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Nature Conservation Saves for Tomorrow

Biodiversity Conservation Act Review
Department of Planning and Environment
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To whom it may concern

Statutory Review of the *Biodiversity Conservation Act 2016*

The Blue Mountains Conservation Society is a community volunteer organisation with over 900 members. The Society aim is to help conserve the natural environment of the Blue Mountains and to increase awareness of the natural environment in general. The Society wishes to make a submission to the Statutory Review of the *Biodiversity Conservation Act 2016*.

MAJOR ISSUES

- (A) Biodiversity is in rapid decline in NSW ([*NSW State of the Environment 2021*](#); [*Biodiversity Outlook Report 2020*](#)). Many drivers of the decline are associated with small activities which are impractical to regulate. As a result, regulated activities and government programs need to do more than minimise their impact on biodiversity. Regulated activities should improve or maintain biodiversity and government programs should actively enhance biodiversity through large-scale programs (including protected area programs and programs to control or manage broadscale threats – such as invasive species, degradation of native vegetation and climate change).
- (B) Clearing of native vegetation is the single greatest threat to biodiversity in NSW ([*NSW State of the Environment 2021*](#)). Since the *Native Vegetation Act 2003* was repealed and responsibility for its regulation shifted to the Local Land Services in 2017, clearing of native vegetation has tripled¹ ([*NSW State of the Environment 2021*](#)). From the perspective of biodiversity conservation, those reforms have failed. Native vegetation regulation should be

¹ Rising from an average each year of 13,000 hectares 2009 to 2015 to an average of 35,000 hectares from 2017 to 2019

shifted to the *Biodiversity Conservation Act* and the relevant provisions of the *Local Land Services Act* repealed. Furthermore, large-scale clearing of native vegetation and clearing of high conservation value native vegetation and locally significant native vegetation should be ended (as was substantially achieved under the *Native Vegetation Act 2003*).

(C) The existing biodiversity conservation strategies and plans are long, complicated and lack SMART goals/results. The Act should require the Minister to prepare and publish target-driven, time-bound biodiversity conservation strategies which identify:

- The desired conservation results for each [NSW bioregion](#) and the State;
- Three or four major steps to achieve those outcomes/results;
- A handful of targets for each step;
- Annual reports on progress towards achievement of the conservation results, and amount of funds allocated and spent.

Some elements of the existing [Biodiversity Conservation Investment Strategy](#) (under Part 5 of the Act) and draft [National Parks System Directions Statement](#) could contribute to the bioregional and State strategies (noting the Directions Statement is still in draft form and despite being prepared in 2017).

(D) To conserve biodiversity all activities regulated under the Act or other NSW environment and development-related legislation² should be required to improve or maintain biodiversity outcomes (including by being consistent with the bioregional and State biodiversity conservation strategies). State Significant Development likely to have a '*serious and irreversible impact on biodiversity*' should be refused consent, as is already the case with Part 4 activities and certain native vegetation clearing, except where the development is required for an essential public purpose and all other alternatives have been exhausted. In these cases, the legal test should be objective rather than subjective.

(E) Decision-makers and developers have many priorities and the last issue to which they turn their minds may be biodiversity conservation. This issue needs to be tackled head-on. The Act should require all decision-makers making decisions under the Act and other environment and development-related legislation to make decisions that improve or maintain biodiversity outcomes. The Act should also require developers to certify whether the proposed development would improve or maintain biodiversity.

(F) Much of the cost, complexity and delay associated with decision-making would be removed by adopting a single biodiversity outcomes assessment and decision methodology to guide

² Including the *Environmental Planning and Assessment Act*, *Fisheries Management Act*, *Water Management Act* and *Local Land Services Act*

decisions that may impact on, or seek to improve, biodiversity outcomes in NSW. For practical reasons, and also to improve consistency of decision-making, the methodology could be applied through a user-friendly digital tool which is made widely available, including to decision-makers and all other stakeholders (including developers, landholders, accredited persons, NGOs and members of the public).

