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Nature Conservation Saves for Tomorrow

Via <https://www.landmanagement.nsw.gov.au/have-your-say/>

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Submission opposing proposed changes to the NSW biodiversity and conservation laws

Overarching conclusions and comments

- The Society has assessed the proposed changes in the context of maximising biodiversity conservation and minimising the clearing of native vegetation consistent with Australia's commitment to reduce its CO₂ emissions. In that context the proposals are an abject failure.
- In terms of facilitating all forms of development, escalating the clearing of native vegetation and wildlife habitat, and disregarding biodiversity conservation, while concurrently enhancing the likelihood of corrupt practices, the Society deems the changes resoundingly successful.
- Transferring responsibility for environmental conservation from the Environment Minister to other Ministers with vastly different responsibilities and agendas, ensures that the existing imbalance favouring development over environmental considerations is exacerbated.
- Biodiversity offsetting has negligible scientific merit and provides no basis for destroying exceptional environmental values. Offsetting is repugnantly devious and is designed to ensure that the vast majority of development proposals receive 'conditional approval', irrespective of public opinion and environmental outcomes¹.
- It is totally unsurprising that the Wentworth Group of Concerned Scientists has written to all MPs stating its view that the laws fail to protect nature; similarly damning submissions have been made by the Royal Zoological Society of NSW and the peak environmental groups.
- The Society is frequently asked how the Government can be so wrong? The simple answer is that its values are different. Government is achieving its economic and political objectives through the sale of public assets and development-friendly policies. The downside comprises environmental vandalism and a disregard of greenhouse gas emissions. When there is nothing left to sell, construction is incomplete, biodiversity is compromised, and global warming is rampant, the architects of the present policies will have much to answer for; but it will be too late!²

¹ For an expansion of this theme, refer to: Elizabeth Farrelly, *Destructive powers push through city*, SMH, News Review p24, June 25-26.

² As per footnote 1.

1. Introduction

The Blue Mountains Conservation Society (BMCS and also ‘The Society’ in the present submission) has a membership which fluctuates in the range 800-850. The membership is mainly drawn from the City of the Blue Mountains and the Greater Sydney region, but a scattering of members exists throughout NSW and also interstate.

The Society has a strong interest in the Greater Blue Mountains World Heritage Area (GBMWhA) in terms of protecting its many parks and reserves. It is also extremely active in campaigning for the reservation of the Gardens of Stone Stage 2 Proposal covering the western portion of the Blue Mountains and the Western Escarpment between Blackheath and the Capertee valley, and pursuing the National Heritage Listing of parts of these areas with a view to having them ultimately being assessed for addition to the GBMWhA.

The Society, through close association with other environmental organizations such as The Colong Foundation, Nature Conservation Council, National Parks Association, Protect Sydney’s Water, Our Land Our Water Our Future, and Lock the Gate, engages to varying degrees with State-wide and broader issues.

The Society, in recognition of its mission, its primary focus on the Greater Blue Mountains region and the GBMWhA, and its more general environmental interests, has opted to comment on the proposed changes to the biodiversity and conservation laws. The comments overall will be intensely critical, this being in accord with the Society’s perception that the proposed changes will weaken environmental protection and compromise the standards established by the legislation which the proposed laws will supersede.

2. What is repealed and what is proposed instead

It is implied by Government that the existing legislation is deficient in terms of lacking clarity and thereby causing confusion, and perhaps being too restrictive and placing undue burdens upon landholders. Based on such poorly substantiated value-judgements, the government aims to repeal the *Native Vegetation Act 2003*, *Threatened Species Conservation Act 1995*, *Nature Conservation Trust Act 2001* and sections of the *National Parks and Wildlife Act 1974*. These fundamental pieces of legislation are to be replaced by the proposed *Biodiversity Conservation Bill (BCB)2016*, *Local Land Services Amendment Bill (LLSAB) 2016* and, in due course, changes to the *Environmental Planning and Assessment Act (EP&A)1979*.

