

SWEEPING CHANGES PROPOSED TO NSW BIODIVERSITY AND NATIVE VEGETATION LEGISLATION

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Legal Briefings - By **Peter Briggs**, **Kirstie Richards** and **Daniel Webster**

The NSW Government has proposed a complete overhaul of biodiversity and land clearing legislation.

The amendments envisage the repeal of existing legislation and the enactment of a new Biodiversity Conservation Act, which will centralise the manner in which biodiversity offsets are calculated and procured. Further changes to the Local Land Services Act 2013 will make it easier to undertake land clearing in accordance with particular codes, or when land has been identified as not containing native vegetation.

IN BRIEF

The NSW Government has released a new legislative package which proposes substantial amendments to the current framework to manage biodiversity and ecologically sustainable development in NSW. The legislative changes in this reform include:

- Repeal of the *Native Vegetation Act 2003*, *Threatened Species Conservation Act 1995* (**Threatened Species Act**), *Nature Conservation Trust Act 2001* and sections of the *National Parks & Wildlife Act 1974*.
- The introduction of a new *Biodiversity Conservation Act* (**BC Act**) (reflecting the contents of the *Biodiversity Conservation Bill 2016* (**BC Bill**)) to replace the repealed legislation above and introduce a new system for managing biodiversity, land management and ecologically sustainable development.

- Amendment of the *Local Land Services Act 2013* (NSW) (**LLS Act**) through the proposed *Local Land Services Amendment Bill 2016* (**LL Bill**)

WHO NEEDS TO KNOW?

Anyone who:

- Owns land in NSW and is considering whether that land is suitable for a conservation agreement,
- Intends to clear land in NSW or who requires vegetation clearing or biodiversity offsets, and
- Is involved in resource-based activities in NSW.

WHAT WILL HAPPEN NEXT?

Both the LL Bill and the BC Bill were on public exhibition until 28 June 2016. The government aims to introduce the legislation into parliament in October 2016.

FURTHER DETAIL ON REFORMS

The reforms have two major impacts:

1. Redefining controls applicable to land clearing, and
2. Reconfiguring the way in which biodiversity offsets are determined and regulated.

These impacts, as well as the impacts of the reforms on wildlife interaction, are considered below.

Land clearing

The Chief Executive of the Office of the Environment and Heritage will make a Native Vegetation Regulatory Map, which will identify rural land where:

1. native vegetation clearing is not regulated under the new land management framework, and
2. landowners need to comply with clearing controls under the LLS Act.

The Map will designate land as one of three categories:

Category 1 (exempt land)

Clearing of native vegetation is exempt from the new land management framework

Category 2 (regulated land)

Clearing of native vegetation can occur in accordance with an allowable activity or code under the LLS Act. Proposed clearing that cannot occur in accordance with an allowable activity or code requires approval under the LLS Act

Excluded land

The land management framework does not apply, and clearing is regulated under the *Environmental Planning and Assessment Act 1979* and the new Biodiversity Conservation Act framework, as well as some other legislation such as national parks and forestry legislation

Allowable activities' on category 2 land will include low-risk native vegetation clearing activities that are generally part of routine land management. This will include to address an imminent risk of injury or damage, for environment protection works or for specified infrastructure. Further codes of practice are being developed to allow the clearing of category 2 land, and the bases for these codes are available for review.¹

The clearing of excluded land will be regulated by a new State Environmental Planning Policy and Development Control Plan to be developed by the Department of Planning and Environment. Any such clearing will require approval under the LLS Act and for offsets to be obtained and calculated by reference to the biodiversity assessment method (**BAM**), explained further below.

Importantly, landowners will be entitled to submit their own further information in support of an application classify their land as category 1 or category 2 land, affording greater opportunity to limit future controls applicable to land clearing on their land.

