegetation, or access an expanded offsets market, but the bottom line is that there will be increased clearing at the site scale.

2. Offsets and ecologically sustainable development

How does the NSW Government's proposed biodiversity reform package stack up against the principles of ecologically sustainable development?

According to the information on public exhibition, a key goal of the new laws is to 'facilitate' ecologically sustainable development (ESD), and the primary way of doing that is by expanding the biodiversity offset market.

So, before analysing the reform package through the prism of ESD, it is worth taking time to explore how the proposed biodiversity offsetting mechanism will work compared to current offsetting.

Offsetting under the new reform package
Offsetting already occurs every day in NSW, under a variety of legal regimes and policies. The proposed reforms aim to establish a single scientific method for assessing impacts at a development site and calculating how many biodiversity offset credits would be needed to offset that impact.

Of all the offset methodologies developed to date – including the Environmental Outcomes Assessment Methodology (EOAM), the Biobanking scheme, Biocertification and the Commonwealth offset policy – the NSW Government has opted to base its reforms on the tool with arguably the weakest offset standards, the NSW Offsets Policy for Major Projects.

As a result, under the new biodiversity assessment method (BAM), the direct 'like-for-like' offsetting requirements are relaxed and can be circumvented. For example, offsets do not need to be of the same species or vegetation type as the one being impacted. We predict that a new option to pay money in lieu of a real world, or direct physical offset, is likely to result in net loss of certain threatened species and communities. Furthermore, under the proposed regime, offset areas and set-asides may be cleared and offset again later on, rather than protected in perpetuity.

We are currently getting expert advice on the BAM, but key concerns include:

- Lack of effective 'red lights', as significant and irreversible impacts are as yet undefined.

[2] Maron et al., 2015, Land clearing in Queensland triples after policy ping pong, The Conversation; and Taylor, 2015, Bushland destruction rapidly increasing in Queensland, WWF

- Application of the BAM will be determined by 'BAM thresholds' that have not yet been confirmed, but could mean large areas of clearing may not be assessed by the BAM, including in endangered ecological communities.
- Important information is missing from the documents on public exhibition.
- There are significant changes (reductions) in number of credits required to offset certain impacts, and it is not yet clear why.
- The BAM incorporates the highly criticised Swamp Offset Policy.
- The BAM does not include salinity, soil, water assessment modules like the current EOAM.
- Increasing use of like for like variations and supplementary measures.
- No guarantee Conservation Trust will actually be able to offset as required.
- Mine rehabilitation - credit for rehabilitation when really should already be required to do this.

The revised Biocertification scheme for large areas of land under the new laws removes the requirement to 'maintain or improve environmental outcomes'. Instead, it applies the BAM and allows broad discretion to impose conditions. It will have an aim of avoiding 'serious and irreversible' (currently undefined) environmental outcomes, but with greater emphasis on streamlining approvals and expanded offset options. There will also be financial incentives and further relaxation of offset rules for planning authorities that undertake a new category of 'strategic biocertification.'

These proposed changes represent a relaxation of offsetting rules, and will significantly reduce the ecological integrity and effectiveness of offsetting in NSW.

Testing the reforms against the principles of ecologically sustainable development
Will these proposals encourage ecologically sustainable development, or encourage development at the expense of the environment? Below we test the proposed reforms against the four key principles of ESD.

The precautionary principle
To properly apply the precautionary principle, public and private decisions should be guided by 'careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and an assessment of the risk-weighted consequences of various options.'[3]

There are some welcome aspects of the reform package that apply a precautionary approach. For example, the requirement that developers demonstrate how they have tried to avoid and mitigate negative impacts on the environment.

However, more importantly, the proposed regime fails to enshrine the principle to avoid serious or irreversible damage. The clauses that get nearest refer to 'serious AND irreversible' impacts – a more lenient definition – and avoidance of such impacts is

[3] *Protection of the Environment Administration Act 1991,* S6(2)(a)

discretionary for major projects. That means for the most significant projects, there are no red lights, even where a project could cause local extinctions.

Inter-generational equity
Inter-generational equity is the principle that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations.

Two aspects of the reforms suggest that they are unlikely to ensure inter-generational equity: (i) the proposed regime can allow local extinctions and irreversible impacts; and (ii) the removal of mandatory soil, salinity and water impact assessments under the new vegetation laws can allow declines in the health and productivity of the landscape.

By allowing extinction and degradation and increasing carbon emissions through land clearing, the proposals do not safeguard the environment for future generations.

Conservation of biological diversity and ecological integrity
ESD requires that the principle of conservation of biological diversity and ecological integrity be a *fundamental* consideration. The proposed regime relegates biodiversity conservation to just one of many considerations, rather than a fundamental one.