Government is currently seeking input on what aspects of the *EP&A Act* should be amended from the viewpoints of environmental organizations. Submissions will also be made by lobbying organizations representing the agricultural, forestry, mining and CSG industries *inter alia*. Government will then go ahead and produce a draft for formal consultation. **If the outcome follows the pattern established by the BCB and LLSAB, there will be further weakening of environmental protection in the interests of streamlining all types of development approval.**

BMCS believes that Government has already decided on the changes needed to facilitate its development-friendly agenda and contends that the phases of consultation are largely ‘whitewash’ designed to convey a semblance of democracy.

BMCS categorically rejects the government’s position regarding the deficiencies of the legislation due to be repealed, because the legislation is not perfect, in that the current imbalance already favours development over the environment, it has achieved some successful environmental outcomes. Thus:

- The *NSW State of the Environment Report 2015* has recognized the *Native Vegetation Act* as a key piece of legislation which has the objective of protecting natural bushland and wildlife habitat throughout NSW and also ensures the protection of soils and facilitates sustainable land management.

- The *Native Vegetation Act*, according to the WWF, has resulted in land clearing declining by 40%, with this equating to saving 116,000 native mammals, as well as contributing to the preservation of habitat including numerous plant species.
- The *Native Vegetation Act* has also been responsible for establishing 1000 property vegetation plans which ensure that over 4 million ha of native vegetation on farmland are subject to improved management.
- The *Threatened Species Conservation Act* is fundamental to ensuring the preservation of species. It plays an important role in preventing widespread destruction of bushland for mining and farming purposes, and other forms of development such as airports, and housing and industrial estates. Unfortunately, its application is largely subverted by such iniquitous processes as offsetting, and the planning system disproportionately valuing economic and selected social outcomes above environmental interests.

It can of course be argued that the Government is implementing changes to ensure more equitable outcomes in terms of a triple bottom line approach. However, the Society is totally unconvinced of this type of claim (spin!) because:

- There is nothing in the proposed changes to support the claim – indeed, moving to a system which aims to streamline processes and provide certainty (for you know whom?) would seem to be exacerbating the existing imbalance between economic and selected social outcomes versus environmental outcomes.
- The Acts to be repealed are not perfect, but their application has evolved over the past 15-40 years such that a level of competence has developed within the decision-making authorities – much of this experiential learning would be lost with the introduction of a new system. The same type of loss would be experienced by those putting forward an application and various community-based organizations attempting to assess applications from environmental and social viewpoints.
- The saying ‘if it isn’t broken don’t fix it’ has considerable attraction – it is more sensible to make focused clearly-needed modifications rather than starting from scratch. Apart from anything else, small adjustments carry far more conviction than sweeping changes, particularly when those changes are developer-friendly and diminish the capacity of community groups to challenge inequitable outcomes.

Conclusion 1: the government’s argument that the existing legislation is confusing and ineffective is not justified by the environmental outcomes, at least before the Baird Government came to power.

Conclusion 2: deficiencies in the existing system should be dealt with incrementally rather than by attempting to start with a clean slate.

Conclusion 3: the aim of the legislation should be biodiversity conservation, not facilitation of clearing and development in accord with Government’s economic imperative.

3. No requirement to ‘improve or maintain biodiversity values’

The ‘improve or maintain’ requirement is a key feature of the *Native Vegetation Act* and of Biodiversity Certification under the *Threatened Species Conservation Act*. As the Government will remove such legally binding requirements when the acts are repealed, and the new laws are devoid of any clearly defined provision for such requirements, this will unquestionably lower the bar for all land-clearing activities. Poorer environmental outcomes must inevitably eventuate.

Conclusion 4: omission of ‘improve or maintain biodiversity values’ demonstrates a clear and unacceptable intention to weaken environmental outcomes.

4. Lack of provision for no-go zones

There are many environments and ecosystems which, for reasons **such as** having exceptional scenic value, being an irreplaceable land system, possessing uniqueness for ‘natural’ reasons and/or due to

human actions³, and having national and/or state listing as endangered or critically endangered, should be deemed too precious to destroy and be classified as off limits for clearing and development. These should be designated ‘no-go zones’⁴ by the appropriate government departments, preferably before any form of development is contemplated, but also by their recognition during the initial stages of assessment.

