



Contact: Jacob Sife

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Biodiversity Reforms - Have Your Say
PO Box A290
Sydney South
NSW 1232

Dear Sir/Madam,

Re: Submission on proposed changes to NSW biodiversity and conservation laws

The *NSW Biodiversity Conservation Act 2016* (BC Act) and the *Local Land Services Amendment Act 2016* (LLSA Act) were passed into law in November 2016. On commencement, which is scheduled for 25 August 2017, the BC Act and LLSA Act will repeal and replace the *Threatened Species Conservation Act 1995* (TSC Act), the *Native Vegetation Act 2003* and the *Nature Conservation Trust Act 2001* (NCT Act).

The Government has released 13 draft documents and tools which support and implement the BC Act and LLSA Act. These supporting documents are on public exhibition for a 6 week period ending 21 June 2017. Ku-ring-gai Council welcomes the opportunity to provide comments and requested additional time to respond to the significant changes being proposed, but the request was refused. Further, Council is concerned that by setting the commencement date for the BC Act and LLSA Act for 25 August 2017, the NSW Government has not allowed enough time to consider substantial issues that may be raised during the exhibition period. Some major questions regarding the operation of the acts and associated mapping tools remain unresolved whilst some of the legislative instruments are incomplete.

Council strongly recommends that the scheme does not commence until key instruments have been consulted on and finalised, there has been sufficient time for assessors to be trained and accredited, Council staff are brought up to speed and mapping supporting the legislation is accurate and comprehensive.

Ku-ring-gai Council's Submission

As Ku-ring-gai Council is within the Sydney Metro region, not all of the new regulations have a direct impact. This submission will deal with particular components of the regulation package which are considered most relevant, including;

- [Draft Biodiversity Conservation Regulation 2017 \(PDF\) \(referred to within this submission as the regulation\)](#), and its supporting [regulatory impact statement \(PDF\)](#)
- [Draft Environmental Planning and Assessment Amendment \(Biodiversity Conservation\) Regulation 2017 \(PDF\)](#)
- [Biodiversity Assessment Method \(BAM\) \(PDF\)](#) and [BAM tool \(Link\)](#)
- [Accreditation Scheme for the Application of the Biodiversity Assessment Method \(PDF\)](#)
- [Draft Sensitive Biodiversity Values Land Map \(Link\)](#)
- [Serious and irreversible impacts guidance \(PDF\)](#)
- [Offsets payment calculator \(Excel\)](#) and [User Manual \(PDF\)](#)

A separate submission from Ku-ring-gai Council will be made on the [Explanation of Intended Effect for the State Environmental Planning Policy \(Vegetation\) 2017](#).

Cumulative impact

Council are making or have made submissions on numerous legislative reforms released by the NSW state government over the past 24 months. Whilst these individual bills, amendments, codes, policies and guidelines have significant impacts on local government wide issues and procedures, it is the accumulative impact of the legislative reform which could potentially have catastrophic impacts on the environment.

Council are concerned that the overall impacts of the new legislative framework have not been sufficiently considered in regards to the pressures on the environment and particularly in regards to biodiversity. Council seek reassurance from the Minister that the accumulative impacts of the legislative reforms have been considered and request further information relating the quantification of potential impacts.

Ku-ring-gai Council have provisions for Biodiversity Protection within its planning and assessment instruments, however, it is recognised that environmental protection is scarcely guaranteed without strong support from state legislation.¹

¹ Mcgregar L, Kelly A (2015), Ku-ring-gai, New South Wales: A battleground between urban consolidation and green amenity, Environmental and Planning Law Journal 32 EPLJ 562 at 576

The BC Act and LLSA Act – Councils submission

Ku-ring-gai Council made a submission to the NSW government during the exhibition period for the BC Act and LLSA Act (attached as appendix 1). Additionally, during the exhibition period Ku-ring-gai Council held a work shop on the biodiversity reform and consulted with the community about the impacts of the biodiversity reform.

