

Council Reference: Biodiversity



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20 June 2017

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### **Tweed Shire Council submission – biodiversity conservation and local land services legislation review**

Tweed Shire Council welcomes the opportunity to review and provide comments on the proposed Biodiversity Conservation Regulation 2017, Local Land Services Amendment Regulation 2017, State Environmental Planning Policy (Vegetation) 2017 and relevant supporting material.

As noted in our previous submission (28 June 2016), the proposed legislation has significant implications for biodiversity and local government throughout New South Wales. We note some improvements arising from previous consultation but have identified numerous residual issues of concern as detailed herein.

It is noted through analysis of submissions from other local government organisations and through consultation with our regional peers in the Northern Regional Organisation of Councils (NOROC), with whom we have collaborated on a separate submission, that similar concerns are widespread in the local government sector.

Tweed Shire Council maintain the position that the reforms package remains in conflict with its defined purpose and objects due to anticipated biodiversity loss and the significant additional complexity, administrative burdens and costs for local government. This position is based on the persistence of key issues of residual concern including:

- The removal of the ability for local councils to ensure offsets are delivered onsite or locally in accordance with community expectations
- Weakening of genuine like for like offsets
- Lack of an approval role for councils in biodiversity certification
- Overly complex assessment process
- Weakening of clearing controls in rural areas
- Increased uncertainty regarding regulatory responsibility for vegetation protection

General and specific comments relating to the regulations and other supporting material are provided below. It is important to note that due to the large volume of material the comments below should not be considered exhaustive. Additionally, the

comments below should not be interpreted as an endorsement of the parent legislation.

### General issues

1. As noted in our previous submission, the reforms process has been significantly lacking in genuine consultation with key stakeholders, notably local government. There is a highly significant resource burden placed on local government due to the volume, significance, relevance and complexity of the review material. Inadequate time and engagement is a fundamental failing of the exhibition process. This is exacerbated by the lack of critical detail such as actual draft instruments, key definitions, ambiguous guidelines and inconsistencies within material.
2. Council has made a direct request and representation through NOROC and LGNSW for additional time to complete the review. The six week period allocated is not sufficient to enable reasonable review, consultation, clarification and submission preparation for the raft of material relevant to this exhibition period.

### Explanation of Intended Effect for the State Environmental Planning Policy (Vegetation) 2017

3. Not providing the actual draft planning policy prevents the development of informed and considered responses. The material provided lacks critical detail and it is recommended that Council is provided a further opportunity to review the draft policy prior to its finalisation.
4. A number of inconsistencies are evident with the regulatory pathways of the policy. In the case of a development application (DA) that exceeds the Biodiversity Offset Scheme (BOS) threshold, council has the opportunity to refuse the application or apply the BOS (BC Act 7.13). There appears to be no similar role for council to apply avoid and minimise principles to proposed clearing not associated with a DA that exceeds the BOS threshold. In this case the application goes straight to Native Vegetation Panel (NVP) who appear to be under no obligation to apply the same avoid and minimise standards as a council may use to regulate DAs (Note the Biodiversity Assessment Method (BAM) only requires consideration of a number of factors around “avoid and minimise” but does not set standards). This is likely to promote pre-emptive clearing and lead to negative biodiversity outcomes.
5. The exhibited material identifies that a Native Vegetation Regulatory Map (NVR Map), made under the LLSA Act, will identify land and determine the nature of the approval pathway required for land clearing where development consent is not required. Information contained on the *land management* web site indicates that the NVR Map will be published in draft form in the first half of 2018 and will be subject to land owner review. Given the time delays associated with delivering the final NVR Map, it is suggested that the implementation of the policy be delayed until such time as all the associated regulatory tools are available and adopted.

