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**Submission:  
Proposed Biodiversity Conservation Bill 2016,  
Local Land Services Amendment Bill 2016**

Yours faithfully



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NOROC welcomes the opportunity to review and provide comments on the proposed Biodiversity Conservation Bill 2016, Local Land Services Amendment Bill 2016 and relevant supporting material.

The proposed legislation has significant implications for biodiversity and local government throughout New South Wales. NOROC acknowledges the case for reform of biodiversity legislation set out by the Independent Biodiversity Review Panel Final Report of December 2014 and notes that its purpose was to:

*...recommend a simpler, streamlined and more effective legislation which improves the conservation of biodiversity and supports sustainable development thereby reducing the compliance and administrative burdens.*

Contrary to the intent of the Independent Biodiversity Review, NOROC are concerned that the proposed legislation will (at least on the far north coast) lead to poorer biodiversity and sustainability outcomes as well as significant additional complexity, administrative burdens and costs for local government.

We are also very concerned that the reforms will interfere with the legitimate strategic planning functions of councils including their ability to implement development control policies that properly reflect the desires of their local communities.

Some specific areas of concern include the following:

#### Consultation

The Bills have been released with very limited community and agency consultation, within a compressed consultation period and without the normal green and white paper process. Given the potential impact on the local government sector (and the community), the consultation and support offered during public exhibition is considered inadequate.

The reforms have also been exhibited in a highly incomplete state. Many fundamental materials such as the Native Vegetation Regulatory Map, associated State Environmental Planning Policy (SEPP) and crucial detail to be included in the Regulations are missing. This significantly impacts on the ability of all stakeholders including councils to understand and provide meaningful comment on the proposed reforms.

#### Recommendation

1. That a formal working group including representatives of relevant government agencies (e.g. OEH, DP&E), local councils and LGNSW is formed to clarify issues relating to the application of the proposed legislation in the local government context, prior to making of the Bills.

### Cost shifting

The proposed reforms represent a significant cost shift to local government. This is acknowledged in the Independent Biodiversity Legislation Review Panel report but not in any of the legislation reform public exhibition materials.

Review and analysis of the materials and implications for local government alone is a significant resource burden especially in the absence of many of the components of the entire legislative package.

Of particular concern is the implementation of the Biodiversity Assessment Methodology (BAM) which is very complex and will require specialist staff with ecological expertise to carry out the necessary assessments. This will present particular difficulties for small councils unable to afford specialist staff. The BAM also requires specialist staff to be trained and accredited. Moreover, the assessment process will take significantly more staff time. Under the existing Bio banking scheme such assessments are currently undertaken by OEHL. Under the proposed legislation the scheme will be greatly expanded and most of the burden will fall to local government.

There will also be additional burdens on Councils arising from reviewing their existing policies, amending approved LEPs, educating the community and the development industry on the changes, resolving conflicts, including court actions likely to arise from ambiguities in the new legislation, and ensuring compliance.

Proponents will also incur additional assessment costs.

### Recommendation

2. That the Government provides a package of measures to compensate local government for additional administrative burdens of the proposed legislation, including free training and accreditation of council staff. Such a package could partly be sourced from OEHL staff who currently administer the Native Vegetation Conservation Act.

### Strategic planning

The proposal for private entities to apply for biodiversity certification (cl. 8.5) without local government involvement is not supported. Local government invest considerable resources in strategic planning and are best placed to facilitate the relevant information and coordinate stakeholders for land use decision making at this scale. Local government must have a minimum of a concurrence role in biodiversity certification. It is highly likely that perverse planning outcomes will occur if councils do not have a say in what areas are appropriate for biodiversity certification. For example, under the proposal the Minister for Environment could bio-certify an area (thus allowing certain clearing and offsetting to take place) without having to consider other relevant council planning controls such as an adopted locality plan. Apart from undermining Council's strategic planning roles, such approvals could also lead to serious conflict among stakeholders (including individual landholders) in an area slated for development.

While the recommendation of the Independent Biodiversity Review Panel Final Report of December 2014 to increase the scope of biodiversity certification to a wider range of developments is noted, this recommendation did not extend to excluding the relevant consent authority from the process.

#### *Recommendation*

3. That the Biodiversity Conservation Bill is amended to prevent biodiversity certification by a proponent without the approval of the relevant consent authority.