Ku-ring-gai Council's submission outlined concerns which were shared with many within the community, specifically, that the biodiversity reform was a retrograde step in relation to biodiversity protection in the state. The BC Act and LLSA Act are considered a missed opportunity for strengthening biodiversity controls and preventing further extinctions particularly in regards to the increased clearing which is likely to result from the biodiversity reform and repeal of the Native Vegetation Act 2003.

Council understands that the BC Act and LLSA Act have now been passed into law and that the current exhibition period is for a series of supporting documents. Council have made an effort to review these documents and provide comments relating to potential impact, identified strengths and recommendations for improvements.

Councils review of supporting documents

The exhibited documents include reforms to the regulation of many aspects of biodiversity, and this submission has been broken up into the following sections:

- native plants and animals
- private land conservation
- ecologically sustainable development

Native plants and animals

Listing threatened species and ecological communities

Regulations for Part 4 of the new Act prescribe updated criteria for listing threatened species and ecological communities. Council support this change and consider the move towards alignment of threatened species criteria with the criteria established by the IUCN² and the *Environment Protection and Biodiversity Act 1999* (EPBC Act) to be a positive step. Council are also supportive of the regulations maintenance of a criteria to list a species population as endangered as specified in section 4.1 of the regulations.

² The *IUCN Red List Categories and Criteria. Version 3.1*, International Union for Conservation of Nature and Natural Resources, <http://www.iucnredlist.org/technical-documents/categories-and-criteria>

The alignment of threatened species lists across jurisdictions into a national framework was a recommendation of the 2009 Hawke report³. The Hawke report claimed that a national list of threatened species would improve the administrative and legal processes regarding assessment and approvals for activities impacting threatened species and simplify prioritising and coordinating recovery actions⁴. This recommendation has now been, at least partly, implemented through the BC Act regulations. However, the net benefits from this approach on species conservation and protection is contingent on the actions that follow a species listing and this relates to the conservation programs instituted through the regulations, namely the 'Saving our Species' (SoS) program and the offsetting scheme.

Saving Our Species and Recovery Plans

The intention of recovery planning as a legislative instrument is to establish the processes and mechanisms of ecological restoration⁵. Recovery plans provide guidance for research and management actions seen as necessary to stop the decline or support the recovery of a species, population or ecological community.

In NSW recovery planning instruments were provided for under the TSC Act. Under the TSC Act recovery plans could be prepared for all species listed on the threatened species schedules. Once a recovery plan was adopted, consent authorities such as local councils, Ministers and other public authorities were prevented from making decisions inconsistent with the measures established in the recovery plan and thereby, recovery plans that specified habitat requirements or limits to habitat loss provided a powerful tool to protect habitat.

It is noted the TSC Act did not obligate the preparation of recovery plans and that since 2007, preparation of recovery plans had been largely replaced by Conservation Advices and Priority Action Statements (PAS), which unlike recovery plans, are not binding on decision makers.

Notwithstanding chronic underutilisation, recovery plans played a significant role in the recovery and conservation management of many threatened species across the state and within the Ku-ring-gai LGA.

³ Hawke A (2009), *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999*. Page 74 at 2.89

⁵ Australian Conservation Foundation, Birdlife Australia, and Environmental Justice Australia (2015), *Recovery planning Restoring life to our threatened species*. Page 7

The BC Act and regulations set out a new path governing conservation planning in NSW. The SoS program which had its legislative base in the PAS of the TSC Act has now been mandated through the BC Act in part 4, division 6⁶. Council are concerned that the SoS program does not carry the same legislative weight, that consent authorities are not required to consider efforts being conducted under SoS and that actions contrary to a conservation program may be approved.

It is noted however, that areas under SoS management 'may' be included on the sensitive land maps and this measure is supported.

In addition to providing protection, recovery plans were a valuable information tool. Council asks that consideration be given to the SoS program in an attempt to improve the information available regarding threatened entities.

The BC Act also specifies in section 4.37 that SoS will be reviewed every 5 years after its establishment⁷. Council recommends an inclusion in the regulations for specific review and reporting requirements. For example, reviews should include updates on specific projects whilst also outlining the success or failure of the program as a whole and should contrast results with the conservation value of the previous regime (e.g. recovery plans/species impact statements). This would allow for a comprehensive comparison and gap analysis for SoS.