For example, there is discretion for decision makers to reduce the number of offsets required on non-scientific grounds. Under the proposed system, self-assessed clearing can occur in endangered ecological communities, and set aside areas need not be of equivalent biodiversity value. Development can also be approved in areas of outstanding biodiversity value (ie critical habitat).

Improved valuation, pricing and incentive mechanisms
The proposed reform package zealously embraces the principle that 'environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms....'[4]

In fact, the whole package is about removing regulatory controls and relying almost entirely on a market mechanism – an offsets scheme – to provide desired environmental outcomes.

In addition to the weakened offsetting standards proposed, our analysis suggests that there is a lack of clearly established environmental goals to ensure that the proposed pricing and incentive measures will actually deliver desired biodiversity outcomes.

The principle also states that 'environmental factors should be included in the valuation of assets and services.' The proposed scheme does not attempt to effectively and comprehensively value the ecosystem services that biodiversity provides, such as the value of stable soils, reduced salinity, cleaner water, and the pollination and pest control services provided by biodiversity. Paddock trees are simply seen as a financial burden on farmers for obstructing certain farm machinery and activities such as centre pivot irrigation, rather than having any asset value. The proposed scheme allows broadscale clearing of paddock trees without consent.

[4] *Protection of the Environment Administration Act 1991*, S6(2)(d)

Furthermore, the new option for developers to pay a single payment into an offset fund administered by a new Biodiversity Conservation Trust in lieu of finding and managing a direct offset, arguably does not satisfy the principle that users pay prices based on full life cycle costs including the use of natural resources and assets. This puts the burden of avoiding extinction on the Trust money without stopping to find out if that is actually possible through offsetting.

In summary, ESD is front and centre in the rhetoric and objectives of the proposed biodiversity reforms. But will the relaxed clearing rules, poorly structured offsets scheme and deficiencies in meeting ESD principles be balanced by the potential gains of investment in private land conservation?

3. Private land conservation and funding

The biodiversity legislative and policy reform package comes with welcome environmental funding through a new Biodiversity Conservation Fund. But will this funding promote enough private land conservation to make up for the reforms' more relaxed clearing rules, expanded offsets scheme and failure to implement the principles of ecologically sustainable development? We expect not.

Private land conservation: the funding incentive
A key element of 2016 reform package is a funding commitment for $240 million over 5 years to support private land conservation, with $70 million each subsequent year dependent on performance reviews. Conservation funding will come from a Biodiversity Conservation Fund allocated by a new Biodiversity Conservation Trust, whose funding decisions will be guided by a proposed Biodiversity Conservation Investment Strategy.

EDO NSW strongly supports funding incentives for environmental stewardship and payments for landholders to manage land for conservation. We work with many landholders who are fantastic stewards of the native vegetation and biodiversity on their properties. In this context we welcome the proposed investment.

The propsed system will, however, reduce the range of conservation agreement options available to landholders. Currently there are a variety incentive schemes available to NSW landholders for private land conservation – including biobank sites, voluntary conservation agreements, Aboriginal management agreements, and wildlife refuge funding, to name a few.

The reform package reduces this variety to just 3 types of agreement:

- Biodiversity Stewardship Agreements – these will enable payments to landholders for sites that will be able to generate offset credits (similar to existing biobank sites)
- Biodiversity Conservation Agreements – with smaller stewardship payments for the management of high conservation value land (like current VCAs)
- Wildlife refuges – with more flexible grants for landholders to set aside land for conservation, and may be converted to higher agreements later.

These agreements may flourish in some areas and struggle in others. Who will get what funding will depend on the Biodiversity Conservation Investment Strategy, which is yet to be developed.

Our biggest concern is, however, that under the new system, conservation isn't guaranteed in law, but is instead dependent on funding decisions.

The risks of a system reliant on funding
The proposed regime places almost complete reliance on political, budgetary decisions to achieve biodiversity gains, rather than on protections enshrined in law to prevent continued biodiversity decline.

We've seen this happen before in environmental policy. The introduction of the current *Native Vegetation Act* was accompanied by a $430 million funding commitment for four years, including $120 million for property vegetation plans (PVPs). Funding for farmers and on-ground works catapulted from $18 million in 2002/03 to $118 million in 2004/05 and not surprisingly, private land conservation activity grew in line with the funding.

But what happened when the funding stopped after four years? There were no longer resources for farm visits. The wait time for PVPs extended into months. It was a resourcing and implementation failure. But at least the protections in the Act remained to prevent inappropriate clearing.