The BAM takes no account of LEP clauses, zones, zone objectives or other council policy (development control plans, locality plans, council strategies etc.) that may influence how an area of biodiversity value is treated. Without further clarity in the Bill to preserve the right of the consent authority to apply local policy (as per Recommendation 1 above), the potential remains for the reforms to undermine councils' strategic planning roles.

Another concern arises in respect of the proposal to remove certain Endangered Populations from the threatened species schedules of the Bill viz: *Cl4.4 (4) A population is not eligible to be listed as a threatened species if the species to which the population belongs is separately listed (whether of the same or of a higher or lesser threatened category).*

For example, the Tweed Brunswick Coast Koala Endangered Population was only gazetted in April 2016. The consequence here is that the Endangered Population listing underpins Tweed Council's Tweed Coast Koala Plan of Management making it very difficult for proponents to avoid its provisions by arguing that koalas are well conserved elsewhere in the State. Moreover, the listing as an Endangered Population means that preferred koala habitat on the Tweed Brunswick coast will qualify for environmental protection zoning under the recently endorsed Northern Councils E zone Review Final Recommendations Report (October 2015) and associated s117 direction of March 2016. Under the E zone review, the simple listing of the koala as a Vulnerable species will not be sufficient on its own to qualify for environmental zoning.

#### *Recommendation*

4. That savings provisions are implemented to ensure any Endangered Populations scheduled under the *Threatened Species Conservation Act 1995* are preserved for the purposes of any:
  - a. development controls in force; or
  - b. strategic planning processes initiated prior to the introduction of the BC Act.

#### *Development control*

Under the Biodiversity Conservation Bill (BC Bill), a Biodiversity Assessment Report (BDAR) is required to accompany a development application (cl7.7) where there are to be certain impacts on biodiversity values (cl 6.3). The BDAR is based on the BAM which requires the proponent to consider avoiding and minimising impacts before proceeding to offsets. However, the BAM provides little guidance for the proponent or the consent authority on what should be avoided and minimised, and potentially allows almost any habitat to be offset. Moreover, cl 7.5 insists that BC Act prevails over the Planning Act (EP&A Act) in relation to planning approvals.

The issue here is that many constituent councils already have biodiversity policies, strategies and development control plan provisions in place that may provide clear guidance on what should be avoided, minimised or offset. Although it would appear that any offsetting needs to occur in accordance with the BAM, it is not clear if councils can apply local policy under the Planning Act with respect to avoiding and minimising biodiversity impacts. The proposed legislation requires the proponent to “consider” these impacts but is silent on the discretion of the consent authority to refuse or condition a development application where it is not comfortable with the proposed biodiversity impacts.

With respect to offsetting, it is common practice for councils to approve onsite offsetting where considered appropriate and feasible. This is considered superior to offsite offsetting as it accounts for the impact locally, rather than at some distant location as allowable under the BAM. Council’s should be free to insist that any required offsetting occur onsite where considered appropriate and feasible.

As noted above, the BAM also takes no account of LEP clauses, zones, zone objectives or other council policy that may influence how an area of biodiversity value is assessed. This potentially undermines councils’ development control roles.

#### *Recommendation*

5. That the Biodiversity Conservation Bill and/or the BAM is amended to:
  - a. clearly indicate that the Biodiversity Assessment Method is a minimum standard;
  - b. clearly identify the right of the consent authority (under Section 79C of the EP&A Act) to apply local policy (consistent with Section 8 of the BAM) with regard to avoiding and minimising biodiversity impacts; and
  - c. allow the consent authority to require any offsetting to occur onsite where that is considered appropriate feasible by the consent authority.

#### Local decision-making

Despite the fact that much of the remaining vegetation on the far north coast is Endangered, or over-cleared and supports Australia’s highest numbers of threatened species, the assessment methodology appears to be a one-size-fits-all process that pays little attention the desire of local communities, through their Councils, to protect important areas.

Extensive areas of the far north coast are subject to high development pressure, particularly along the coast. Local communities rely on their councils to ensure acceptable environmental outcomes. It appears that the net result of the proposed legislation in these areas will be ongoing biodiversity loss against the wishes of local communities. With increasing awareness of environmental values, Councils need to be able to respond to the wishes of their local communities.

### Biodiversity Outcomes

While many of the impact assessment standards contained in the BAM are welcome and will ensure that impacts are assessed in the same way, the same cannot be said for the outcomes of the BAM which will lead to a very uneven distribution of biodiversity loss across the landscape.