(G) The Queensland [Regrowth benefits interactive map](#) is a good example of an environmental outcomes assessment and decision methodology applied through user-friendly digital tool. The *Regrowth benefits interactive map* identifies the benefits of protecting regrowth for biodiversity or carbon values to help landholders decide whether to provide their regrowth³ forests as a carbon or biodiversity offset. A similar approach was taken under the former *Native Vegetation Act 2003* under which decision-makers used a digital assessment and decision tool named the *Native Vegetation Assessment Tools* to apply the test under the *Native Vegetation Act* (which was whether broadscale clearing, if carried out, would improve or maintain environmental outcomes). Application of the test under the *Native Vegetation Act* relied upon an environmental outcomes assessment methodology established by the [Native Vegetation Regulation 2005 Environmental Outcomes Assessment Methodology](#).

(H) There are existing precedents for this strict (but practical) approach to environmental regulation in NSW. For example, Chapter 6.5 of *State Environmental Planning Policy (Biodiversity and Conservation) 2021* requires development in the Sydney Drinking Water Catchment to have a neutral or beneficial effect on water quality (clause 6.61(1)). The provision is given practical implementation by clause 6.61(2) which provides that an assessment using the NorBE Tool⁴ (which is a web-based decision tool) is used to determine whether the proposed development would satisfy the legal test. Developers can also use the NorBE Tool so that they can be confident that their proposed development will satisfy the test.

The Act could legislate the core principles of the biodiversity outcomes assessment and decision methodology including:

- The objective: presently the objective is to conserve all elements of present-day biodiversity at bioregional and State scales for the indefinite future (section 1.3(a)). However, if recent national and international targets are incorporated into the Act, then the objective could be to recover populations and prevent species not presently threatened becoming so (see the responses to Questions 3 and 6 below). For instance, the recently released national *Threatened Species Action Plan: Towards Zero*

³ Clearing of remnant forest is ended in Queensland.

⁴ <https://www.waternsw.com.au/water-services/catchment-protection/councils-and-developers>

Extinctions, includes the goal of preventing any new extinctions of plants and animals, and protecting and conserving at least 30% of Australia's land mass.

- An objective environmental standard: 'improve or maintain' biodiversity outcomes is suggested because the standard is familiar in NSW environmental legislation;
- The core principles to be used to operationalise the environmental standard including:
 - Ending clearing of native vegetation as proposed above;
 - High biodiversity value and locally significant areas off-limits to offsetting;
 - Proponents required to show genuine endeavours to avoid and minimise impacts on native species, and particularly on threatened species and ecological communities;
 - Like-for-like offsetting at a bioregional (and preferably local) scale only;
 - No use of indirect offsets and no discounting of offsets;
 - Mine rehabilitation activities may not be used to generate offsets.

(I) The digital tool would improve consistency of decision-making and provide a tamper-proof audit trail.

(J) The reports of the Audit Office of NSW ([Effectiveness of the Biodiversity Offsets Scheme August 2022](#)) and the NSW Legislative Council ([Integrity of the NSW Biodiversity Offsets Scheme August 2022](#)) have identified profound problems with the integrity, efficiency, and effectiveness of the biodiversity offset scheme and market established by the Act. These problems should be addressed before further use of the offset scheme.

Thank you for the opportunity to make a submission to the independent review. Please see attached responses to questions posed by the independent review.

Yours sincerely



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Blue Mountains Conservation Society

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ATTACHMENT

RESPONSES TO QUESTIONS POSED BY THE INDEPENDENT REVIEW

Purpose of the Biodiversity Conservation Act

1. How effective are the objects of the Biodiversity Conservation Act to restore, conserve and enhance biodiversity today and into the future?
2. How could the Act best support national and international biodiversity aspirations including climate change adaptation, nature positive and restoration goals?

