DRAFT REPORT

Biodiversity conservation regulations

Regulatory Impact Statement

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THE CENTRE FOR INTERNATIONAL ECONOMICS
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The NSW Government's reform package

Based on the recommendations of the Independent Biodiversity Review Panel (the panel), the NSW Government has been developing a reform package for biodiversity conservation and land management, including reforms to the regulation of:

- native plants and animals
- private land conservation
- agricultural land management
- ecologically sustainable development

Following public exhibition in May and June 2016, the legislative reforms (including the repeal of the existing legislation) were passed by the NSW Parliament on 17 November 2016 and were contained in:

- the *Biodiversity Conservation Act 2016*, and
- the *Local Land Services Amendment Act 2016.*

The new legislation is yet to commence.

Proposed regulations to support the new *Biodiversity Conservation Act 2016* (BCA) have now been developed for public exhibition. Under the *Subordinate Legislation Act 1989* (SLA), a regulatory impact statement (RIS) must be prepared before regulations are made. The purpose of the RIS is to assess the regulatory impacts of the Biodiversity Conservation Regulation.

Objectives and options

The stated purpose of the BCA is to maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future, consistent with the principles of ecologically sustainable development.

The recommendations of the Independent review, which formed the basis of the NSW Government's reform package, aimed to establish simpler, streamlined and more effective legislation that will:

- facilitate the conservation of biological diversity
- support sustainable development
- reduce red-tape.

The regulations aim to support these stated objectives.

The Options to achieve these overarching objectives formally considered under the RIS are as follows.

1 The status quo — that is, the arrangements that apply under the current legislation.

2 The proposed Biodiversity Conservation Regulation.

Approach to the RIS

Although all of the reform elements form an integrated package, the RIS relates specifically to the proposed regulations under the BCA. As such, the RIS covers only those elements of the reform package included in the proposed Biodiversity Conservation Regulations (the regulations). It therefore does not consider the impacts of the BCA, the Local Land Services Amendment Act, the Local Land Services Regulations or supporting products like the Biodiversity Assessment Method (BAM).

The impact of regulations must be assessed against a base case. For the RIS, the base case used is the status quo (i.e. Option 1 outlined above). The RIS therefore analyses the impact of the proposed regulations compared to the current regulatory arrangements.

Cost benefit analysis (CBA) is generally a key element of the RIS process. This is a tool to help weigh up the costs and benefits of the regulatory proposals in a systematic way. However, in practice, it has not always been possible to estimate the costs and benefits of the regulatory changes due to:

- uncertainty around the number of future clearing proposals the regulations could apply to, due to:
  - data limitations
  - uncertainty around how stakeholders will respond to changes in the regulatory framework
- challenges in valuing the benefits and costs accurately.

Where quantification of the costs and benefits is not possible, our approach has been to qualitatively describe the potential impact of the proposed regulations, relative to the status quo and discuss the key factors that could affect the magnitude of the benefits and costs.

It is intended that a revised RIS will be prepared after public exhibition and finalisation of the regulations.

Assessment of proposed regulations against the base case

The impacts of the main elements of the proposed regulations are summarised below.

Native plants and animals

The *Biodiversity Conservation Act 2016* establishes a legislative framework for:

- Protection of animals and plants (Part 2)

- Areas of outstanding biodiversity (Part 3)
- Threatened species and threatened ecological communities (Part 4).

Protection of animals and plants

Under the current framework of the *National Parks and Wildlife Act 1974* (NPW Act) it is an offence to undertake activities that impact on protected and threatened species unless the activity is authorised under other laws or authorised by *a licence* issued by OEH or is a specified defence under the NPW Act.[1] Under the NPW Act, regulation has mostly been achieved through licensing low and high-risk wildlife interactions in the same way.

Part 2 of the BCA establishes a new tiered, risk-based approach that includes exempt activities (lowest risk), activities that comply with a code of practice (moderate risk) and licensed activities (highest risk).

The draft Regulation provides further details to support the new risk based approach, including the arrangements for making new Codes of Practice and clarifying the circumstances in which a code of practice can be considered a defence.

The substantive benefit from this new approach which replaces 'universal' licensing is the anticipated reduction in administration and compliance costs. There will be better allocation of regulatory effort. Enabling better regulatory focus on higher risk activities should confer additional benefits but it is difficult to quantify benefits in terms of the survival and enhancement of threatened species and communities.

Another expected benefit from the reforms is the reduced administrative burden for community members undertaking low risk wildlife activities which will no longer require a licence and, instead, being covered by a Code of Practice.

Areas of Outstanding Biodiversity Value

Under the *Threatened Species Conservation Act 1995*, there are four areas declared as 'critical habitats': Three of the sites fall within national parks while the little penguin critical habitat site in North Sydney Harbour borders and includes some private land. The *Biodiversity Conservation Act 2016* replaces the critical habitat mechanism with stronger provisions to maintain, conserve and restore areas of Areas of Outstanding Biodiversity Value.

The draft Regulation provides additional detail on how to assess if an area meets the eligibility requirements of the Act. The key benefits expected to arise include greater rigour in the approach to identifying key areas of high biodiversity value and prioritising public expenditure on conservation to maximise biodiversity gain. Prescribing the AOBV criteria in the regulations will also provide more clarity to the community and stakeholders (currently, there are no detailed criteria for critical habitat).

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1 The defence includes, for example, approved developments and forestry activities, as well as exemptions (locally unprotected birds, aboriginal cultural activities).

There may be an additional cost to the NSW Government of compiling 'rigorous evidence' to inform recommendations.