There should also be ‘no-go zones’ (perhaps preferably referred to as legislated buffers) around the boundaries of world heritage areas, national parks and other forms of reserve, to avoid peripheral pollution by weeds and sullyng the reserves by other aspects of human invasion.

It may be that those responsible for the proposed changes see ‘biodiversity offsetting’ as an answer to destroying things of exceptional environmental merit. **The simple response to this is that the Society has consistently opposed such offsetting; the practice is an outrageous subterfuge designed to enable developments to proceed.** Aspects of this will be referred to in a later section.

BMCS appreciates that the Biodiversity Assessment Method (BAM) will trigger a ‘red flag’ (essentially a ‘no-go zone’) for ‘*serious and irreversible impacts on biodiversity values*’, but this raises more problems than it solves. First, there is no definition of ‘*serious and irreversible*’ in any of the proposed bills (*BCB*, *LLSAB*, *BAM*); second, even if there were a definition, there is no clarity on how areas would be assessed relative to a definition (e.g., would OEH be the determining authority, or would DPE accept the finding of the company’s ‘rusted on’ consultant?); and third, there is no stipulation that consent should be refused for any piece of state significant development (SSD) or state significant infrastructure (SSI) which would cause ‘*serious and irreversible impacts*’.

BMCS similarly recognizes that provision exists in the *BCB* for the Environment Minister to declare ‘*Areas of Outstanding Biodiversity Conservation Value*’. Sounds impressive, but it is in no way clear when and how these powers would be used. Currently, the ‘*critical habitat provisions*’ in the *Threatened Species Conservation Act* have rarely been used, this probably reflecting the relative ranking of planning and resource development versus the environment in this and some previous Governments. **Were this not the case, such provisions should have been invoked to protect the demonstrably endangered swamps on Newnes Plateau.**

BMCS suspects that governmental pecking orders will not change, and that the provision in the BCB is little more than window dressing whilst increasing the imbalance in favour of development.

Conclusion 5: there should be provision for identifying ‘no-go’ zones, including legislated buffers, which should be automatically excised from any exploration application and development proposal.

Conclusion 6: there should be provision for the Environment Minister, through advice provided by OEH, to act in the interests of preserving land and habitat deemed to have exceptional conservation value – these powers must be clearly prescribed and the nature of the conservation values be encapsulated through definitions.

Conclusion 7: ‘red flag’ provisions and the Minister of the Environment’s powers under the BAM are inadequately defined and need substantial clarification if they are to be effective in conserving biodiversity.

5. Diminishes the role of the Minister for the Environment

The principal point here is that, unless the gross volume of responsibility is expanding, removing responsibility from one minister inevitably means that another takes it over; it also means that the respective ministers may have very different levels of commitment to the environment versus development. **This is apparent in what is stated below:**

³ For example, the widespread destruction of most of a relatively common ecosystem by open-cut mining and clearing for agriculture.

⁴ This submission principally focuses on natural environmental issues, but ‘no-go zones’ should also apply for health and other social reasons, in terms of recognizing absolute buffer zones around clusters of dwellings (‘villages/hamlets’). The notion that a village can be exposed to open-cut coal mining, virtually up to the back fences, should be litigated against, not left to the uncertainty of campaigns and costly last-resort court actions.

The Minister for the Environment has responsibility for the *Native Vegetation Act*, including approval of land clearing applications, although the assessment and approval of Property Vegetation Plans is controlled by the Local Land Service (LLS). Now, under the proposed system, the LLS will oversee land clearing activities using the *Local Land Services Act (LLSA)* administered by the Minister for Primary Industries.

BMCS notes that there would seem to be little doubt where the sympathies of those who would be implementing the proposed changes are likely to lie.

Conclusion 8: biodiversity conservation should primarily be the responsibility of the Minister for the Environment and his/her department – other branches of Government have different responsibilities and they are clearly expressed in the proposed changes!

6. The Biodiversity Assessment Method (BAM)

BAM will supersede the BioBanking Assessment Methodology, Biodiversity Certification Assessment Methodology, the preparation of Species Impacts Statements and the Framework for Biodiversity Assessment under the NSW Biodiversity Offsets Policy for Major Projects.

