

Attachment A

Biodiversity Reforms - Have Your Say
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Biodiversity Legislation Reforms - Submission

Thank you for the opportunity to comment on this significant reform which will have serious implications for local councils.

Council supports the stewardship payments to landholders with biodiversity values on their lands and limited development opportunities who wish to conserve these values. Council also supports the accreditation of consultants preparing Biodiversity Assessment Reports but can see benefits in terms of consistency of assessment if all persons (consultants and local government environmental assessment staff) undertaking BAM and Assessments of Significance are accredited.

Council acknowledge that the unification of biodiversity offsetting methodologies is much needed, but it must be practical and robust.

The following are detailed comments on the proposed reforms with regard to their impact on local government and loss of biodiversity in the Shoalhaven.

Regulatory mapping

- Council staff who are already significantly burdened with an extensive legislative framework of development controls, must now interpret a new regulatory map in its administration of the EP&A Act.
- In order to do this, mapping must be at a scale that allows for the accurate delineation of categories on small rural lots (<5ha) which are common in the Shoalhaven LGA.
- Land categories must be reviewed to take into account OEH vegetation mapping of EEC, the Sensitive Lands Review into urban zoned lands, Regional Biodiversity Conservation Plans and Terrestrial Biodiversity layers on the Shoalhaven City Council LEP to reflect the existing Shoalhaven LEP and Council mapping. Vegetation within these zones must be excluded from the LLS Amendments.

Increased responsibilities and delayed development assessment

- The 4 part test of significance (revised 7 part test) and BAM will require Council Planners or private certifiers, or at minimum Council's environmental assessment officers, to have a sound knowledge both forms of assessment to appropriately advise developers, decision makers and Council.
- There are currently no guidelines to assist Council officers in this process. These will be required prior to the Act and Regulation being gazetted.
- Council will have to assess development against two different methods of biodiversity impact assessment, the test of significance (4 part test) and the BAM.
- The new legislation is likely to lead to delays in the development assessment process until the community, developers and their consultants become familiar with the new BAM requirements.

- The roll of advising the community on the new process is likely to be shouldered by Council's Environmental staff. Not all Councils have positions or resources available for this purpose.
- Council will have increased compliance obligations to ensure that a Biodiversity Assessment Report (BAR) has been prepared in accordance with the Biodiversity Assessment Methodology and to enforce offset requirements and mitigation measures as conditions of consent. Council does not have the resources to undertake additional compliance.
- There are no guidelines to deal with potential disputes in regard to the BAM thresholds, offsetting discounts, or determining developments of 'serious and irreversible harm'.
- There is uncertainty about whether assessment of significance assessment guidelines for a 4 part test will be available for consultants who prepare such reports and for Council assessing officers.

BAM thresholds and Sensitive Areas Map

- SLEP terrestrial biodiversity overlay and E zones must be used to identify sensitive values. This mapping has been prepared in consultation with the community and government agencies and therefore has a good level of rigour.
- More detailed scenario testing by OEH and Department of Planning should be undertaken to consider a range of development types and contexts that could trigger the BAM threshold.
- Consideration should be given to including a % of property area as an additional BAM trigger and lower thresholds for Endangered Ecological Communities.
- Council should have opportunity to make recommendations to OEH on what should be included in the sensitive area map and have opportunity to comment on a draft map.

Increased accountability for Local Government

- The discretion to set a lower offset obligation than that calculated by the BAM must be guided to ensure transparency of this process. Currently there are no guidelines or criteria proposed to govern this process. The degree of subjectivity that could be imposed in determining discounts is unacceptable and may lead to ongoing disagreements with applicants as well as being vulnerable to exploitation. Council will no doubt receive pressure to discount on every application to reduce the cost of development.
- How will offset actions be calculated? Councils will need a consistent approach to avoid accusations of inequitable treatment. Are 'save our species' (SOS) programs detailed enough to ensure this? There may not currently be adequate or sufficient actions with the saving our species program for developers to select the "compensation action" option rather than paying for an offset. Guidelines need to be provided to developers and Councils for this option.
- If the required offsets make a development "too expensive" then the development may be frustrated and seek to provide additional clearing of land with environmental value.
- There should be an incentive for purchasing local offsets. In turn, this might provide a small incentive for Council's not to discount offsets.
- Monitoring and enforcing compliance with BAR requirements and development consent conditions will have serious accountability and capacity implications for Councils. The compliance and enforcement burden is unknown.

- Councils are advised that development applications that are determined likely to have serious or irreversible harm impacts should be refused. However there is some discretion that may be exercised by Council in this regard. What will be the criteria to assist Council in making this decision? It is unclear how a dispute on this matter may be resolved with no input from the State Government and no course for appeal in the Land and Environment Court.
- Guidelines on development assessment of biodiversity impacts for Councils should be prepared in conjunction with the regulations.