6. Councils are the best placed to regulate clearing on urban and environmental lands where clearing is intimately related to development issues. The proposed Native Vegetation Panel (NVP) are likely to be poorly placed to fully understand the complex planning and pre-emptive development issues associated with vegetation clearing in this context. For the NVP to take on this role they would need to liaise very closely with council to ensure their decisions are well informed, defensible and consistent with local community expectations. If it is acceptable for Councils to be the consent authority for DAs involving vegetation there appears to be no clear reason why a different consent authority is needed to regulate the same clearing not currently requiring a DA. Councils currently regulate clearing not subject to a DA under clause 5.9 of their LEPs. The proposal to require approval from the Native Vegetation Panel for certain vegetation clearing is confusing and adds an additional layer of bureaucracy that is not necessary. The NVP are unlikely to fully understand the planning context, environmental values and community standards around protection of native vegetation compared with a local Council. Therefore, directing clearing consent decisions to a state-wide panel for clearing above the BAM threshold is likely to lead to decisions which are not consistent with local community standards, council led strategic planning and protection of biodiversity.

Recommendation: It is recommended that the policy is used to require development consent for native vegetation clearing over the BOS threshold.

7. The zones included in the proposed policy largely mirror the “urban” zones excluded from the soon-to-be-repealed *Native Vegetation Act 2003*, however there are notable exceptions that are now proposed to be regulated under the policy. These include the large lot residential zone (R5), recreation zones (RE1, RE2) and environmental zones (E2, E3, E4). The inclusion of these additional zones under the policy is supported as the issues around clearing are either urban, peri-urban, or environmental in nature, all of which involve complicated planning considerations that councils have traditionally managed. Similar complexities are likely to arise with the RU6 Transition zone and waterways zones (W1, W2) where they are other urban or environment zones.

Recommendation: It is recommended that RU6 Transition zone and waterways zones (W1, W2) where they are other urban or environment zones are included in the policy.

8. The stated objectives are generally supported however the following points are made. The first and second objectives relating to consistency and the conservation of local and regional biodiversity respectively are potentially compromised by the issue raised above which highlights inconsistencies in the regulatory pathway and the potential for poor biodiversity outcomes in areas of high development pressure.
9. For a number of far north coast councils all environmental zones were deferred from their Standard Instrument LEPs pending the outcomes of the Far North coast Ezone Review. The affected councils (Tweed, Byron, Ballina, Lismore and Kyogle) are now in the process of reviewing their LEPs.

Recommendation: It is recommended that the provision is made to include these deferred areas under the policy.

10. Further clarification is required in relation to clearing exemptions and their interaction and consistency with other relevant legislative instruments. While the intent of the proposal to provide certain exemptions is supported, it is recommended that a caveat be included to ensure that such works are carried out in an environmentally appropriate manner in accordance with any standards contained in Council's DCP. This is particularly important with respect to some noxious and other environmental weeds which can infest very large areas in environmentally sensitive locations (steep slopes, riparian areas, areas close to urban settlements etc.). For example, there have been numerous examples of unregulated clearing of camphor laurel using large machinery on the Far North Coast that have resulted in significant environmental damage including soil erosion, sedimentation, increased weed infestation, harm to threatened species and eutrophication of waterways.

Recommendation: It is recommended that in addition to those exemptions mentioned, councils should be free to determine any additional exemptions in their DCP.

Recommendation: It is recommended that a caveat be included to ensure that such works are carried out in an environmentally appropriate manner in accordance with any standards contained in Councils DCP.

#### Biodiversity Conservation Regulation (2017)

11. It is noted that existing endangered populations are retained under Schedule 1 of the BC Act but under clause 4.1 (5), it appears that populations will not be able to be listed in the future even at a higher level than the species itself:

*4.1(5) **Special additional criteria for listing populations** A population of a species is not eligible to be listed as a threatened species under any of the criteria specified in the following clauses of this Division unless: (a) the species to which the population belongs is not separately listed as a threatened species, and (b) the population is, in the opinion of the Scientific Committee, of significant conservation value based on its role in the conservation of the species or of the number of the species.*

Recommendation: It is recommended that clause 4.1(5) be amended to continue to allow the listing of a population of a species in cases where the population faces a higher risk of extinction than an existing threatened species within NSW.

This measure is necessary to prevent the local extinction of entire populations of species already regarded as threatened.