The objects of the Act should be amended to state with precision the conservation outcomes/results that the Act is trying to achieve and to incorporate recent national and international targets. Amendments should include:

- Prevent new extinctions of native species and ecosystems in NSW (Objective 3 of the Australian [Threatened Species Action Plan: Towards Zero Extinctions 2022-2032](#)); Goal A and Target 4 of the [Kunming-Montreal Global Biodiversity Framework UN Convention on Biological Diversity](#);
- Reverse the number of species and ecosystems listed as threatened with extinction in NSW by recovering those species and ecosystems (Target 4 of the [Kunming-Montreal Global Biodiversity Framework](#));
- Reverse the decline of native animals and plants and the area and quality of ecosystems in NSW (Target 4 of the [Kunming-Montreal Global Biodiversity Framework](#));
- Reverse the decline in the area and quality of native vegetation in NSW (or halt and reverse deforestation and land degradation by 2030) ([Glasgow Leaders' Declaration on Forests and Land Use UN Climate Change Conference](#));
- Improve biodiversity at bioregional and State scales, and where practically possible at the local scale, and
- Conserve 30 per cent of NSW terrestrial and inland water areas, and of marine and coastal areas, by 2030 (Target 3 of the [Kunming-Montreal Global Biodiversity Framework UN Convention on Biological Diversity](#); Objective 4 of the Australian [Threatened Species Action Plan: Towards Zero Extinctions 2022-2032](#)).

4. How could the Act better integrate Aboriginal knowledge and support the aspirations of Aboriginal people in biodiversity conservation? [see also question 9]

The independent panel should explore how the legislation can better integrate Aboriginal knowledge and support the aspirations of Aboriginal people with Local Land Councils, Registered Native Title Bodies Corporates, and traditional owners.

5. How current and comprehensive are the existing elements of the Act for biodiversity conservation?

6. Is there other architecture that should be included to achieve the objects of the Act?

To achieve objects (a) *conserve biodiversity at bioregional and State scales*, (b) *maintain the diversity and quality of ecosystems and enhance their capacity to adapt to change*, (d) *support biodiversity conservation in the context of a changing climate* and (h) *support conservation and threat abatement action*, and the other objects more generally, the *Biodiversity Conservation Act* should be amended to:

- Regulate native vegetation clearing and end large-scale clearing and the clearing of high conservation value and locally significant native vegetation: see Major Issues (A) and (B) above.
- A whole of government biodiversity conservation strategy: see Major Issues (C) above.
- Prioritise action to reduce the ‘most common’ threats to biodiversity: The [NSW State of the Environment 2021](#) identifies the three ‘most common’ threats to biodiversity in NSW as the clearing and degradation of native vegetation, invasive pests and weeds, and climate change. The scale of the threat posed by the most common threats to biodiversity are so great and so widespread that they warrant special consideration in the Act. The Act should require the Minister to include target-driven, time-bound strategies to control, manage or reverse native vegetation clearing and degradation, invasive pests and weeds and the impacts of climate change in the bioregional and State biodiversity conservation strategies referred to above.
- All decisions under the Act and other environment and development-related legislation⁵ should be required to improve or maintain biodiversity outcomes: see Major Issues (D) and (E) above.
- Adopt a single, State-wide biodiversity outcomes assessment and decision methodology and digital tool: see Major Issues (F), (G), (H), (I) and (J) above. The [Guidance to assist a decisionmaker to determine a serious and irreversible impact](#) and the [Native Vegetation](#)

⁵ Including the *Environmental Planning and Assessment Act*, *Fisheries Management Act*, *Water Management Act* and *Local Land Services Act*

[Regulation 2005 Environmental Outcomes Assessment Methodology](#) (repealed) provide a useful starting point.

Conserving threatened species and ecological communities

7. How could the Biodiversity Conservation Act best support landscape-scale actions to prevent species from becoming threatened?

The three 'most common' threats to biodiversity in NSW are habitat loss due to the clearing and degradation of native vegetation, invasive pests and weeds, and climate change ([NSW State of the Environment 2021](#)). All three are broadscale, pervasive threats which impact numerous species. Landscape-scale actions that would help prevent species from becoming threatened include:

- Ending large-scale clearing of native vegetation (as proposed above).
- Establishing large-scale programs to eliminate or control invasive species, particularly in areas of high biodiversity value.
- Requiring all decisions under NSW environmental and development legislation to improve or maintain biodiversity.
- Requiring the Minister to prepare and publish target-driven, time-bound biodiversity conservation strategies for each NSW bioregion and the State, including strategies to secure at least 30 per cent of each NSW bioregion in national parks and other public and private conservation areas by 2030.