If, as has happened in the past, the bucket of money for private land conservation runs out under these new reforms, we will be left with a system that allows increased clearing at a site scale, with little or no incentive funding for farmers and private landholders to protect the biodiversity value of their properties.

Even worse, as we have shown in issue one above, and as will be seen in our next issue, we won't have important protections as currently set out in law to stop broadscale land clearing.

4. Saving our species

We know that biodiversity in NSW is on the decline. Will the new legislation under NSW Government's proposed biodiversity reform package maintain protections under current laws for saving our precious species? It appears not.

There are two key proposed laws in the reform package: the Draft Biodiversity Conservation Bill and the Draft Local Land Services Bill. These two Bills appear to be in conflict, with potentially disastrous consequences for our threatened species.

The Biodiversity Conservation Bill
The Draft Biodiversity Conservation Bill contains familiar provisions for threatened species, carrying over some of the mechanisms in our current threatened species laws.

The Bill incorporates the existing Saving Our Species program, in which threatened species are categorised into different streams for prioritised management actions and funding.[5] The Bill retains the NSW Scientific Committee and contains elements that aim to align better with international categories and national threatened species lists. There are offence provisions for harming threatened animals or damaging habitat without authorisation.

The Bill provides for a category of 'serious and irreversible impacts', although these have not yet been defined and will not act as a red light for major projects. Critical habitat will be replaced by a new category of 'Area of Outstanding Biodiversity Value' that can be declared by the Minister for the Environment, although these areas can still be subject to clearing applications.

Taken alone, the Bill appears to be continuing the threatened species provisions of the current system. But, when you examine the overall reform package, potential problems become apparent.

Two Bills in conflict

While on one hand the Biodiversity Conservation Bill carries over provisions of our current threatened species laws, at the same time the Local Land Services Bill will increase known threats to those species by allowing more land clearing via self-assessed codes and discretionary development applications.

To illustrate, consider how the two bills treat hollow bearing trees, which provide critical habitat, such as nesting sites, for many threatened species. The Biodiversity Conservation Bill lists 'loss of hollow bearing trees' as a key threatening process. At the same time, the Local Land Services Bill allows clearing of paddock trees without approval. It will be difficult to enforce the protection of hollow bearing trees under biodiversity law when under land clearing law no formal approval is required for cutting these trees down.

The legislative detail and missing pieces of the puzzle

There are a number of other issues we have identified from the vast reform package that suggest the legislative framework will act to reduce environmental protections, including issues about Local Land Services resourcing, mapping and how urban clearing and biodiversity will be regulated.

In the package, the NSW Government is departing from a key recommendation of the Independent Biodiversity Legislation Review Panel – that land clearing involving a change of land use should be assessed under planning laws – and is instead handing the vast majority of clearing approvals to the Local Land Services which currently do not have the resources or expertise to carry out these functions.

Also, as noted in issue one above, how the new legislation is applied will depend heavily on future mapping, which has not yet been undertaken and, we predict, is likely to encounter problems and be highly contested.

Urban areas identified under the maps will be treated differently. Urban areas will not be covered by the new native vegetation scheme – the Bills specifically exclude Sydney and Newcastle Local Government Areas, all urban and large lot residential zones, and e-zones

[5] See Saving Our Species, Office of Environment & Heritage

E2, E3, E4. Biodiversity in these areas will be covered by a new State Environmental Planning Policy, a new model Development Control Plan (DCP) and by the new Biodiversity Assessment Methodology (BAM). The State Environment Planning Policy that will specify how urban clearing will be regulated is not public yet.

It is very difficult to predict the fate of urban biodiversity in the absence of crucial details, but with what we do know about expanded application of non-like for like offsets, it is likely that certain urban coastal developments will be less constrained by strict offset requirements, resulting in a net loss of some species and communities in areas of development pressure.

The rural/urban regulatory divide will therefore be continued, which begs the question – how fair will the new laws be? We explore the equity of the reforms in the next issue below.

5. Equity?

The word 'equity' has appeared often as the NSW Government has prepared its biodiversity legislative and policy reform package. But how fair are the proposed reforms? Below we apply three equity tests to the reform package – between farmers and miners, current and future generations, and private and public interests.

Farmers and miners
Farmers in NSW have rightly pointed out that under the current *Native Vegetation Act*, their land use can be constrained by the ban on broadscale clearing as applied by the environmental outcomes assessment methodology, while the mine next door seems to be able to clear significant vegetation under different rules.

EDO NSW has consistently argued that the way to create equity in this instance is to apply the same standard to all development. That is, any clearing, be it for farming development, a mine, a public infrastructure project, or a private urban development, should be required to meet the same essential standard – that the clearing must improve or maintain environmental outcomes.