Additionally, Council looks forward to the opportunity to comment on the anticipated Biodiversity Investment Strategy which will play a critical role in guiding investment in conservation programs. Council requests a 12 week exhibition of the strategy in order to effectively review the strategy and make a submission.

Areas of outstanding Biodiversity Value

As with recovery plans Council considers critical habitat under the TSC Act a very powerful and woefully underutilised conservation tool. The BC Act regulations set out criteria to establish Areas of Outstanding Biodiversity Value (AOBV) and these AOBVs will replace critical habitat. Council support the broadening of the applicable criteria applied to AOBVs and recommends a nomination process is included in the regulations. It is Council's opinion that any person should be able to nominate an AOBV akin to the nomination process for threatened species and ecological communities.

The regulations set out a requirement for areas being considered for AOBV to be published online.

As AOBVs will be highly regulated, Council recommend interim protection be included in the

⁶ Biodiversity Conservation Act 2016 see part 4 Division 6, section 4.35

⁷ Biodiversity Conservation Act 2016 see part 4 Division 6, section 4.37 (1) and (2)

regulations whilst AOBVs are under consideration to prevent potential impacts during the interim period.

Private land conservation

Although there are significant changes under the Private Land Conservation (PLC) component of the reform package, the primary elements in the regulations relate to Biodiversity Stewardship Agreements (Tier 1 Agreements), as well as some reimbursement provisions relating to Conservation Agreements (Tier 2 Agreements).

Ku-ring-gai Council welcome the additional investment into private land conservation with \$240 million committed over five years and \$70 million in each following year to support conservation on private land. Council also support the transition of BioBanking agreements established under part 7 of the TSC Act to Biodiversity Stewardship Area's (BSAs) under the BC Act.

Council raises concern with the ability to vary or terminate offsetting agreements. Offsets must be in perpetuity and this includes protection from mining and petroleum interests.

The draft BC Regulation includes new provisions to support the reimbursement of establishment costs and other amounts in certain circumstances where BSAs and conservation agreements are varied or terminated due to mining or petroleum related activity. These provisions should be eliminated altogether, as the principle of offsetting is in-perpetuity conservation. Alternatively, if a mining or petroleum interest is to breach a BSA, there should be a penalty imposed to act as a strong disincentive to breaching a BSA.

Council supports the provisions for private land conservation (other than Biobanking agreements) to remain valid and their existing governance arrangements to be saved e.g. conservation agreements and wildlife refuges under the *National Parks and Wildlife Act 1974* and trust agreements under the NCT Act . Council considers the Voluntary Conservation Agreements to have significant conservation value, partly driven by the long term nature of these agreements. For example, the VCA covering the Ku-ring-gai Flying Fox Reserve was entered into in 1991 and the long-standing VCA has offered great protection to the resident Grey-headed flying-fox camp.

Council support the new provision under the draft BC Regulation allowing offset obligations created outside of the BAM Scheme to be met by voluntarily entering into a BSA and immediately retiring any biodiversity credits that are generated (e.g. if a development consent issued before the BC Act commences requires a proponent to secure an area of their land in perpetuity as an offset). This change brings surety to the offset through the use of the BSAs and will guarantee a site's long term management, including a mechanism to secure funding and strong compliance measures.

Council support the provisions in the draft BC Regulations that allow minor changes to BSA's without the requirement for an additional BAR where the variation/s will not significantly impact the biodiversity values the agreement seeks to achieve. The submission guide released provides an example of minor changes, being a change to the timing of scheduled pest control activities. Council are concerned that this provision could be misused and urges the publication of clear guidelines to be used by the minister when making changes to any BSA not requiring a BAR.

New risk-based approach to regulating wildlife interactions

Whilst Council appreciate the need to reduce the administrative burden of licencing interactions between people and wildlife, Council are concerned that codes of conduct may be used to sidestep requirements for researchers and other groups interacting with wildlife to obtain landowners approval. Council support the requirement within the regulations to publically consult on Codes of Conduct as they are developed. In any Code of Conduct, Council considers an obligation to report on findings as well as any incidences e.g. unintended impacts to fauna species, to be critical.