Listing threatened species and ecological communities

Regulations for Part 4 of the new Act prescribe updated criteria for listing threatened species and ecological communities consistent with IUCN standards. The changes associated with aligning the listing criteria to international standards will ensure that the listing process is based on the most robust scientific standards. This is expected to improve the accuracy and representativeness of listings (as criteria for listing threatened entities have been updated to reflect international best practice). It will provide a better evidence base to guide investment to maximise environmental outcomes from conservation programs. There are also expected to be some efficiency gains for proponents from improving consistency of categorisation across jurisdictions. Net benefits from this approach are difficult to quantify as they are embedded in the better prospects for species contingent on the actions that follow their listing. However, any rationalisation of the listing process that sharpens eligibility criteria and assessment processes sets up *potential* gains from the conservation strategies built around them.

Private land conservation

Although there are significant changes under the PLC component of the reform package, the primary elements in the regulations relate to Biodiversity Stewardship Agreements (Tier 1 Agreements), as well as some reimbursement provisions relating to Conservation Agreements (Tier 2 Agreements).

Biodiversity Stewardship Agreements (BSAs) correspond to Biobanking Agreements under the current arrangements. To some extent, the proposed regulations carry over existing policy settings from the current *Threatened Species Conservation (Biodiversity Banking) Regulation 2008* (Biobanking regulations). There are however, some changes to policy positions, for example the draft Regulation establishes simpler processes for making minor variations to BSAs and includes changes to which land is eligible to be a Biodiversity Stewardship site. The impacts of these changes are expected to be relatively minor.

Ecologically sustainable development

The Biodiversity Offsets Scheme established under the BCA provides a legal framework for the assessment of the biodiversity impacts of development and gain at an offset site, determination of offset obligations by the consent authority and meeting offset obligations.

The proposed Regulation includes operational arrangements for the biodiversity offsets scheme, including the policy settings for the Biodiversity Offsets Scheme threshold and offsets rules.

Under the proposed Regulation, there will be an expansion of coverage of developments required to be assessed through the Biodiversity Offsets Scheme. Non-major projects

above a regulated threshold and all major projects will be required to complete a BAM assessment to determine any offset liabilities. Proponents for Part 5 activities also have the option to opt-in to the Scheme. It is anticipated that the expansion of the scope of the Scheme (primarily the broadening to include Part 4 local development) will improve biodiversity outcomes because biodiversity impacts are more likely to be offset than under the current system. The requirement for local development that exceed the regulated threshold to apply the BAM and satisfy offset obligations may increase the cost of local development. The extent of impact will depend on the approach currently being adopted by local governments, scope for the proponent to redesign to avoid or minimise biodiversity impacts and any decisions made by consent authorities to discount offset obligations.

The proposed Regulation also includes offset rules (including like-for-like and variation rules) which will determine the type of credits that can be used to meet offset obligations. In this way they will affect the offsets market. For major projects, the proposed offset rules provide greater flexibility for developers in some aspects of the rules, and less flexibility in other aspects. For local developments, the rules are new, as a mandatory offset scheme has not previously applied to these developments.

The changes in the regulation also relate to:

- Prescribed impacts of action
- Principles for determining serious and irreversible impacts.
- Changes to the accreditation scheme
- Requirements to prepare Biodiversity assessment reports

Overall the changes may impact developers through broadening of the scope of the scheme (primarily relating to Part 4 development), increasing costs where offset rules have been tightened and potentially reducing holding and search costs where increased flexibility has been provided in the offset rules. For local developments, there will be increased certainty and consistency compared to the status quo of ad hoc assessment and offsetting requirements set by individual consent authorities.

Biocertification of land

The biodiversity certification scheme is currently established under Part 7AA of the *Threatened Species Conservation Act 1995* (TSC Act). The Minister may confer biodiversity certification on land if satisfied that biodiversity certification will improve or maintain biodiversity values. Biodiversity certification offers planning authorities a streamlined biodiversity assessment process for areas marked for development at the strategic planning stage.

Currently only planning authorities can apply to the Minister to have biodiversity certification conferred over an area of land. Planning authorities must submit a biodiversity certification assessment prepared in accordance with the Biodiversity Certification Assessment Methodology (BCAM).

The *Biodiversity Conservation Act 2016* modifies the framework for biodiversity certification, replacing the existing scheme in Part 7AA TSC Act.

The draft Biodiversity Conservation Regulation includes a range of provisions to support the new biodiversity certification scheme. The changes largely reflect minor changes to the existing arrangements such as enabling measures to avoid and minimise harm on biodiversity certified land to be specified as 'other approved measures' in a biodiversity certification order and prescribing criteria for the Minister to declare Strategic Biodiversity Certification. The changes are not expected to have a significant impact on developers and the environment more broadly.

1 Background and introduction

The NSW Government's reform package

Based on the recommendations of the Independent Biodiversity Review Panel, the NSW Government has been developing a reform package for biodiversity conservation and land management. The four components of the reforms are as follows.

- Native plants and animals — key elements of this component include:
  - changes to threatened species legislation to improve the identification and protection of threatened plants and species and areas of outstanding biodiversity value.
  - additional funding of around $100 million over five years for the Saving our Species program; and
  - a new risk-based approach to managing wildlife interactions that will protect native plants and animals, establish minimum standards of animal care and maximise public safety.
- Private land conservation — key elements include:
  - moving to a three tier system of private biodiversity conservation agreements;
  - the establishment of the Biodiversity Conservation Trust to administer the Private Land Conservation program; and
  - increased government investment in Private Land Conservation (PLC) (also delivered by the Biodiversity Conservation Trust), with $240 million allocated over the first five years.
- Agricultural land management — key elements include:
  - the removal of the 'improve or maintain' standard for clearing;
  - the development of a native vegetation regulatory map[2] to give farmers certainty over what land is and is not subject to regulation;
  - an expanded range of allowable and code-based activities, reducing red tape; and
  - major clearing proposals to go through the Local Land Services approval process and giving farmers access to offsite offsets, giving farmers additional flexibility.
- Ecologically sustainable development — key elements include:
  - a new biodiversity offsets scheme;
  - a single consistent methodology for assessing offsets called the Biodiversity Assessment Method

2 Until the map is incorporated into the regulatory framework there will be an interim measure to regulate native vegetation instead of land

– the development of an State Environmental Planning Policy (Urban Vegetation) 2017.

