

28 June 2016

Biodiversity Reforms

PO Box A290

SYDNEY SOUTH NSW 1232

Re: Draft Biodiversity Conservation Bill 2016

Thank you for the opportunity to submit feedback on the Draft Biodiversity Conservation Bill 2016 currently on exhibition by the NSW Office of Environment and Heritage.

The Urban Taskforce supports overall objective of the biodiversity reforms to improve the legislative and policy framework for biodiversity conservation and native vegetation management in New South Wales. Please find our comments and recommendations below.

The draft *Biodiversity Conservation Bill 2016* in its current form will impose new burdens on developers seeking approval for land clearing that does not affect threatened species and will also affect the way that approvals are handled for many urban development sites in Greenfield areas.

The proposed changes will change the existing 'status quo' of biodiversity regulation¹

At present when issues of biodiversity are considered, the major focus for planning authorities is whether there is *'likely to be significant effect on threatened species, populations or ecological communities, or their habitats'*. This is the key question that most flora and fauna assessment attempt to address. The process of answering this question is often (informally) known as the seven-part test.

Typically, an urban developer will seek to modify a proposed development up-front, to ensure that its ecologist is able to confirm that there will not be any significant effect. Most urban development proposals are able to do this. This may often involve some element of mitigation or offsetting. If the development cannot be modified in this way:

- The developer will need to have a species impact statement prepared, and
- The development application will require the concurrence of the Office of Environment and Heritage.

Alternatively the developer can currently choose to avoid this process by electing to purchase and surrender biodiversity credits (created under the 'biobanking scheme'). Use of the bio banking scheme by urban developers has been sporadic at best. Most developers prefer to manage the process by mitigating impacts and,

¹ Gadiel, A (2016) *New planning risks for greenfield developers*, published on Mills Oakley website on 13 May 2016, see: www.millsOakley.com.au/new-planning-risks-for-greenfield-developers

if necessary, arranging for offsets (either onsite or elsewhere) outside of the biobanking scheme.

If there are no threatened species impacts (when the land has a modern urban zoning), the clearing of native vegetation at a level that is consistent with the zoning and planning controls is (currently) generally permitted without the need for offsetting. This is because the clearing of such native vegetation is an anticipated impact that is understood to be part of the normal trade-off necessary to secure new housing and services within an expanded urban footprint.

For example, the key objective of a typical R1 zone ('General Residential') is the provision of the housing needs of the community. There is currently no presumption that the land clearing will need to be offset if:

- The zoning is a modern zoning
- No other planning controls require the protection or maintenance of the natural environment on the site;
- There is not likely to be any significant effect on threatened species; and
- The level of land clearing is unexceptional for the development type.

The proposed legislation, in its current form, will change this status quo.

Proposed new biodiversity offsets scheme should not be compulsory

The new legislation sets up a new biodiversity offsets scheme. Its structure is generally similar to the existing biodiversity biobanking scheme. However, unlike the existing scheme, particularly in the new biodiversity offsets scheme will be mandatory in certain cases. Some form of participation in the scheme will be required whenever development is of an extent or kind that is likely to 'have an impact on biodiversity values.'

'Biodiversity values' includes 'vegetation integrity'. That is, the degree to which vegetation has been altered from a near natural state.

Development that materially changes the state of vegetation to reduce its resemblance to what it might have looked like in its natural state will have an 'impact on 'biodiversity values'. The type of vegetation is not limited to threatened flora. As a consequence, any development that involves any significant clearing of native vegetation is likely to impact on 'biodiversity values'

This is important for the following reasons -

Definition of 'threshold' must be clearly defined

Firstly, for such development, a developer will need to obtain a 'biodiversity development assessment report' from an accredited biodiversity assessor – if the proposed development will exceed the 'threshold'.

However, the proposed legislation does not say what the 'threshold' will be. This will only be set out in the regulations to be made under the legislation. The Urban Taskforce recommends the Department consult with industry in developing the definition of the 'threshold' which triggers the requirement for a biodiversity development assessment report.

The wording of the proposed legislation suggests that the compulsory elements of the scheme will not be limited to development that triggers the existing seven part test. That is, it seems likely that development that does not have a significant effect on threatened species would trigger a need for a 'biodiversity development assessment report'. The report will need to be submitted with a development application.

The report will detail proposed measures to avoid and minimise the impact of the development. It will also outline the biodiversity credits that would need to be obtained by the developer (e.g. by purchase) and 'retired'(given to the government for cancellation) to offset the 'residual impacts' of the development.

If development consent is to be granted, there is presumption that the consent will only be granted with a requirement that the necessary biodiversity credits will be obtained. However, there is discretion for a consent authority to waive or reduce the requirement when it is 'justified having regard to the environmental, social and economic impacts of the proposed development.'

There is nothing in the proposed legislation to suggest that land that has already been zoned urban will be exempt from the requirement to obtain a 'biodiversity development assessment report' (although this could be done in the regulations).

If no exemption is made in the regulations, the development proponent will need to make out an argument why there should be no or reduced offsetting in the context of the proposed development.

Additional discretion for the consent authority should be removed

The consent authority will have the discretion to impose a development consent condition requiring the offset of impacts on biodiversity values – even where there is no obligation to submit a 'biodiversity development assessment report' with a development application. This discretion extends to mandating that biodiversity credits be obtained and retired by the developer.

This means that even if the government sets a 'threshold' so it excludes typical greenfield urban development projects, consent authorities will still have a discretion to require credits be obtained and retired to offset adverse impacts on native vegetation (even when the vegetation is not threatened flora). This is in sharp contrast to the current voluntary biobanking scheme. The Urban Taskforce recommends that this additional discretion for consent authorities is removed.

The property development industry should be consulted in the development of the Biodiversity Conservation Regulation

The proposed legislation allows regulations to be made that would prevent development consent being granted for development that seriously and irreversibly impacts on biodiversity values. This requirement would not apply to state significant development. This effectively has the potential to create a new class of 'prohibited development;. That is, even where development may be permitted under a local environmental plan, a consent authority may be stripped of the ability to assess the development proposal on its merits because of a state government regulation).

Under the current legislation even development that might have an irreversible impact on the natural environment may be approved, if the social and economic benefits warrant it. This new legislative framework envisages that there will be some social and economic benefits. It will not be clear which development types will be regarded as causing 'serious and irreversible impacts on biodiversity values' until the regulations are finalised. The Urban Taskforce requests that the Department consult with industry in the development on the Regulation to ensure industry concerns are addressed.

The Urban Taskforce is always willing to work closely with the Government to provide a development industry perspective on this issue. Please feel free to contact me on telephone number 9238 3955 to discuss this further.

Yours sincerely,



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Chief Executive Officer

Urban Taskforce Australia