12. The provisions of the regulation relating to offsets (Part 6) retain significant issues of concern resulting in an offset system that is not consistent with the objects of the legislation, nor current best practice or readily available scientific literature. Some of these issues include the high likelihood of significant biodiversity losses in areas of high development pressure due to not restricting the scheme to onsite, local and genuine like for like offsets. Further weakening

of the scheme through the proposed variation rules, proposed options for mine site rehabilitation and the ability to make a payment to the Biodiversity Conservation Fund to retire offsets are not supported. The inability to identify an offset in accordance with best practice offset principles should not provide justification for poorer ecological outcomes and loss of biodiversity. Many areas, including Tweed are highly restricted with regard to available offset sites.

Recommendation: It is recommended that the offsets scheme is restricted to the provisions of strict like for like offsets prioritising onsite or local offsets.

Recommendation: It is recommended that should section 6.4 (variation rules) be retained that this section be amended to include the requirement for a 'reasonable efforts' test prior to allowing variation and that additional credit penalties are applied for the use of this option.

13. The non area-based BOS thresholds referred to in section 7.1 apply to any clearing of native vegetation. This is likely to be problematic because the thresholds trigger the preparation of a biodiversity development assessment report in accordance with the BAM. Such reports are complex, likely to be costly to prepare and may act to prevent the consent authority from insisting that any offsetting (if it is permitted at all under s7.13 of the BC Act) is carried out on site or at a nearby location even for relatively minor impacts (e.g. removal of a single tree).

Recommendation: It is recommended that the requirement for a biodiversity development assessment report is compulsory for proposed clearing over the area-based threshold (7.1(1)(a)) but at the discretion of the consent authority for non-area based thresholds (7.1(1)(b) and(c)) subject to an over-riding no net loss principle.

This would allow councils to condition locally appropriate solutions. In many cases it would also avoid the need for costly assessments for relatively minor impacts.

14. With regard to the specified area-based BOS thresholds (s 7.1(1)(a) & s7.2), future urban development sites commonly consist of numerous lots totalling a large area (typically 100 ha plus). Although there may be a need to clear and offset some native vegetation to ensure practical planning outcomes, these areas are often large enough to provide biodiversity offsets onsite. With BOS thresholds of 0.25ha to 0.5ha (depending on applicable minimum lot size in the LEP) council may not be in a position to ensure biodiversity offsets are provided onsite despite the capacity for this to occur.

15. With regard to s8.1 (avoiding and minimising biodiversity impacts in conferring biodiversity certification), measures to avoid and minimise impacts considered as "other approved conservation measures" under BC Act 8.3(3)(c) should be consistent with any Council development control plan or adopted policy that sets standards for avoiding and minimising biodiversity impacts.

Recommendation: It is recommended that measures to avoid and minimise impacts considered as "other approved conservation measures" under BC Act

8.3(3)(c) should be consistent with any Council development control plan or adopted policy that sets standards for avoiding and minimising biodiversity impacts.

16. There remains significant uncertainty regarding the sensitive biodiversity values map. The current draft coarse scale mapping tool appears inconsistent with council strategic mapping products including the Tweed Vegetation Management Strategy 2004 and Tweed Coast Comprehensive Koala Plan of Management 2014. It is also unclear as to whether councils will have the opportunity to provide specific initial feedback on the map, what process will be employed for periodic updating of the map and arrangements regarding the timing of completion of the map in relation to commencement of the legislation.

*Draft guidance and criteria to assist a decision maker to determine a 'serious and irreversible impact'*

17. The entire guidance is premised on impacts in excess of thresholds for candidate species. No thresholds have yet been developed and the candidate list is qualified as being indicative only.
18. There are several key self-confounding aspects of the guidance including that the principles for determining serious and irreversible impacts appear highly inconsistent with the candidate list, and the notion that there is presently sufficient 'best current ecological knowledge' to identify those species that are 'unlikely to respond to management' in order to meet the relevant principle.
19. Despite the highly restricted application of the SAI due to inclusion of only those species/communities of the highest threat level - state significant development, state significant infrastructure, Part 5 activity and biodiversity certification are only required to take the likely SAI 'into consideration'.
20. The mechanism remains largely unclear as whilst it purports to enable council as a decision maker to apply the principles, the guidance also stipulates that 'any threatened species, ecological community or habitat component of a threatened species or ecological community not listed in Appendix 2 or Appendix 3 (the candidate lists) is unlikely to meet the relevant SAI principles. However, a decision maker may still consider whether a species or ecological community is likely to meet the relevant SAI principles'