Legislative reform

Following public exhibition in May and June 2016, the legislative reforms (including the repeal of the existing legislation) were contained in:

- the *Biodiversity Conservation Act 2016*, and
- the *Local Land Services Amendment Act 2016.*

These new Acts were passed by the NSW Parliament on 17 November 2016.

Proposed regulations under the Biodiversity Conservation Act

Proposed regulations to support the new *Biodiversity Conservation Act 2016* have been developed for public exhibition (see table A.1 in the appendix) for a summary of the matters covered by the proposed regulations).

Regulatory impact analysis requirements in NSW

The regulatory impact analysis (RIA) process is simply a formal framework to help policy-makers think through the impacts of regulatory proposals in a disciplined and comprehensive way. This helps to ensure that policy decisions are based on best practice regulatory principles (see box 1.1) and the best available evidence, resulting in better policy outcomes for the community.

1.1 Better Regulation Principles[3]

Principle 1: The need for government action should be established. Government action should only occur where it is in the public interest, that is, where the benefits outweigh the costs.

Principle 2: The objective of government action should be clear.

Principle 3: The impact of government action should be properly understood by considering the costs and benefits (using all available data) of a range of options, including non-regulatory options.

Principle 4: Government action should be effective and proportional.

Principle 5: Consultation with business and the community should inform regulatory development.

Principle 6: The simplification, repeal, reform or consolidation of existing regulation should be considered.

Principle 7: Regulation should be periodically reviewed, and if necessary reformed to ensure its continued efficiency and effectiveness.

The current RIA requirements for regulations are set out in the the *Subordinate Legislation Act 1989* (SLA). Under the SLA, a regulatory impact statement (RIS) must be prepared before regulations are made. The matters that must be included in a RIS are outlined in box 1.2.

[3] NSW Government, *NSW Guide to Better Regulation*, October 2016, p. 6.

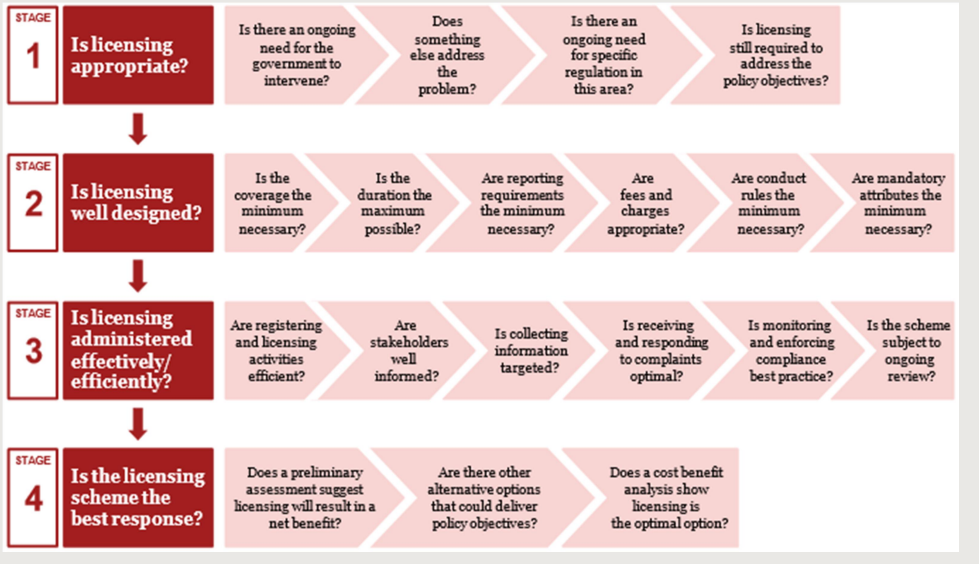
1.2 RIS requirements under the SLA

A regulatory impact statement must include the following matters:

- A statement of the objectives sought to be achieved and the reasons for them.
- An identification of the alternative options by which those objectives can be achieved (whether wholly or substantially).
- An assessment of the costs and benefits of the proposed statutory rule (this includes economic and social benefits and costs). Wherever possible, costs and benefits should be quantified. If quantification is not possible, the anticipated impacts of the proposed action and of each alternative should be stated and presented in a way that permits a comparison of the costs and benefits.
- An assessment of the costs and benefits of each alternative option to the making of the statutory rule (including the option of not proceeding with any action), including the costs and benefits relating to resource allocation, administration and compliance.
- An assessment as to which of the alternative options involves the greatest net benefit or the least net cost to the community.
- A statement of the consultation program to be undertaken.

Under the new *Guide to Better Regulation*, all regulatory proposals that involve licensing are to include an assessment against the Licensing Framework developed by IPART (see chart1.3). As some of the regulations under the *Biodiversity Conservation Act 2016* relate to Biodiversity Conservation licences this implies that an assessment against the Licensing Framework will also be required.

1.3 The Licensing Framework



Data source: IPART, *Reforming licensing in NSW: Review of licence rationale and design*, Regulation Review — Final Report, September 2014, p. 43.