8. Are there improvements that could be made to Areas of Outstanding Biodiversity Value and the Saving our Species program to give them a greater role in enhancing biodiversity?

Areas of Outstanding Biodiversity Value

Declaring Areas of Outstanding Biodiversity Value has great potential to conserve biodiversity. However, the provisions have never been used since the Act commenced.

- The independent panel is asked to investigate why no new Areas of Outstanding Biodiversity Value have been declared.
- The Act should be amended to establish a time-bound process for deciding whether an area nominated by a third party should be declared an Areas of Outstanding Biodiversity Value.

Saving our Species

Part 4 of the Act requires the establishment of a Biodiversity Conservation Program. This program is currently known as 'Saving our Species' and its focus is on-ground conservation projects working directly with landholders and the community. Unfortunately, the Saving our Species program:

- Is too small-scale. Presently funding is approximately [\\$60 million over the period 2020-23](#) or \$2.45 per NSW resident per year.
- Operates separately to the land use system established by other NSW environmental and development legislation so that Biodiversity Conservation Program sites may be destroyed by subsequent changes in land use.

The review panel is asked to recommend that the budget of the *Saving our Species* program be increased and that the Act be amended to require that:

- An impact on a past or existing Part 4 Biodiversity Conservation Program sites is a ground for refusing approval for an activity;
- Developers to certify whether proposed activities may affect a Biodiversity Conservation Program site;
- Decision-makers under NSW environmental and development legislation avoid making decisions that impact on past or existing Part 4 Biodiversity Conservation Program sites.

Private land conservation and investment

10. How could the Biodiversity Conservation Act best support partnerships with private landholders to conserve, restore and enhance biodiversity across New South Wales?

- Permitting accredited persons and conservation NGOs to create permanent conservation agreements and/or conservation covenants (providing a competitor to the Biodiversity Conservation Trust).
- Providing automatic rate and land tax exemptions for land under permanent conservation agreements or other conservation covenants (whether created by the Biodiversity Conservation Trust under the Act or otherwise).
- Protecting land under permanent conservation agreement or conservation covenant from mining by repealing section 5.26 of the Act (activities authorised by mining or petroleum authorities not affected by conservation agreement) is likely to provide a strong incentive to some landholders to protect land under permanent conservation agreement.

- Reduce the cost, delay, difficulty, and uncertainty of creating agreements under the Act by adopting a single biodiversity outcomes assessment and decision methodology applied through a user-friendly digital tool.
- Although not strictly a matter for the Act, the independent panel should ask the NSW Government to lobby the Federal Government to amend income tax law to deem land under permanent conservation agreement to be the carrying on of a business as this would enable landholders to deduct the costs of management and inputs of conservation land from other income.

11. How could the Act best support strategic landscape-scale biodiversity conservation outcomes and improve connectivity?

By requiring the Minister to prepare and publish target-driven, time-bound biodiversity conservation strategies for each NSW bioregion and the State, which include goals/objectives to secure at least 30 per cent of each NSW bioregion in public and private conservation areas by 2030.

12. How could the Act enable financial investment by government, businesses, and philanthropic organisations?

- In the absence of a tangible financial benefit to firms, there is very little prospect of large-scale investment by firms in biodiversity conservation. At present the most likely tangible financial benefits to firms are either development opportunities which can only be realised by purchasing biodiversity credits or offsets, and government grants or funds in exchange for biodiversity conservation commitments (for example, the \$206 million [NSW Nature Positive Farming Program](#)). However, the need to purchase biodiversity credits or offsets will only arise if large-scale clearing and clearing of high biodiversity value vegetation is ended in NSW.
- Financial investment by government, businesses and philanthropic organisations could be made more attractive by providing tax benefits to landholders, protecting land under permanent conservation agreement from mining and reducing the cost, delay, difficulty, and uncertainty of creating agreements under the Act as described in Question 10 above.

Biodiversity Offsets Scheme

13. Is the Biodiversity Conservation Act providing an effective mechanism to ensure that the right developments and land use changes are being assessed?

14. Does the Act provide the appropriate framework for avoiding and minimising impacts, and addressing serious and irreversible impacts?