*Biodiversity Assessment Methodology*

21. While the preparation of a single tool for assessment is supported, the draft BAM is incredibly complex and reliant on interactions between numerous formulas and the outcomes of multiple aspects of field assessment. Without substantial experience and/or training in applying the methodology, it is difficult to provide detailed comment on the ability of the BAM to properly inform the offset process.
22. It is noted that an Accreditation Scheme has been drafted for application of the BAM. This is supported. Significant Council staff time will be required to undertake and maintain accreditation and assessment of BDARs.

23. In relation to designing a project to avoid and minimise biodiversity impacts BAM section 8.1.2.1(f) states: - making provision for the demarcation, ecological restoration, rehabilitation and/or ongoing maintenance of retained native vegetation habitat on the development site” This could be interpreted to mean that “demarcation, ecological restoration, rehabilitation” must be confined to “retained native vegetation”. Such an interpretation is not consistent with the accepted meaning of these terms (see point below) and may not include measures such as restoring or rehabilitating a riparian area or other constrained land simply because it was not “native vegetation” at the time.

Recommendation: It is recommended that BAM section 8.1.2.1(f) is amended to read:

*making provision for, and demarcation of, areas to be used for ecological restoration, rehabilitation and/or ecological maintenance on the development site”*

and that: section 9.3.3.1(k) is amended to read:

*making provision for ecological restoration, rehabilitation and/or ecological maintenance of areas used for one or more of those purposes on or adjacent to the development site”*

24. To further improve clarity and standardised interpretation and application, the integration of best practice definitions is suggested.

Recommendation: It is recommended to include the following definitions for *ecological restoration, rehabilitation and ecological maintenance* (Source: McDonald, T., Jonson, J., Dixon, K.W., 2016 National standards for the practice of ecological restoration in Australia Restoration Ecology 24 No. S1 pp S4-s32)

***Ecological restoration*** is the process of assisting the recovery of an ecosystem that has been degraded, damaged or destroyed.

***Rehabilitation*** is the process of reinstating degrees of ecosystem functionality on degraded sites where restoration is not the aspiration, to permit ongoing provision of ecosystem goods and services including support of biodiversity

***Ecological maintenance:*** Ongoing activities intended to counteract processes of ecological degradation to sustain the attributes of an ecosystem. This maintenance phase is distinguished from the restoration phase that precedes it. Higher ongoing maintenance is likely to be required at restored sites where higher levels of threats continue, compared to sites where threats have been controlled.

25. It is noted that number of aspects of the BAM as currently drafted are likely to result in a net loss of biodiversity, for example:

- Impact on highly degraded native vegetation is not required to be offset. This has potentially significant impact on some aspects of local biodiversity, particularly where the remaining examples of some vegetation types exist only in highly degraded forms.
  - The ability to make a payment to the BCT or fund a biodiversity action to meet an offset obligation is likely to result in the loss of local biodiversity. If local and genuine offsets are not able to be found, the impact should not be allowed to occur.
26. Under the BAM the requirement for offsetting only applies to threatened species or their habitat. If offsetting is permitted at all it should apply to all biodiversity impacts. There is clear scientific evidence that many common and iconic species are disappearing from parts of the landscape including areas subject to development pressure.
27. The example BAM tool provided with exhibition materials is incomplete, and does not include any information relating to the subregions of the far north coast. It is therefore not possible to work through any local scenarios to gain understanding of the implications of the tool in this area.
28. The Atlas of Living Australia database should be included in the list of published databases to be used when preparing a Biodiversity Development Assessment Report (BDAR), Biodiversity Certification Assessment Report (BCAR) or Biodiversity Stewardship Site Assessment Report (BSSAR).
29. Consultation with local government on biodiversity data that they hold is supported, and should be required to be requested by the assessor preparing the BDAR, BCAR or BSSAR.
30. It is noted that the consistent application of the BAM and vegetation management in general is undermined by the lack of standardised, up to date vegetation mapping for NSW.