As licensing arrangements impose a 'red tape' burden on the community, the aim of the Licensing Framework is to ensure that where licensing is used:

- it is appropriate
- it is well designed and minimises red tape costs on the community
- it is administered effectively/efficiently, and
- it is the most efficient approach for achieving the Government's objectives (i.e. the approach that delivers the largest net benefit to the community).

The process outlined in the Licensing Framework largely reflects best practice principles that would already be covered by the RIS

This report

This report is a draft Regulatory Impact Statement (RIS) for the proposed regulations under the BCA. The structure of the report is as follows:

- Chapter 2 outlines the case for reform, specifies the objectives, outlines the options considered and sets out the general approach to the analysis.
- Chapter 3 covers the regulations relating to interactions with wildlife and threatened species and ecological communities.
- Chapter 4 covers the regulations relating to private land conservation.
- Chapter covers the regulations relating to Ecologically Sustainable Development.
- Chapter 6 covers the regulations relating to the Biodiversity Certification of Land at the strategic planning stage.
- Chapter 7 covers some miscellaneous reforms.

Chapter 8 provides an assessment of the accreditation scheme against the Licensing Framework.

2 Approach to the RIS

The case for government action

"Biodiversity" is a shorthand word for "biological diversity". It describes not just the variety of all life forms (plants, animals, and micro-organisms), but also the ecosystems in which they interact. Biodiversity provides essential ecosystem services like clean air, water, food and medicines, and is directly linked to the survivability of many vulnerable species.

In NSW, almost 1000 animal and plant species are at risk of extinction. Currently, more than 50 per cent of mammal species and about a third of all native birds and amphibians are listed as threatened, along with 14 per cent of plant species. Threatened species include the Bush Stone-curlew, Jewelled Gecko, Slender Darling Pea, Yellow-footed rock-wallaby, Flame robin, and Bathurst copper butterfly.

Without government action, there is expected to be a continuation of the loss of biodiversity in NSW. There are also other reasons for regulatory action including community expectations that biodiversity will be conserved and valued.

Human impact on biodiversity outcomes

Human activities impact on biodiversity in various ways, including the following.

- Human interactions with wildlife impact on native species — this includes through activities such as keeping native animals as pets or commercial activities, such as breeding and dealing in native animals and plants.
- Active management of land for conservation improves biodiversity values — this includes management of habitat on public land (including national parks) and private land.
- Development and other activities impact on biodiversity, including by clearing native vegetation.

The NSW land area is around 800 000 km^2. Close to 75 per cent of this land is zoned for private use. Around 580 000 km^2 (73 per cent) of this land is currently zoned for agricultural use, 4 773 km^2 (0.6 per cent) of the land is currently zoned for residential use and a further 635 km^2 (0.1 per cent) zoned for commercial use.[4] About 200 000 km^2 of NSW that is public land designated for uses such as national parks and reserves and forestry. Given the extent of land area for private use, the *future* actions on these lands

4 CIE estimate based on property data provided by NSW Land and Property Information.

have the potential to significantly impact on the extent of biodiversity in NSW in the future.

The extent of clearing varies across NSW. Table 2.1 indicates the extent of native vegetation coverage in different regions throughout NSW in 2010.

2.1 Extent of native vegetation coverage as a share of total catchment area, 2010

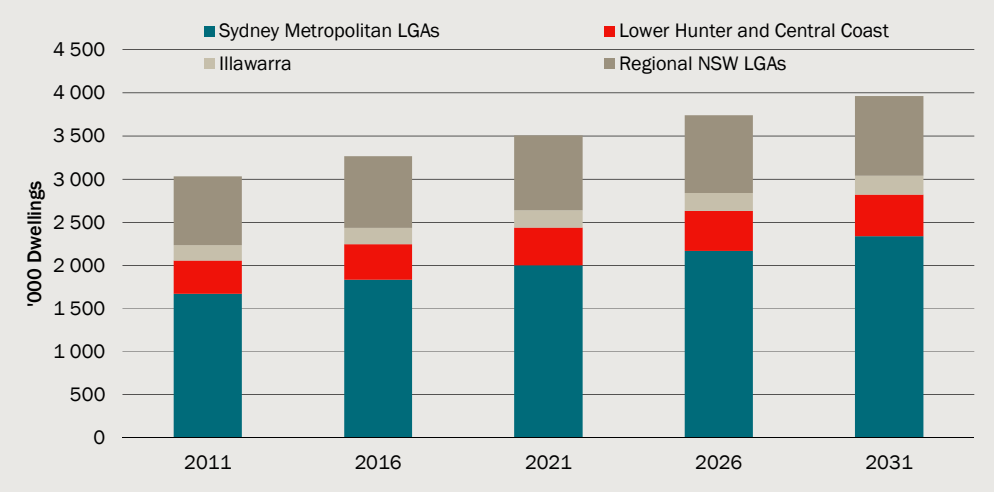
Region	Native intact	Native derived	Native / non-native mosaic	Non-native or Other	No Data
	Per cent	Per cent	Per cent	Percent	Per cent
Gwydir	31	15	25	29	-
Central West	28	12	40	20	-
Hawkesbury-Nepean	70	7	18	5	-
Hunter-Central Rivers	54	16	27	3	-
Lachlan	40	9	31	20	-
Lower Murray Darling	93	4	1	2	-
Murray	25	4	41	30	-
Murrumbidgee	32	10	37	21	-
Namoi	41	12	27	20	-
Northern Rivers	63	10	25	2	-
Southern Rivers	70	6	3	21	-
Sydney Metropolitan	40	1	12	13	34
Western	94	3	1	2	-

Source: State of Catchment Reports 2010 http://www.environment.nsw.gov.au/soc/stateofthecatchmentsreport.htm

There is pressure is some parts of the State to undertake further land clearing because of productivity gains enabled by new technologies and farming techniques as well as increased global competitive pressure in the agricultural sector.