Potential loss of Biodiversity in the Shoalhaven

- The changes will allow an increase in clearing permitted without approvals on rural land. There is risk of increased use of these allowable activities to cumulatively clear land for development prior to a development application, even though such development may not eventuate.
- Only direct impacts are offset with the BAM. The indirect impacts of development such as weed and pest invasions and edge effects are not adequately considered such as they must be under the current S5A assessment process. It will be Council's responsibility to ensure these impacts are adequately mitigated via conditions of consent.
- Offsets do not have to be like for like. The Act allows development proponents to pay directly to the Biodiversity Conservation Trust, without ensuring the trust can deliver like-for-like offsets. While this offers greater flexibility, it could lead to disproportionate removal of protected habitat within a given locality.
- The perception that clearing is not a 'significant impact' when a BAM is not required may create high expectations for development approval on unregulated - Category 1, and Exempt - Category 3 land. In the Shoalhaven there are EEC's and local populations of *Melaleuca biconvexa*, the Green and Golden Bell Frog and terrestrial threatened and critically endangered orchids that are confined to isolated rural lots, urban or cleared and highly disturbed land and at risk of being significantly impacted by development. There may be pressure on Council to approve development on these lands even though a significant impact is likely. The legislation should encourage the same avoid, minimise and offset requirements for these EECs or threatened species.
- The legislation and sensitive areas map must recognise these values and possibility of significant impacts (assessed via S5A) on Category 1 and 3 land.
- New Assessment of Significance guidelines must be developed for the revised 4 part test of significance to ensure that risks of significant impacts are adequately considered in the assessment process.

E zones are not included in the Category 2 (regulated Areas)

- It will be the responsibility of Local Government to protect values in E zones that fall within unregulated land (Category 1 and 3). There are some E zones including Threatened Species habitats and EEC that may fall within Category 1 areas. The impacts to these local populations/occurrences may be under-assessed via the revised 4 part test (Section 5a EP&A Act) as there may be a perception that the test of significance will be met in all circumstances where a BAM is not required.

Changes to SI LEP may be required

- Local Environmental Plans may need to be amended to require development consent for agricultural development that includes native vegetation clearing in those land use zones where:

- any type of agriculture is currently permitted without consent or
- a landholder wants to change between one land use and another land use and there is an intensification of use within the same category of agriculture
- This may result in rural land owners requiring development consent where they previously did not.
- This is a significant impost on Council and the land owner. Currently these types of proposals are assessed by Local Land Services. This requirement should not be transferred to Council.
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New SEPP may override DCP in Urban Land

- Where the SEPP applies it is unlikely that tree clearing would trigger the BAM threshold such that Biodiversity Assessment Report (BAR) would be required in URBAN zones. However the BAM threshold may be triggered by the sensitive values threshold map. Council may have concerns regarding risk if this overrides the existing 45 degree rule.
- Will cl 5.9 be removed from the SI LEP when the SEPP commences?
- The judgement in *Elachi v Council of the City of Shoalhaven* [2016] NSWCA 15 should be closely reviewed when drafting the SEPP & 'template DCP'
- Any SEPP should allow Councils to include local provisions and controls to be implemented.

Increased strain on Local Government resources

- Council will need increased capacity to provide advice to the community on the new legislation and development assessment process
- There will be increased pressure on Council officers determining DA's due to the expertise required to assess the adequacy of BAR's and reports prepared under the new 4 part test without the guidelines which were relied on previously to provide consistency in development impact assessment.
- Guidelines should be updated at the same time as the regulations
- Council does not have the capacity to undertake additional enforcement work and the increased staffing requirements for development assessment – the increased capacity requirements have not been addressed.

Private conservation agreements

- Council support landholder stewardship agreements linked to payments for management actions.
- Council would welcome opportunities to enter into stewardship agreements in Council managed Bushland Areas
- There is a need for a relatively simple and low cost legally binding conservation mechanism that can be used to protect residual, environmentally sensitive land in locations such as Verons Estate, Sussex Inlet (DP 9897). A DCP chapter for this Estate requires 75% of each 8ha lot to be protected through a legally binding conservation agreement, in conjunction with development. Currently, owners are likely to prefer PVPs because they are free to set up and do not require annual monitoring reports.

- It is uncertain whether Tier 1 and 2 agreements will receive rates rebates. If so, the cost should not be imposed on local government and should be funded by the Biodiversity Conservation Trust.

Accreditation of consultants

- This is a positive change. Council support an accreditation program to ensure that there is consistency and a clear standard for consultants.

Biocertification opportunities

- Council would support Biocertification incentives so that offsets for larger scale development can be determined at the strategic level.