The principal aim is to separate land-clearing decisions from biodiversity assessment, such that the former is dealt with under the *Local Land Services Act (LLSA)* and the latter under the *EP&A Act*. The Government would appear to be responding to complaints by small farmers and large agribusinesses, the mining and CSG industries, and developers in general. The issues were perhaps brought into focus by the Coalition's National Party members in the face of potential electoral losses to Independents and the Shooters, Fishers and Farmers Party.

The Society's first reaction was that anything **should** be better than the BioBanking system and the Biodiversity Offsets Policy. **Unfortunately, the first reaction was and is wrong; the BAM is environmentally unsound.**

Likewise, the concept of rationalising land clearing and biodiversity assessment under the *Local Land Services Act (LLSA)* and the *EP&A Act* respectively, might seem sound, but as partly indicated in Section 4 (above), the outcomes are disappointing and need much more consideration. The Government needs to place conservation (rather than clearing and development) in the forefront of its thinking.

6.1 The BAM's deficiencies

The BAM will weaken biodiversity offsetting rules for all types of development, because it: (i) contains many of the unacceptable aspects of the current NSW Biodiversity Offsets Policy for Major Projects; and (ii) clearly intends to expand the use of biodiversity offsetting. **The repugnant philosophy appears to be that comprehensive offsetting enables the vast majority of development proposals to be approved! BMCS does not accept this approach and believes that it can only result in gross environmental vandalism.**

Some of the specific deficiencies are:

- There is no clear objective to protect biodiversity or achieve net positive outcomes, despite this concept of maintaining or improving biodiversity being basic to the acts which are to be replaced [Refer to Section 2 above].
- The proposals acknowledge a 'red flag' system but its details are ill-defined and the 'red flag' can be disregarded for major projects [Refer to Section 3 above].
- Offsetting is not limited to 'like-for-like' and permits such things as: mine-site rehabilitation (a cosmetic but otherwise totally inadequate system of compensating for destruction); monetary payments where suitable offsets (even in the loosest interpretation) are not available or have not been identified; and ill-defined supplementary measures, termed 'biodiversity conservation actions', which are as yet unavailable for public comment. **It is ridiculous that comment is sought on a proposal where all its parts are unavailable for consideration. All the cards should be on the table and face up!**

Related concerns in the *BCB* and *LLSAB* are:

- A provision in the *BCB* and *LLSAB* allow decision-makers to discount and in other ways alter biodiversity offset credits. This is frightening in that it encourages corruptive practices and other forms of ‘special consideration’. It is unacceptable!
- Offset sites are not in themselves protected in perpetuity in the *BCB* to the extent that offset agreements can be altered at the Minister’s discretion. This could lead to an offset area being cannibalized by later phases of mine development and adds grist to the impression that this government will allow nothing to stop development.

Conclusion 9: the BAM must embrace the objective of maintaining or improving biodiversity, ensure that avoidance and mitigation are fully investigated before considering offsets, and comprehensively recognise that circumstances exist where offsetting should neither be acceptable nor applicable; offsetting must never be a panacea for approval.

Conclusion 10: offsets must be preserved in perpetuity, and offset-determinations should be absolute and free from selective ‘accommodations’.

Conclusion 11: offsets should not include ill-explained supplementary measures (‘biodiversity conservation actions’) – such flexibility is open to abuse and impossible to evaluate.

6.2 Native Vegetation Regulatory Maps

Three categories of land are recognized: exempt, regulated and excluded.

- Exempt lands [cleared land and regrowth, low conservation value grasslands, and biodiversity certified land (i.e., land previously subject to biodiversity assessment)] **can be cleared without approval.**
- Regulated lands [land not cleared lawfully since 01/01/1990, land subject to private conservation agreements or conserved with public funds, vulnerable land (e.g., steep land at risk of erosion), unlawfully cleared land, high conservation grasslands, and land with features subject to other regulation (e.g., coastal and Ramsar wetlands)] **are all subject to self-assessment using clearing codes; they will be administered by the Local Land Service and Minister for Primary Industries.**
- Excluded lands [includes all Sydney and Newcastle local government areas, and state-wide lands in E2, E3 and E4 zones, and R5 zones under LEPs] will be regulated by the *EP&A Act* using the Biodiversity Assessment Methodology (= rampant offsetting) – a new SEPP and Development Control Plan will apply, however the contents of these policies are not currently available. **BMCS again points out the difficulty of dealing with a set of bills when much is still under the table.**