In the residential sector, increased population pressure is expected to drive the need for increased development activity to support the growing population. NSW Planning has estimated that between 2016 and 2031 an additional 694,000 additional dwellings are projected throughout NSW. Approximately 73 per cent of this increase is expected to occur in the Sydney Metropolitan Area, 11 per cent in the Lower Hunter and Central Coast, 4 per cent in the Illawarra and 13 per cent in other regional areas in NSW.

2.2 NSW Dwelling Forecasts till 2031



Data source: http://www.planning.nsw.gov.au/Research-and-Demography/Demography/Population-Projections

The extent of loss of biodiversity will depend on whether such urban development occurs on already cleared land (e.g. agricultural land on the urban fringe) or whether some clearing of native vegetation will be required.

While clearing of native vegetation is seen as the largest contributor to the loss of biodiversity in the past, other factors such as climate change, also pose a serious threat to biodiversity in NSW. This threat is particularly acute in coastal, alpine, rainforest or fragmented terrestrial ecosystems, or ecosystems in areas vulnerable to fire or low freshwater availability.

Regulation of biodiversity in NSW

The case for some level of Government intervention in biodiversity conservation on the basis of market failure is well established. This has been clearly articulated in a previous Productivity Commission review.[5]

One way to view the market failure is that biodiversity conservation has some public good characteristics. In particular, the non-use benefits of biodiversity conservation are:

- non-rival (i.e. one person enjoying the non-use benefits of biodiversity does not prevent another person from enjoying the same benefits); and
- non-excludable (i.e. members of the community cannot be excluded from enjoying the non-use benefits of biodiversity).

Biodiversity also provides private benefits that not always easily measurable. For example, ecosystem services from native vegetation may improve farm productivity through control of erosion rates, flood protection and soil nutrient storage.

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5 Productivity Commission (2004), Impacts of Native Vegetation and Biodiversity Regulation XXIII

Due to public and non-obvious private good characteristics, biodiversity will be under-provided by the market.

An alternative way of viewing the market failure in relation to biodiversity is that land clearing and other activities that reduce biodiversity imposes a cost on members of the community that value biodiversity (i.e. there are negative externalities). Where private land owners do not bear the full cost of land clearing, the level of land clearing will be above the level that is socially optimal.

Over the past 20 years or so, State and Territory governments have introduced, and progressively strengthened, legislation controlling the clearing of native vegetation on private freehold and leasehold land. Regulatory regimes continue to evolve.

The main stated rationales for the introduction of clearing controls have been land degradation (particularly salinity problems in some States) and a concern in many jurisdictions that levels of remnant native vegetation — especially on private leasehold or freehold land — were approaching critical levels for habitat and biodiversity maintenance.

The current approach

The current regulatory approach differs depending on the nature of the development proposed. There are quite different legislative regimes and processes depending on whether the development relates to agricultural activity or other development types such as urban, resource and infrastructure development.

- Clearing required to enable agricultural development to occur is assessed under the *Native Vegetation Act 2003* and relies on a system of Property Vegetation Plans (PVPs), Routine Agricultural Management Activities (RAMAs) and ministerial orders to determine what clearing can occur and in what circumstances. The *Native Vegetation Regulation 2013* (the Regulation) sets out an Environmental Outcomes Assessment Methodology (EOAM) that the LLS must use to assess whether clearing proposals for PVPs and Development Consents meet this criteria.[6] Key criticisms of this system are that:
  - it is time consuming and cumbersome and is limited by the need to satisfy a "maintain or improve" test at the site level; and
  - it does not consider social and economic factors in decision making. It was noted that the current 'command and control' regulatory approach was preventing efficient farming decisions and leading to perverse outcomes.
- By contrast, urban development, mining development and infrastructure proposals are all assessed under the *Environmental Planning and Assessment Act 1979 (*EP&A Act*)* and *Threatened Species Conservation Act*. This system has a broader orientation by enabling social and economic factors to be considered in decision making, and provides for offsetting for biodiversity impacts. However, the current system is not without its challenges, including:

6 http://www.environment.nsw.gov.au/vegetation/eoam/

  - environmental assessments can be time consuming and have onerous documentation requirements, as well as a variety of different pathways for approval; and
  - the system can also result in "regulatory creep", whereby in some cases biodiversity impacts are considered at multiple stages of the planning system (especially at the strategic land use planning stage and the development assessment stage).
- In relation to managing wildlife interactions, the primary mechanism for managing interactions in NSW is provided by the *National Parks and Wildlife Act 1974* and the associated *National Parks and Wildlife Regulation 2009*. The basic approach remains one of prohibition and prescription.

The Independent Biodiversity Review Panel commented that the current system for assessing biodiversity impacts is:

> … a complex system that is difficult for the community to navigate, has imposed unnecessary regulatory burdens, especially in certain regions and sectors across the state, is process driven and not fulfilling current objectives in the most effective and efficient way.[7]

The panel concluded that the current legislative framework has become fragmented, overly complex and process driven. It creates inconsistent regulatory standards across different sectors and fails to deliver the right incentives for industry and landholders. The panel also concluded that the current laws also do not deliver balanced outcomes across the NSW Government's environmental, social and economic objectives. The laws also no longer link coherently with emerging laws and policies.