#### Local Land Services Amendment Regulation and Code

31. EECs have been retained as Category 2 and therefore are not excluded from being affected by the Code.

Recommendation: That EECs (or all TECs) are mapped as Category 2 – Sensitive Regulated Land. This category is excluded from application of the Code.

32. The simplistic approach to defining regrowth as vegetation established since 1990 is not appropriate in all regions of the state. This is inconsistent with Recommendation 42 of the Biodiversity Review Panel which sought to take a bioregional approach to the proposed reforms. For example on the Far North Coast, regrowth littoral and lowland rainforest grown since 1990 will typically conform to the Scientific Committee Final Determinations for these communities, both of which are nationally recognised as Critically Endangered. It is not considered acceptable to allow clearing of such areas without formal consent.



33. The codes raise serious concern by expanding opportunities for landholders to carry out significant clearing that otherwise would require a PVP under the current legislation. Certain divisions of the code will likely lead to unintended clearing for development as opposed to facilitating the expansion of legitimate sustainable agriculture in the shire.
34. The use of professional habitat restoration practitioners has not been prescribed in establishing and managing set asides. Habitat restoration work particularly in areas of TEC and EEC by unqualified/unskilled landowners is not supported.
35. The ratios of set-asides are considered inadequate. There appears to be conflicting requirements with respect to 'like for like' offsetting for Threatened Ecological Communities. In some instances reductions on the percentage of an offset can be applied where clearing a larger area or achieving the protection of an EEC (even if you are removing an EEC) or where the set aside is of strategic landscape importance.
36. The following recommendations are provided in relation to a range of relevant aspects of the draft Regulation and Code:

Recommendation: That the list of values specified at s108 is expanded to include endangered populations and associated habitat; and all listed ecological communities

Recommendation: That in relation to s113, that land that is by a condition of a development consent or approval under the *Environmental Planning and Assessment Act 1979*, required to be land set aside for nature conservation, for re-vegetation of native vegetation or as a native vegetation offset should qualify as Category 2 – Sensitive Regulated Land

Recommendation: That the intended effect of s116 be explained. It would appear that the provision enables historic unlawful clearing to be overlooked where an application for re-categorisation is made.

Recommendation: That in relation to s130, that the public register should extend to voluntary and mandatory code compliant certificates regardless of whether 'set asides' have been applied.

Recommendation: That in relation to s131, that further information should be provided on the 'reasonable steps' that the applicant has taken to secure like for like biodiversity credits. Matters of consideration should be stipulated.

Recommendation: That long term protection of 'set-asides' should run with the land and remain in perpetuity even where re-categorisation has not been proposed. Conversely the clearing should remain bound to the landowner only.

Recommendation: That set aside areas should not be allowed to be located in Category 2 – Sensitive Regulated Land as these areas are already afforded exclusion from the code. Areas 'set-aside' should be those that are vulnerable to clearing under the code or that capture Category 1 land through revegetation efforts.

Recommendation: That the code should not apply in the coastal zone due to the likelihood of application of the code as a pre-emptive measure to facilitate activities/development other than agriculture.

37. There are a number of inconsistencies and inadequacies with the Code that require resolution including:

- The general 'set-aside' provisions are inadequate. There appears to have been no information provided on how ratios were determined based on sound scientific advice influenced by the principles of the BAM.
- There appears to be inconsistencies with respect to 'like for like' set-asides for TECs under Part 6 and 7. The requirement for 'like for like' should not be compromised or any discounts obtained for achieving this fundamental biodiversity offset outcome.
- An inexplicable discount has been offered under certain components of the Code that encourages the removal of broader tracts of vegetation to reduce set-aside areas. This provision should be deleted.
- No schedules have been provided. These are considered critical for making meaningful comment on the Code.

If you require any further information in relation to this submission, please contact Dr Mark Kingston on 02 6670 2593 or Scott Hetherington on 02 6670 2561.

Yours faithfully



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