Apart from the unknown aspects, it is clear that some lands which were more closely regulated can now be cleared without approval, while the amount of self-assessment dramatically increases under ‘code-based’ clearing. And where more detailed approvals are required under the *EP&A Act*, it will be implemented under the disgraceful process of biodiversity offsetting within the BAM. The whole system is based on effectively reducing constraints on land clearing by: the proposed enactment of clearer-friendly categorization; the sentiments of those charged with administering much of the proposals being more attuned to farmers and developers than to the best environmental outcomes; and by ‘cowboy’ companies and individuals who wish to stretch the limits of the system being able to test those limits with relatively little risk of adverse consequences.

The proposed changes will unquestionably lead to an escalation of clearing at a time when, from the viewpoint of climate change, it is essential to reduce destruction of native vegetation.

The Society is unable to accept that these changes will be implemented without substantial amendments and contends that:

- The reliance on offsetting as a means of ensuring the acceptability of a development should be either rejected or its application substantially weakened from convenience and/or financial viewpoints to ensure that it is never the preferred option.

- Under no circumstances should clearing of Endangered Ecological Communities (EECs) or any form of threatened species habitat be permitted under self-assessment codes; nor should it be permitted in excluded lands other than for high-integrity ‘like-for-like’ offsets, and only then after all possibility of avoidance and mitigation has been exhausted.
- Under no circumstances should it be possible for code-based clearing to convert ‘regulated lands’ (category 2) into ‘exempt lands’ (category 1); without this provision, code-based clearing could comprise a chain of destruction.
- Biodiversity conservation should be in the hands of an expanded OEH which has conservation as its objective, rather than in the hands of those committed to development and land clearing.
- The participation of the Minister for the Environment must be enhanced within the overall process, rather than being relegated to near insignificance.

Conclusion 12: the ‘exempt’ and ‘regulated’ categories of lands should be revisited and their content more carefully detailed in order to minimise environmental abuse through ‘misunderstanding’.

Conclusion 13: self-assessment (code-based or whatever) should be avoided. It will not work over time; individuals and organizations will always test the limits of a system and adjust practices accordingly. Such adjustment will naturally test the flexibility of the overseer (LLS) and could spawn corrupt practices to the detriment of biodiversity.

Conclusion 14: the role of the BAM for ‘excluded’ lands is contingent upon policies (a new SEPP and Development Control Plan) which are not available; this is unsatisfactory and does not inspire confidence.

7. Compendium of discrete conclusions

These should be in the context of being components of the ‘Overarching conclusions and comments’ presented at the beginning of the submission.

Conclusion 1: the Government’s argument that the existing legislation is confusing and ineffective is not justified by the environmental outcomes, at least up to when the Baird Government came to power.

Conclusion 2: deficiencies in the existing system should be dealt with incrementally rather than by attempting to start with a clean slate.

Conclusion 3: the aim of the legislation should be biodiversity conservation, not facilitation of clearing and development in accord with Government’s economic imperative.

Conclusion 4: omission of ‘improve or maintain biodiversity values’ demonstrates a clear and unacceptable intention to weaken environmental outcomes.

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Conclusion 10: offsets must be preserved in perpetuity, and offset-determinations should be absolute and free from selective ‘accommodations’.

Conclusion 11: offsets should not include ill-explained supplementary measures (i.e., ‘biodiversity conservation actions’) – such flexibility is open to abuse and impossible to evaluate.

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Conclusion 14: the role of the BAM for excluded lands is contingent upon policies (a new SEPP and Development Control Plan) which are not available; this is unsatisfactory and does not inspire confidence.

A handwritten signature in black ink, appearing to read 'Brian Marshall', with a long, sweeping flourish extending to the right.

***Dr Brian Marshall,
For the Management Committee.***