15. Can the Act in its current form result in improved ecological and environment outcomes?

16. How can complexity and costs be minimised while still achieving positive biodiversity outcomes?

17. How could the Act better support an effective and efficient offset market?

- In view of the reports of the Audit Office of NSW ([Effectiveness of the Biodiversity Offsets Scheme August 2022](#)) and the NSW Legislative Council ([Integrity of the NSW Biodiversity Offsets Scheme August 2022](#)), which identified profound problems with the integrity, efficiency, and effectiveness of the biodiversity offset scheme and market established by the Act, the answers to Questions 13, 14 and 15 are clearly 'no'.
- Implementation of the recommendations of the Audit Office and Legislative Council would foster a more effective and efficient offset market.
- Ending clearing of native vegetation, bioregional and State biodiversity conservation strategies and associated annual reporting, prioritisation of biodiversity conservation by decision-makers, a single biodiversity outcomes assessment and decision methodology and user-friendly digital tool as proposed in Major Issues (A) – (J) above would all reduce complexity and costs while still achieving positive biodiversity outcomes.

Biodiversity Certification

18. How can the Biodiversity Conservation Act support better 'up front' consideration of impacts on biodiversity from development?

19. How can the Act support better consideration of impacts on biodiversity from development at a regional level?

Ending clearing of native vegetation, bioregional and State biodiversity conservation strategies and associated annual reporting, prioritisation of biodiversity conservation by decision-makers, a single biodiversity outcomes assessment and decision methodology and user-friendly digital tool as proposed in Major Issues (A) – (J) above would help achieve these objectives.

Compliance and enforcement

25. How can the Act give the community more confidence and clarity in the approach to regulation?

Measures to give the community more confidence and clarity in the approach to regulation include:

- Ending clearing of native vegetation, bioregional and State biodiversity conservation strategies and associated annual reporting, prioritisation of biodiversity conservation by decision-makers, a single biodiversity outcomes assessment and decision methodology and user-friendly digital tool as proposed in Major Issues (A) – (J), together with regular audits of decisions made using the methodology and digital tool;
- Providing open-standing, third-party, and civil enforcement rights under the Act and other environment and development-related legislation;
- Removing privative clauses from the Act and other environment and development-related legislation;
- Ensuring that registers of applications and approvals for development, native vegetation clearing and forestry, conservation agreements, offset and biodiversity stewardship agreements and biodiversity certifications are easily accessible to the public;
- Target-driven plans to monitor compliance with approvals.

26. *Should the Act be strengthened to require data collection under the regulatory frameworks in place?*

Yes. Particularly in respect of the matters identified in the response to Question 25.

Other important matters

28. *Do you have any feedback on these matters or other issues you would like considered in the review of the Act?*

Use of interactive maps, technology, and innovation to inform and support decision-making, including the Biodiversity Values Map and Native Vegetation Regulatory Map

NSW has excellent data resources, particularly for specialists (eg. [Six Maps](#); [E-Spade](#)), however the biodiversity conservation maps and tools made available to the general public, including the *Biodiversity Values Map* and *Native Vegetation Regulatory Map*, are relatively basic. This is not because the information is not available as the [Native Vegetation Assessment Tools](#) were best practice in their day.

Further developments in remote sensing of the Earth's surface by satellites and drones and high-volume digital information processing provide an even better opportunity for the NSW government to implement user-friendly assessment and decision support tools for use by decision-makers and stakeholders. Doing so would help development proposals to reduce their impact on biodiversity, would improve biodiversity conservation project design, improve monitoring and compliance, and reduce the cost of biodiversity conservation and restoration projects and monitoring and compliance, as a large proportion of the cost of projects and

monitoring and compliance is the cost associated with ensuring that the projects are actually being implemented as agreed and by ground-truthing monitoring and compliance.