Changing community expectations

Changing community expectations, identified in the Independent Biodiversity Review Panel, have also been a catalyst for change. The review noted that the community expects that biodiversity and the ecosystem services it provides are valued, conserved and sustainably managed and used. It also noted that there is a strong community expectation that the Government will manage human interactions with wildlife to ensure, as a society, unique native plants and animals are being protected.

Case for reform

Given the shortcomings of the current regulatory framework, the Independent Biodiversity Review Panel provided a compelling case for reform. On this basis, the NSW Government accepted the recommendations of the review in full in March 2015.

The recommendations of the Independent review, which formed the basis of the NSW Government's reform package, aimed to establish simpler, streamlined and more effective legislation that will:

- facilitate the conservation of biological diversity

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7 Byron, N., et al, 2014, *A review of biodiversity legislation in NSW: Final Report. Independent Biodiversity Legalisation Review Panel.* Page 4.

- support sustainable development
- reduce red-tape.

In November 2016, the NSW Parliament passed the Biodiversity Conservation Bill and Local Land Services Amendment Bill. The new Acts will be supported by regulations and other detailed products.

Objectives

The stated purpose of the BCA is to maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future, consistent with the principles of ecologically sustainable development and in particular:

- to conserve biodiversity at bioregional and State scales
- to maintain the diversity and quality of ecosystems and enhance their capacity to adapt to change and provide for the needs of future generations
- to improve, share and use knowledge, including local and traditional Aboriginal ecological knowledge, about biodiversity conservation;
- to support biodiversity conservation in the context of a changing climate;
- to support collating and sharing data, and monitoring and reporting on the status of biodiversity and the effectiveness of conservation actions;
- to assess the extinction risk of species and ecological communities, and identify key threatening processes, through an independent and rigorous scientific process;
- to regulate human interactions with wildlife by applying a risk-based approach;
- to support conservation and threat abatement action to slow the rate of biodiversity loss and conserve threatened species and ecological communities in nature;
- to support and guide prioritised and strategic investment in biodiversity conservation;
- to encourage and enable landholders to enter into voluntary agreements over land for the conservation of biodiversity;
- to establish a framework to avoid, minimise and offset the impacts of proposed development and land use change on biodiversity;
- to establish a scientific method for assessing the likely impacts on biodiversity values of proposed development and land use change, for calculating measures to offset those impacts and for assessing improvements in biodiversity values;
- to establish market-based conservation mechanisms through which the biodiversity impacts of development and land use change can be offset at landscape and site scales;
- to support public consultation and participation in biodiversity conservation and decision-making about biodiversity conservation;
- to make expert advice and knowledge available to assist the Minister in the administration of this Act.

Approach to the analysis

The options formally considered under the RIS are as follows.

1 The status quo — that is, the arrangements that apply under the current legislation.

2 The policy settings in the proposed Biodiversity Conservation Regulation.

The RIS requirements under the SLA (see box 1.2) require an assessment of the costs and benefits of each alternative option, including the option of not proceeding with any action. This implies that a 'no regulation' option should be considered.

As discussed above, there is a strong case for regulation of biodiversity conservation on the basis of market failures. In particular:

- biodiversity has public good characteristics (i.e. the non-use benefits of biodiversity are non-rival and non-excludable), resulting in an under-provision of biodiversity in the absence of regulation, and
- activities that result in biodiversity loss (such as land clearing) impose a negative externality on third parties.

No regulation around biodiversity conservation would result in significant biodiversity loss and would not meet the objectives of the BCA. Therefore, removing all regulation is not a realistic option being considered by the NSW Government.

Although all of the reform elements form an integrated package, the RIS relates specifically to the proposed regulations under the BCA. As such, the RIS covers only those elements of the reform package included in the proposed regulations.

Evaluation framework for the RIS

A Cost Benefit Analysis (CBA) framework will be used to evaluate the different changes to the regulatory framework. CBA is a tool designed to place the benefits and costs of particular actions or proposals on a common basis so that they can be compared and understood. It provides a basis on which the NSW Government can assess the net benefits of decisions around the package of land management and biodiversity reforms.

CBA provides a technique that allows a systematic treatment of trade-offs arising from Government decisions and the changes they entail. It allows for quantification and valuation of the full range of potential impacts that might arise from changes in actions. It involves aggregation of these impacts across the various types of costs and benefits and through time into a single metric — *the expected present value of net benefits* from a change relative to a reference or base case.

A CBA framework is focused on the social welfare of the community. The policy option that delivers the highest *net social welfare* is considered to be the best for society.

CBA is designed to take account of the full range of potential benefits and costs of particular actions. In this sense, it is holistic and designed to include, for example, the environmental, health and economic impacts of particular actions. A CBA places each of these impacts on a common basis so that they can be compared and understood.

A CBA framework also considers the timing of each of the impacts. Under a CBA approach, future impacts are 'converted' into today's terms so that they can be meaningfully compared. A CBA, for example, will enable an evaluation of policies that deliver different streams of benefits and costs over time.

The key principles of a CBA are presented in box 2.3.