Ecologically sustainable development

Council have conducted a preliminary review of the Biodiversity Assessment Methodology (BAM). In general, Council consider the BAM a robust assessment tool to quantify impacts at a development site and potential biodiversity gain at an offset site. The BAM is considered an improvement on the current system which does not have sound mechanisms for securing biodiversity offsets unless the offset is done through the Part 7 TSC Act.

However, Council has concerns regarding how proponents will be able to discharge their offset obligations under the BAM and makes the following points:

1. Offsets must be underpinned by the maintain or improve principle.
2. Offsets must be genuine like-for-like to a minimum of Plant Community Type (PCT) for communities and specific to species for individual flora or fauna species. Variation rules allowing for impacts on one species to be offset by protections for another species do not

achieve the principles of effective offsetting and risk pushing some species towards extinction. A lack of like-for-like offsets should be an alert that the impact may be serious or irreversible.

3. Currently, the offset scheme is an opt-in for Part 5 development under the *Environmental Planning and Assessment Act 1979* (EP&A Act). This should be reversed to an opt-out and decision makers who opt-out should be required to publically notify of that decision and reason.
4. The ability to discharge an offset obligation by payment into a fund must be very closely regulated. Where a like-for-like offset is not able to be located, for a specific proposed activity, the fund must ensure they are able to effectively offset any impacts to a commensurate PCT or the same species or the application should be refused. Location restrictions should still apply for offsetting requirements by the Biodiversity Trust.

Within the regulations, mining proponents can discharge their offsetting obligations by committing to deliver mine site rehabilitation that creates the same ecological community or threatened species habitat (available for major mining projects only). The ability for any rehabilitation of a mine to a functional ecological community commensurate with a specific native community is questioned by Council. A requirement to rehabilitate following extractive activities should be required in addition to the offsetting of the impacts; as rehabilitation, if possible, may take decades or even centuries.

Serious and Irreversible Impacts (SAII)

The NSW state Government has released a '*Draft guidance and criteria to assist a decision maker to determine a serious and irreversible impact (SAII)*' and the Biodiversity regulations provide a framework for the decision maker to determine if the remaining impacts of a proposal are likely to be serious and irreversible.

Council commend the preparation of this guide and recognise the importance of including a section within the regulations for SAI determination. Under the TSC Act, a definition for Significant Impact was not provided and this led to some confusion and differing interpretations, which threatened conservation outcomes.

At section 7.16 (2) of the BC Act, a consent authority must refuse to grant approval in the case of an application for development where SAI is predicted, but only where the proposal was submitted under Part 4 of the EP&A Act. Development under part 5 of the EP&A Act is only required to consider SAI, and a further exemption is given for development or infrastructure determined as 'state significant'.

Council are concerned that SAII may be allowed for a broad range of development and this could lead to extinctions of species and communities. The regulations would appear to allow a development designated state significant or proposed under Part 5 to directly cause extinction of a species, as long as the impacts are considered.

Section 1.3 of the BC Act states the purposes of the act and commits to Ecologically Sustainable Development (ESD) as defined in the *Protection of the Environment Operations Act 1997* (POEA Act). The POEA Act defines ESD in Part 3, Section 6, Clause (2) (a), (b), (c) and (d). Council pose the question whether the acceptance of extinction is in line with ESD?

Council is of the opinion that the guidelines for SAII should make specific reference to the principles of ESD. Further, Council recommends that the BAM be made an opt-out as opposed to an opt-in for state significant development, state significant infrastructure and Part 5 proposals, with a requirement to publically notify intentions to opt-out of the scheme for a specific activity. This recommendation aligns with Council's commitment to no-net-loss of significant vegetation or habitat.

Considering SAII in Part 4 (Development Applications)

Currently, the SAII guidelines and relevant regulations apply to candidate species. These candidate entities are listed under Appendix 2 or Appendix 3 and are assessed against the principles at 1(a), 2(a), 3(a) and 4(a) and the criteria at Appendix 1 of the *Draft guidance and criteria to assist a decision maker to determine a serious and irreversible impact*. For candidate species, threshold impacts will be published and a breach of the threshold will be considered SAII. For candidate species without published thresholds, it is assumed that all impacts are SAII.