Instead of applying a clear and consistent standard for all land clearing activity, the current reforms simply lower the standards for farmers.

Does this mean the reforms achieve equity with the mine next door? No. The new system still has special rules for major projects. Serious and irreversible environmental impacts can lead to a refusal for small developments, but for major projects such as mining, these are simply additional considerations: they do not prevent the project going ahead.

Major projects – the very projects with the greatest potential impacts on biodiversity – have 'streamlined' rules, which may become even more streamlined under recently announced planning reforms. Under the biodiversity reforms, mines can get biodiversity offset credits for rehabilitation undertaken at the end of a project, which may be in as much as 30 years, more than enough time for an endangered species or ecological system to disappear.

Current and future generations
We discussed how the reforms fail to satisfy the ESD principle of 'intergrenerational equity' in the issue two above.

The proposed reform package has no effective safety net for avoiding 'serious or irreversible' environmental damage. Our grandchildren may therefore never enjoy seeing a regent honeyeater or the Warkworth Sands woodland.

A regulatory system that allows more land clearing also has serious carbon implications. If, as seems likely, relaxing clearing controls will result in a significant increase in land clearing, then future generations will need to dedicate greater resources to meeting carbon emission reduction targets to mitigate dangerous climate change.

Public and private interests
The new regime outlined in the reform package does include open standing provisions for any person to bring proceedings under the legislation. But if you drill down into the detail, it is only landholders who can contest the boundaries specified in the land use map described in issue one above, and many enforcement actions are at the discretion of the Environment Agency Head.

The reform package also requires less information to be placed on public registers compared to current laws – particularly in relation to land clearing. It will therefore be difficult for communities to analyse environmental outcomes and engage in the public interest.

In this series, we have analysed some of the key issues of the NSW Government's biodiversity reform package from the point of view of biodiversity conservation and environmental protection. The analysis shows that the reform package removes many of the protections under the current system.

So how could the proposed laws be improved? We turn to this question below.

6. Opportunities lost and our recommendations for effective biodiversity laws

Rewriting our biodiversity laws is a once-in-a-generation opportunity to halt our declining biodiversity while maintaining flexibility for landholders to manage their lands effectively.

In this last blog in our series analysing the NSW Government's proposed biodiversity legislative and policy package, we look at what is missing from the reform package and outline ten recommendations for effective biodiversity laws.

From our analysis, if you compare the laws that are being proposed with the laws that are being repealed, the outlook for native vegetation and biodiversity is not good. Clearing will increase. Offsets will expand to facilitate further clearing. Private conservation will flourish in some areas but struggle in others. Threatened species considerations can be traded off, and the new regime will not actually achieve the intended equity.

The reform package almost completely ignores climate change. For example, under the proposed new Biodiversity Assessment Method, there are five sections referring to the need for wind farms to be subject to an additional layer of assessment for biodiversity impacts, but no references at all to climate change. Also, while the Draft Biodiversity Conservation Bill lists 'anthropogenic climate change' as a 'key threatening process', there is only one brief

reference to 'global warming', and that's just to note that its impacts are not assessed under the regime.

The proposed package carries over a number of deficiencies of current system:

- There are exemptions and wide discretion for projects with the biggest environmental impacts
- Vulnerable ecological communities are excluded from the definition of threatened species
- Mining is still permitted in areas that supposedly offset previous losses and areas of outstanding biodiversity value.
- Cumulative impacts on biodiversity are not addressed.

So what should effective biodiversity laws do?

Our recommendations
EDO NSW will be making a full and detailed submission on the reform package. We have collated a list of ten recommendations for making effective biodiversity laws.

To be effective, biodiversity laws should:

1. Be designed to prevent extinction.
2. Apply a 'maintain or improve' standard to all development.
3. Address key threats such as broadscale land clearing of remnant vegetation and climate change.
4. Establish a NSW Environment Commission or a Biodiversity Commissioner to provide advice and oversight.
5. Mandate the use of leading practice scientifically robust assessment tools.
6. Invest in private land conservation (the current reforms do this).
7. Clearly require comprehensive data, monitoring, reporting on condition and trends (environmental accounts).
8. Limit indirect offsetting.
9. Commit to compliance and enforcement.
10. Properly resource regional natural resource management bodies to work with landholders, have expertise to do assessments and make natural resource management plans that relate to clear targets.

About the reforms

The NSW Government has released a draft law and policy package that represents a serious retrograde step for biodiversity, as it involves removing many of NSW's long-held environmental protections.

Public submissions on the reforms close on **Tuesday 28 June 2016**. Find out how to get involved via the links below.

Links

- Our web page dedicated to the reforms
- Our free community workshops on the reforms
- EDO NSW resources about the reforms