2.3 Key Steps in a CBA

- **Articulating the decision that the CBA is seeking to evaluate**. In relation to biodiversity reform, the decision relates to the best regulation and management framework to maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future, consistent with the principles of ecologically sustainable development
- **Establishing the reference case** (or 'base case') against which to assess the potential socioeconomic and environmental impacts of changes. The base case is the existing biodiversity regulation and management framework.
- **Quantifying the changes (from policy reform options)** relative to the base case. This will focus on the incremental changes/impacts resulting from alternative policy options. The changes may be known with certainty or could also be defined in probabilistic terms. The quantification should focus on key changes that will be utilised in the valuation stage. For example, for this project this would include changes to the quantity and type of development and/or changes to the environment.
- **Placing values on the changes** and aggregating these values in a consistent manner to assess the outcomes. For example, estimating the reduced cost to farmers seeking to remove native vegetation.
- **Generating the Net Present Value (NPV) of the future net benefits stream**, using an appropriate discount rate, and deciding on the Decision Rule on which to assess the different options. The best decision rule is to choose the scenario that has the highest net benefits (or BCR).
- **Undertaking sensitivity analysis** on a key range of variables, given the uncertainties related to specific benefits and costs.
- **Deciding on which option is better for society**. In practice, additional information, aside from the CBA results, may also be utilised when deciding on the preferred option.

In practice, it is not always possible to estimate the costs and benefits of the regulatory changes due to:

- uncertainty around the number of future development proposals the regulation could apply to, due to:
  - data limitations
  - uncertainty around how stakeholders will respond to changes in the regulatory framework

- challenges in valuing the benefits and costs accurately.

Where quantification of the costs and benefits is not possible, our approach has been to qualitatively describe the potential impact of the proposed regulation, relative to the status quo and discuss the key factors that could affect the magnitude of the benefits and costs.

3 Native plants and animals

The *Biodiversity Conservation Act 2016* establishes a legislative framework for:

- Protection of animals and plants (Part 2)
- Areas of outstanding biodiversity value (Part 3)
- Threatened species and threatened ecological communities (Part 4).

Key features of the new legislation include:

- Measures to change the process of listing plants, animals and ecological communities that are threatened.
- Changes to some threat categories to align with standards developed by the International Union for Conservation of Nature.
- Declaration of areas of outstanding biodiversity value.
- Reforms to the approach to regulating human wildlife interactions, wildlife activities and rehabilitation providers.

The key elements to identifying and conserving ***threatened species*** are summarised by the government in the following terms[8]:

> 'Improving the process of listing plants, animals and ecological communities that are threatened and protect them from extinction. Improvements include aligning our standards with international best practice, delivering a strategic process that doesn't show bias towards mammals, birds or other iconic species and developing a common assessment method with Commonwealth, State and Territory governments.
>
> Continuing to make it illegal to harm threatened plants or animals or their habitat without specific approval
>
> Supporting and expanding the Saving Our Species biodiversity conservation program on the ground with an extra $100 million in funding over five years.
>
> Identifying and protecting "Areas of Outstanding Biodiversity Value".

The proposed approach for regulating human interactions with ***native animals and plants*** are summarised by government as[9]:

> ' introducing a risk-based approach to regulating human interactions with wildlife that differentiates between low and high risk activities to ensure regulation is more efficient, more effective, and appropriate for the level of risk involved. This approach to managing wildlife interactions seeks to:
> • protect native animals and plants in the wild

8 https://www.landmanagement.nsw.gov.au/native plants and animals

9 https://biodiversity-ss.s3.amazonaws.com/Uploads/1462236218/A-new-framework-for-managing-wildlife-interactions.pdf

- establish minimum standards of animal care
- maximise public safety.'

The focus of the RIS is on the new regulations to be made under the *Biodiversity Conservation Act 2016.* Other policies such as the 'Saving our Species' investment proposals will also have implications for native plants and animals. The program does not form part of the regulations and will instead be a separate policy decision by the Government.

Listing of threatened species and communities

Listing criteria and processes

Under the current framework, listings occur under the *Threatened Species Conservation Act*. The NSW Scientific Committee is established under the *Threatened Species Conservation Act*. It is an independent committee of scientists appointed by the Minister for the Environment. The committee is responsible for determining the listing of critically endangered, endangered, vulnerable or presumed extinct species and threatened ecological communities in NSW.[10]

The *Biodiversity Conservation Act 2016* includes changes to some of the threat categories for listing species and ecological communities to better align with the international best practice standards developed by the International Union for Conservation of Nature (IUCN). In addition, populations will be defined as a subset of species, to align with IUCN.

Provisions in the Act support the implementation of an inter-jurisdictional Memorandum of Understanding (MOU) on a Common Assessment Method for listing threatened species.

The Independent Biodiversity Review Panel's report also highlighted that current threatened species lists are biased towards mammals, birds and other iconic species. The reforms propose measures to streamline threatened species and ecological communities listing processes to ensure the lists are more representative. The procedure for listing of threatened entities prescribed in Part 4 of the *Biodiversity Conservation Act 2016* includes provisions to allow the Scientific Committee (the Committee) to invite nominations on a particular theme. The Committee could prioritise assessments for these nominations. Nominations can continue to be made at any time on any theme. Under the Act, the Committee will undertake periodic reviews of threatened species and threatened ecological communities lists, at least every five years.

Part 4.7 of the Act specifies that

> ..a regulation that prescribes criteria for the purposes of this Division is not to be made unless the Minister certifies that:

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10 http://www.environment.nsw.gov.au/committee/AboutTheNSWScientificCommittee.htm

(a) the criteria are based on scientific principles only, and

(b) the criteria for listing under a common assessment method agreed between the Commonwealth, States and Territories were given due consideration before the regulation was made.

Impacts of the regulations

Regulations for Part 4 of the new Act establish criteria for listing threatened species and ecological communities consistent with IUCN standards. Under the draft Regulation a species is eligible to be listed as a threatened species if the species meets any one or more of the following matters:

- reduction in population size
- restricted geographic distribution of species
- low numbers of mature individuals of species
- very highly restricted geographic distribution of species
- quantitative analysis of extinction probability

The draft Regulation also sets criteria for listing a population that is not part of a listed threatened species.