Appendix 3, Table B-1 of the *draft guidance and criteria to assist a decision maker to determine a serious and irreversible impact* provides the list of ecological communities that are candidates for serious and irreversible impacts and includes *Blue Gum High Forest in the Sydney Basin Bioregion* (BGHF). Ku-ring-gai has BGHF and requests clarification on how this should be dealt with for Part 4 applications following 25 August 2017. If at that date there are no thresholds published, are Council obligated to refuse every development application which impacts BGHF? And if thresholds are to be published, will Council have an opportunity to comment prior to the commencement of the BC Act? If Council are not provided an opportunity to comment prior to any threshold for Blue Gum High Forest (BGHF) being published, then the following must be considered:

- The thresholds should consider both the ecological attributes provided by a tree (e.g. hollows), as well as its Safe Useful Life Expectancy (SULE).
- Many areas of BGHF exist as canopy remnants, with no intact soil profile. Where there is intact soil profile and resilience, the community far more valuable from an ecological perspective and is far more vulnerable to SAI. Resilience is not an easy quality to measure. Council have developed a matrix to assist in determining a sites resilience. Relevant sections of Councils matrix are provided below to assist in the consideration of this variable.

Guidelines to assist in the assessment of resilience

Evidence of resilience – natural regeneration

Seedlings	<p>Relevant to species which regenerate via seed. Consider what proportion of species is germinating, compared with the full range of species which might be present in an intact patch of the same ecological community.</p> <p>Consider whether the seedlings represent:</p> <ul style="list-style-type: none"> • Only a sub-set, coming up from the canopy & soil seedbanks (in situ resilience)? A few species continue to / are favoured by new disturbance regimes, while most may be being inhibited. • Species coming from off-site (migratory resilience)?
Seedlings of native species which need more or less original soils to germinate	<p>Differs from above point in that the presence of these species indicates an original soil is present, hence a seedbank (containing propagules of more species) may also be present. Recognising such species takes some experience.</p>
Stolons spreading across the ground	<p>Relevant to stoloniferous species.</p>
New shoots from under-ground parts	<p>Relevant to species which regenerate via resprouting from underground parts (rhizomes, bulbs, tubers, corms, lignotubers), e.g. <i>Lepidosperma spp.</i>, <i>Hypolaena fastigiata</i>.</p>
New shoots from above ground stems	<p>This is called epicormic growth. New shoots often come out from buds under bark after fire in e.g. Eucalypts.</p>

Limitation Note: Natural regeneration after soil disturbance may be slow. It may be appropriate to wait 2 or more years after a disturbance (e.g. weed clearing, fire) before determining site resilience in order to make an informed decision regarding the sites management requirements such as applying revegetation techniques, e.g. planting.

Signs of resilience

Signs of potential resilience – including if no native vegetation is present:

- Original landform.
- Original soil profile.
- Rock outcrops.
- Steep slopes.

Flowering	Must occur for seeds (i.e. next generation) to be produced. BUT pollination must also happen. This may not occur if the relevant pollinator is absent.
Fruiting	Means pollination has occurred BUT little or no seed may be produced.
Seed set	Means seed is being produced, BUT the seed must also be viable. This may not be the case for very small populations of certain species.
Species spreading slowly by rhizome (rarely germinating from seed)	E.g. many Restionaceae and Cyperaceae. Their presence (assuming they haven't been planted) indicates that the soil level around the plant is likely to be original; hence the soil seedbank may still be present. If the soil had been highly or frequently disturbed, these species are likely to have been lost.
Species which don't disperse their seed very far	E.g. many Proteaceae species. The plants are present because they were originally here (assuming they haven't been planted), hence the soil seedbank may still be present. BEWARE: More and more local native species have been grown and planted in / near bushland – distinguishing between remnant and planted is becoming increasingly difficult.
Vegetation structure	If the different vegetation layers of the bushland resemble what might be seen in a pristine patch of the same ecological community, then this indicates that natural processes have continued. Layers may include: canopy trees, mid-storey shrubs, groundcover herbs and grasses. Consider the density of, and number of species in, each layer.