Opportunities provided by data held in university studies, development applications, and environmental impact statements

A major opportunity to enhance assessment and decision-making provided by the vast amount of data is held in universities, development applications, environmental impact statements⁶, and other ecological reports. Some of this data is extremely reliable and other less so. However, in many areas of NSW, the data is so rich that errors would be averaged out. Even in areas where this is not so, the data that has been gathered would provide 'sign posts' for issues that warrant further investigation. Digitizing this material would provide very rich opportunities for better decision making. The innovation of the internet itself provides opportunities for the speedy and cost effective digitisation of this material <https://www.mturk.com/mturk/welcome>

NSW and Federal government biodiversity digital maps

The NSW and Federal governments collect and store extensive sets of environmental data including those the maintained by various NSW departments, the Natural Resources Commission, and local councils, and the various Federal departments and agencies (including the [Environmental Resources Information Network](#), Geoscience Australia, ABARES, the National Carbon Accounting System and the [Terrestrial Ecosystem Research Network](#)). While it may be impractical to consolidate these databases, it would be practical to use a publicly accessible digital maps which link to them or refer to them.

Similarly, although development applications and approvals are usually available on departmental websites, critical conditions of consent such as approved development areas, wildlife buffers and offsets are generally not displayed on publicly accessible digital maps. Doing so would improve future decision making (particularly with respect to cumulative impacts and better biodiversity conservation outcomes) and provide the community more confidence and clarity about the measures being adopted to conserve biodiversity in NSW.

Consideration should be given to exploring whether the [Atlas of Living Australia](#) could be used by NSW government as the central portal for the data or for links to other data sets, for all data relevant to biodiversity conservation in NSW.

⁶ To the extent that issues of copyright impedes the upload such material, the *Biodiversity Conservation Act* could be amended to provide that environmental impact statements which form part of a successful development application are to be uploaded to a central database.

A new era of groundtruthing?

The smartphone raises the possibility of widespread interaction between decision makers, developers, landholders, scientists and the community, who simply by taking photos upon request could provide the 'ground truthing' evidence needed to confirm evidence so expensive to obtain through specialised staff visits. Such applications can be made tamper-proof and highly trustworthy, in many cases obviating any need for costly and intrusive site visits. Consideration should be given to exploring this issue with technology companies and other digital specialists.

Statutory Review Process

The *Biodiversity Conservation Act* and Part 5A and Schedules 5A and 5B of the *Local Land Services Act* were enacted together as part of the same reforms. At least as it relates to native vegetation clearing from the perspective of biodiversity conservation, the reforms have failed. Both *Biodiversity Conservation Act* and Part 5A and Schedules 5A and 5B of the *Local Land Services Act* are undergoing a statutory review process. Given the inter relatedness of the Acts, especially in regard to native vegetation management and conservation, in such circumstances it is illogical to separate the reviews of *Biodiversity Conservation Act* and the *Local Land Services Act*. The two Acts should be reviewed together with the primary goal to conserving biodiversity in NSW.

Attachment A BMCC Environment Budget 2017-2023

Operational Plan Year 2017 -18	Net Cost*	^ % Share
Natural Environment	3143	5
Natural Area Visitor Facilities #	2085	3
Water Resource Management	4266	6
Total	9494	14
Operational Plan 2018-2019		
Natural Environment	3731	4
Natural Area Visitor Facilities #	3243	2
Water Resource Management	4835	6
Total	11809	12
Operational Plan 2019-2020		
Natural Environment	3444	4
Natural Area Visitor Facilities #	2559	3
Water Resource Management	5548	6
Total	11551	13
Operational Plan 2020-2021		
Natural Environment	4035	4
Natural Area Visitor Facilities	2592	2
Water Resource Management	1130	1
Total	7757	7
Operational Plan 2021-2022		
Natural Environment	4040	3
Natural Area Visitor Facilities	3083	3
Water Resource Management	758	0.6
Total	7881	6.6
Operational Plan 2022-2023		
Natural Environment	4098	3
Natural Area Visitor Facilities	5113	3.7
Water Resource Management	791	0.6
Total	10002	7.3

Notes

All figures extracted from yearly Delivery Programs and Operational Plans published on Council's website

*Portion of Service expenditure funded from Rates, Annual Charges and other untied income

^ % of net cost of delivering services

Prior to 20/21 the Natural Visitor Facilities Budget was reported as part of community and social services budget (Care). In 20/21 Natural Visitor Facilities Budget started to be reported as part of the environment budget (Protect)