Unless the planning issues noted above are properly addressed (see Recommendations 3, 4 & 5 above), it is highly likely that areas subject to high development pressure, particularly along the coastal strip, will be rapidly depleted of biodiversity values.

Unfortunately, the approach to offsetting under the proposed legislation only makes this situation worse, as it does not guarantee that like-for-like offsets within the vicinity of the development impact. Indeed, cash payments can be made in lieu of having to find a suitable offset site.

Such outcomes are not ecologically sustainable.

### *Recommendation*

6. That the offsetting provisions of the proposed legislation should focus on like for like compensation within the immediate vicinity of the development impact (preferably onsite) and incur significant penalty credits as distance from the impact site is increased.

### Protection of existing offset sites

As previously mentioned it is common for councils to approve offsetting as part of the development application process (outside of the Bio banking Scheme). Many such offsetting outcomes have occurred since 1 January 1990. Furthermore, given development applications may not commence for five years (or more in some cases), many of these offsetting programs may not have yet commenced and/or are in their infancy.

It is therefore highly likely that some of these sites maybe inadvertently mapped as Category 1 (exempt) and/or Category 2 (LLS regulated land) under the provisions of the Native Vegetation Regulatory Map. In such circumstances, a current or future landowner may incorrectly assume they have the legal right to clear the offset site. Given the legal status of the Native Vegetation Regulatory Map it is unclear if Council would be successful in pursuing any enforcement action.

### *Recommendation*

7. The State government design a system where all offset sites approved under the EP&A Act are to be mapped as “excluded” under the provisions of the Native Vegetation Regulatory Map. The development of such a system will require input from local councils and needs to be readily accessible to all current and future landowners.

Additional to this, NOROC also considers that the need for sustainable economic development is seen, by many councils, to be integral to the achievement of good planning outcomes. Sustainable environmental practices are seen as being important and good biodiversity offset provisions can be an effective way of jointly promoting sustainable development and maintaining acceptable levels of biodiversity concurrently. The effectiveness of planning assessment and environmental management measures is increasingly being measured in terms of how streamlined the associated processes are to apply.

There are currently comparable federal biodiversity offset requirements that already apply under the Commonwealth *Environmental Protection and Biodiversity Conservation Act 1999*. These requirements, where applicable, must already be abided by developers and decision authorities. The information regarding the new Bill to date does not identify or explain how the new NSW legislation will apply where there are potential overlaps in offset requirements. Some councils also apply offset provisions through their LEPs. The system envisaged by the current Bill appears to simply provide yet another level to the development assessment decision making process (i.e. in addition to the EP&A Act, SEPPs regional plans and LEPs as well as S117 Directions). This in its present form is likely to only further complicate and prolong approval timeframes for development in NSW resulting in further cost to development and risk retarding economic development particularly in regional areas where the need for offset application is likely to be the greatest.

The proposed new biodiversity offset provisions make reference to other existing Acts, notably for proposed land clearing approval requirements within the *Local Land Services Act 2013* (LLS Act). This has the effect of disaggregating provisions over a number of acts and regulations which will only further complicate assessment processes providing a potential further barrier for economic development and uncertainty over the decision making processes (which can in turn lead to poor and inconsistent outcomes).

The biodiversity offset requirements are to be applied using a 'calculator' to determine offset values. This is similar to the method used by different state and federal jurisdictions (e.g. Queensland Environmental Offsets). The formula used in the calculator to determine land values is usually a point of considerable contention and this critical aspect has been omitted from the State's consultation process regarding the Biodiversity Conservation Bill. Councils and landholders have not had the opportunity to consider this important aspect as part of the consultation process. It is noted that, in principle, provision has been made for including administrative costs for the Trust that will administer the Biodiversity Conservation Fund. No costs associated councils being required to apply the new provisions have been addressed anywhere in the offset values to be calculated or elsewhere in the proposed legislation.

The ability to create biodiversity credits which can, in principle, be transferred is regarded as a positive step in biodiversity management. This aspect has not been strongly enough explained or promoted. The ability for some landholders to place biodiversity value areas in ongoing protection and have such efforts recognised would place a financial recognition on the value of environmental protection and provide a possible additional source of income for some landholders. This is an aspect that should be further developed and promoted.