Species diversity	If the richness (No. of species) and abundance (No. of individuals of each species) is more or less what might be seen in a pristine patch of the same ecological community, then this indicates natural regeneration is / has still been occurring.
Age diversity	If the individuals of each native species present have a range of ages, this indicates natural regeneration is / has still been occurring.
Remnant canopy	The soil level, at least around the base of the canopy plant, is likely to be original; hence the soil seedbank may still be present.

Sensitive Land map

Currently under exhibition is a draft sensitive values map. The resolution of the map makes it difficult to ascertain the areas mapped as sensitive within the Ku-ring-gai LGA, this will need to be improved prior to commencement. Council note clause 7.3 (3) (l) which states for inclusion in the sensitive values map *'land that, in the opinion of the council of the local government area concerned, contains vegetation connectivity features or threatened species habitat and whose inclusion in the Map will, in the opinion of the Minister, conserve biodiversity at a bioregional or State scale'*. Ku-ring-gai have detailed mapping of biodiversity values within their LGA including corridors and connectivity, and these should be incorporated into the mapping prior to commencement of the act.

Additionally, Council would like to see the inclusion of all endangered ecological communities, not just critically endangered ecological communities included on the sensitive values map.

Agricultural Land

The LLSA Act replaces the Native Vegetation Act as the primary piece of legislation controlling land clearing in NSW and sets the state on a new path for native vegetation management in rural areas. Obviously, as the key threat to many threatened species and ecological communities is habitat clearing, the LLSA Act has a vital role to play. Ku-ring-gai Council is a metropolitan council area and as such the self-assessable codes brought into effect under the LLSA Act are not directly applicable, however the impacts on biodiversity are a common concern and biodiversity loss has wide reaching ramifications.

Council is concerned that by allowing for unmitigated clearing in some areas of private property and through the adoption of self-assessable codes for other areas, the new regime has a significantly

looser set of checks and balances when it comes to protection of native vegetation and biodiversity. The NSW EDO has labelled this new system of vegetation management 'less stringent, less evidence-based and less accountable'⁸. The new system is therefore likely to result in significant clearing increases in NSW.

Council recommend that all endangered ecological communities not just critically endangered ecological communities, be omitted from self-assessable codes.

Conclusion

With the state of biodiversity declining in NSW and across the country, Council supports efforts to strengthen and streamline biodiversity conservation legislation.

Council support many of the measures within the BC regulations and supporting documents, but raise a number of concerns detailed in this submission. These include:

1. Weak requirements for like-for-like offsetting.
2. Huge reliance on self-assessable codes.
3. Lack of regarding serious and irreversible threshold impacts for candidate species and apparent acceptance of extinctions and Serious and Irreversible Impacts.
4. Limited scope to nominate and declare AOBVs.

Council strongly recommends that the scheme does not commence until key instruments have been consulted on and finalised, and until there has been sufficient time for assessors to be trained and accredited, Council staff to be brought up to speed and for mapping supporting the legislation to accurate and comprehensive.

Additionally, Council recommend amending the Regulation to include further values relating to *soil quality and erosion control, salinity protection, carbon storage and the resilience, and rehabilitation potential of the land in its landscape context*. These values would draw on the Environmental Outcomes Assessment Methodology (**EOAM**) under the *Native Vegetation Act 2003* and recognised carbon accounting methods. This would recognise that healthy, biodiverse soils support productive landscapes and interconnect with other biodiversity values prescribed in the BC Act and Regulation.

⁸ Environmental Defenders Office NSW (2016)
http://www.edonsw.org.au/2016_nsw_biodiversity_reforms_land_clearing_and_the_rationale_for_reform

Thank you for the opportunity to comment. We hope that you take the time to consider our submission. If you require further information contact Jacob Sife on (02) 94240000 or e-mail jsife@kmc.nsw.gov.au.

Yours sincerely

Andrew Watson

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