Biodiversity offsets

Amongst the suite of changes in the NSW legislative package are three key changes to the biodiversity offsets scheme:

	Key change	Impact
1	The establishment of the new biodiversity assessment method (BAM)	<ul style="list-style-type: none"> • The BAM will be the single assessment method for the calculation of biodiversity credits and will be utilised by accredited assessors. • The BAM will only apply to clearing under the LLS Act (i.e. not category 1 or 2 land), State significant development and State significant infrastructure that will impact biodiversity values, and other development that will have impact on biodiversity values above the BAM threshold. This BAM threshold will also be the trigger for the 'significance test' under section 5A of the Environmental Planning and Assessment Act 1979, being the threshold for the requirement for a species impact statement. • Where the BAM applies, a proponent will be required to prepare a Biodiversity Development Assessment Report, which will set out the proposed offsets and must be taken into account in assessing proposed development. However, a consent authority may accept a lower offset amount in certain circumstances. • Where 'serious and irreversible impacts' on biodiversity (to be defined in the regulations at a later date) may result from proposed State significant development or infrastructure, the Minister for Planning must carefully consider these impacts before deciding whether to approve a project and if any relevant conditions should be imposed. These impacts will need to be avoided for other development.
2	The establishment of the Biodiversity Conservation Trust (Trust) and the Biodiversity Conservation Fund (Fund)	<ul style="list-style-type: none"> • The Trust will replace the Nature Conservation Trust. • People seeking biodiversity offsets (Applicants) will be able to make a direct payment to the Trust (based on BAM calculations), which will then be responsible for locating and securing appropriate offset land. Other biodiversity offset options available to Applicants will include retiring existing biodiversity credits, funding a biodiversity conservation action and committing to rehabilitate the proposed development site (available in limited circumstances only). • The Trust will also be responsible for entering into private land conservation agreements, which will be funded by the NSW Government. These agreements will include Biodiversity Stewardship Agreements (BSAs), Conservation Agreements and Wildlife Refuge Agreements. • BSAs will replace and be substantially the same as the current BioBanking Agreements which, along with the credits they have established, will continue to be recognised under the new scheme.
3	Expansion of the biodiversity certification regime	<ul style="list-style-type: none"> • The reforms include a proposed new category of 'strategic' biodiversity certification. These are proposals likely to have significant environmental and community benefits from assessing and protecting biodiversity impacts early in the planning process. Strategic certification will be available to planning authorities only, which may be eligible for low interest financing from the Trust. • The new certification regime will also allow individuals, in addition to planning authorities, to apply for biodiversity certification for proposed development.

The major consequence of these changes is that developers and resource project operators will have at their disposal the option:

1. to obtain biodiversity certification in advance for land proposed to be developed; and
2. make a direct payment to the Trust for biodiversity offsets, the amount of that payment being calculated using the BAM.

Wildlife management

A risk-based framework will be implemented to regulate human interactions with wildlife. New defences for activities having an impact on wildlife will be authorised by:

1. Regulations including exempt activities (lowest risk),
2. Regulations including adopted codes of practice for activities (moderate risk), and
3. Biodiversity conservation licences (highest risk).

Any existing licences for activities falling under (a) or (b) will be practically obsolete, although they will continue to exist until their expiry date.

Threatened species will be regulated under the Biodiversity Conservation Act (once it is enacted) in a manner similar to that under the Threatened Species Act. However, the reforms will introduce changes to the manner of listing threatened species to reflect international best practice and the growing alignment between State and Commonwealth lists.

Other changes include the expansion of the current 'Saving our Species' biodiversity conservation program and the replacement of 'critical habitats' (under the Threatened Species Act) with 'Areas of Outstanding Biodiversity Value'.

IMPLICATIONS

These reforms substantially change the legal landscape relating to land clearing, biodiversity offsets and human interaction with wildlife. In particular, developers and operators of resource projects will be able to utilise a more centralised and streamlined process for biodiversity offsets through the operation of the Trust and the single biodiversity assessment method.

ENDNOTES

1. [LLS Codes of Practice](#).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



PETER BRIGGS
PARTNER, SYDNEY

+61 2 9225 5155
Peter.Briggs@hsf.com

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