

25 May 2010

The Hon. Catherine Cusack, MLC
Shadow Minister for Climate Change and Environmental Sustainability
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Ms Cusack

Re: *Threatened Species Conservation Amendment (Biodiversity Certification) Bill 2010*

We are writing to you to express our support for the above legislation.

The existing process to secure the "biodiversity certification" of environmental planning instruments is difficult. There is little incentive for councils to participate.

The theory behind biodiversity certification is very sound. Address biodiversity issues upfront and therefore avoid the need for landowners, councils and developers to be involved in (often counter-productive) individual project-by-project assessments of threatened species impacts.

However, the existing legislation is poorly drafted and as a result biodiversity certification has not been attractive. The problem lies in the current provisions of the *Threatened Species Conservation Act 1995*. In particular, the Act requires that before certification of an environmental planning instrument (EPI) the Minister must be satisfied that the EPI will lead to the overall "improvement" or "maintenance" of "biodiversity values".¹

"Biodiversity values" are broadly defined. For example, they include "the composition, structure and function of ecosystems".² This definition makes it extremely challenging to demonstrate that these broadly defined values will be improved or maintained in the context of a larger urban footprint. Any use of land will likely have some impact on the composition, structure and function of ecosystems.

For example, the conversion of agricultural land to housing will reduce the populations of rabbits. Less rabbits mean an altered composition, structure and function of the local ecosystem. There is no provision limiting 'biodiversity values' to those ecosystems which still exist in their natural pre-1788 state. So there will be a loss of "biodiversity values" even when the biodiversity values do not merit protection.

In some instances urban development may result in less grazing land for kangaroos. However, the kangaroos themselves may not be threatened – and may even exist in plague proportions. The existing requirement to "improve or maintain" biodiversity values does not distinguish between

¹ s 126G(1).

² s 4A.

biodiversity values that must be protected because of their rarity and those that are of lesser significance.

As a result of these problems, there was considerable difficulty with the certification process for the Western Sydney growth centres, which culminated in a legal challenge. In response, the government previously passed special legislation to give biodiversity certification to the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006*. This included the insertion of new provisions to entrench the biodiversity certification given to the SEPP and removed the risk of litigation around the "improve or maintain" criteria for that particular certification.³

The *Threatened Species Conservation Amendment (Biodiversity Certification) Bill 2010* addresses these issues generally by providing a clearer process for the operation of the "improve or maintain" test. It allows decisions to take place in accordance with clearly articulated rules. The bill has our support and we urge you to pass it quickly.

While our support is not contingent on any change to the current text of the bill, we can suggest one amendment that will increase the willingness of private sector land owners to accept obligations as part of the biodiversity certification process.

Under the bill as it stands, private land owner(s) can voluntarily assume obligations pursuant to a biodiversity certification.⁴ These obligations may include the dedication of land as reserves or restrictions on the title of private land such as the imposition of biodiversity certification agreements, covenants.

While land owners may accept financial obligations, dedicate land, etc in order to get benefit of a certification, the legislation gives the Minister the power to unilaterally modify, suspend or revoke a certification.⁵ There may be more than one party to a biodiversity certification. This means, that a modification, revocation or suspension may adversely impact on one private land owner, even though the decision was made because of the misconduct of another unrelated land owner. Similarly, a certification may be unilaterally revoked or modified by the Minister because additional data leads the Minister to conclude that the certification no longer "improves or maintains biodiversity values".⁶

As a result, private property owners will (understandably) be unwilling to make up-front commitments, lest a biodiversity certification be revoked or heavily modified down the track for reasons beyond their control. They may be left with the commitments they signed up for in order to secure biodiversity certification, but no benefit. It's worth noting, for example, that the bill removed the unfettered power of the Supreme Court to extinguish obsolete biodiversity certification agreements on a land's title.⁷

The risk of this kind of one-sided outcome occurring might be reduced if the proposed section 126ZV was amended so that the suspension, revocation or modification of a biodiversity certification:

- allows a private land owner to apply to the Minister for some or all of their obligations to be similarly suspended, revoked or modified; and
- in the event that the land owner is dissatisfied with the Minister's decision (or no decision is made within, say, 90 days) the land owner can appeal to the Land and Environment Court.

An amendment along these lines will reduce the risk that a land owner will be unfairly disadvantaged because of arbitrary conduct by the government of the day.

³ Schedule 7, Part 7 inserted by the *Threatened Species Conservation Amendment (Special Provisions) Act 2008*.

⁴ Proposed section 126Z(2)(b); proposed section 126Y; proposed section 126ZD.

⁵ s 126ZO, s 126ZR.

⁶ Proposed section 126ZO(2)(d); proposed section 126ZR(d).

⁷ Proposed section 126ZM.

In any event, we congratulate the government for this bill and we hope that it is able to move through Parliament quickly.

Yours sincerely,

Urban Taskforce Australia

A handwritten signature in black ink that reads "Aaron Gadiel". The signature is written in a cursive style with a long horizontal stroke at the end.

Aaron Gadiel
Chief Executive Officer