Under the draft Regulation an ecological community is eligible to be listed as threatened if it meets any one or more of the following:

- reduction in geographic distribution of an ecological community
- restricted geographic distribution of ecological community
- environmental degradation
- disruption of biotic processes or interactions
- quantitative analysis of probability of collapse of ecological community.

Expected net benefit

The expected benefits attributed to the changes to the listing criteria and consultation requirements on preliminary listing determinations are presented in table 3.1.

3.1 Expected benefits of the Regulation

Expected benefits
Environment
▪ Improvements in the accuracy and representativeness of listings (as criteria for listing threatened entities have been updated to reflect international best practice) ▪ Better evidence base results in better investment to maximise environmental outcomes from conservation programs
Economic
▪ Reduced advertising requirements for preliminary determinations ▪ Consistency with the Common Assessment Method will reduce duplication of listing activity across jurisdictions and support transition to a single operational list – benefits of reduced administrative costs to government and certainty to proponents.

Expected benefits
Social
▪ Greater confidence in the status and representativeness of the threatened species lists

Source: The CIE

Net benefits from this approach are difficult to isolate as they are embedded in the better prospects for species contingent on the actions that follow their listing. However, any rationalisation of the listing process that sharpens eligibility criteria and assessment processes sets up *potential* gains from the conservation strategies built around them.

Reassessment costs

There are some additional costs associated with these changes including some short-term costs for NSW Scientific Committee to re-assess listed entities against the new criteria as well as some additional costs associated with the consultation requirements.

Currently there are around 1000 **threatened species** and over 100 **threatened ecological** communities listed. The threat status for many entities may need to be reassessed against the updated criteria.

The number of preliminary and final determinations per year can be used as a general indicator of assessments undertaken. **Ecological community assessments** often require complex analysis and are time consuming and can take more than a year to assess. In addition, assessments of species or ecological communities where the status does not change may not result in a Determination. The Determinations can be to list, delist, move between schedules or reject a listing – all requiring an assessment. For example 6 Preliminary determinations and 22 Final (or provisional listing) determinations on 28 different species, populations and ecological communities were made in 2016.

If all the existing threatened species and threatened ecological communities are required to be reassessed then there will be an additional cost. The Scientific Committee currently meets on average 11 times a year (full day meetings). The Committee is supported by 3.5 OEH staff. It is estimated that the costs of the Committee and the Secretariat are around $0.6m per annum and this supports the determination of around 30 different determinations (based on 2016 listings).

Reassessment will be less resource intensive where the species or community has already been assessed against similar criteria/data requirements. OEH estimates that the cost of reassessing the list against the new criteria could be in the order of **$3 million over a five year period**. These costs are also assumed to include additional costs of liaising with the different jurisdictions to ensure the application of the Common Assessment method.

In the longer term, once consistent and comprehensive lists of all threatened species and ecological communities has been achieved, overall resource demands should decrease as having listing criteria that is consistent with CAM will reduce duplication of effort on new listing assessments.

Cost of public consultation

The Biodiversity Conservation Regulation requires a published notice of a preliminary determination must be put out for public submissions for a period not less than 4 weeks. This is less prescriptive than the current publication requirements set out in section 22 of the *Threatened Species Conservation Act 1995* (TSC Act).

The *Threatened Species Conservation Act 1995* requires the Scientific Committee to publish notice of its preliminary determination in a newspaper circulating generally throughout the State and, if the determination is likely to affect a particular area or areas (other than the State as a whole), in a newspaper circulating generally in that area or areas (section 22(2)(c)). Under s 24(1)(c) the Committee is also required to advertise final determinations in state and local newspapers. The total cost of advertising both preliminary and final determinations in 2015-16 was $71 000, which represents 48 per cent of the 2015-16 operating expenditure. Savings from advertising can be reallocated to the Scientific Committee to support the listing assessments and the temporary increase in resourcing needed to assess listed entities against the new criteria.

The use of the internet has increased significantly since the *Threatened Species Conservation Act 1995* commenced, and now represents a key source of information for the community. Therefore, removing newspaper advertising requirements is not expected to impact on the stakeholders or the community. However the Scientific Committee has the discretion to advertise a preliminary determination in newspapers where appropriate.

Other costs

The updated listing criteria will support transition to a single operational list across jurisdictions. This could reduce costs for development proponents who require Commonwealth approval under the EPBC Act or who operate across State boundaries by simplifying assessment of impacts on threatened species (i.e. because species will no longer have different threat status across different jurisdictions).

Areas of Outstanding Biodiversity Value

Under the *Threatened Species Conservation Act 1995*, there are four areas declared as 'critical habitats':

- Gould's Petrel critical habitat, predominantly on Cabbage Tree Island of the coast of Port Stephens.
- Little penguin population in Sydney's North Harbour.
- Mitchell's Rainforest Snail in Stotts Island Nature Reserve in the Tweed River near Murwillumbah.
- Wollemi Pine critical habitat in Wollemi National Park within the Greater Blue Mountains World Heritage Area.[11]

11 http://www.environment.nsw.gov.au/criticalhabitat/criticalhabitatprotectionbydoctype.htm

Three of the critical habitats fall within the national parks while the little penguin critical habitat in Sydney's North Harbour borders and includes some private land.

The *Biodiversity Conservation Act 2016* replaces the critical habitat mechanism with stronger provisions to maintain, conserve and restore areas of 'special biodiversity importance'. These areas are called 'Areas of Outstanding Biodiversity Value' (AOBV) in the *Biodiversity Conservation Act*.

Under the Act, AOBVs are areas that are important to the whole of NSW, Australia or globally and make a significant contribution to the persistence of:

- multiple species or at least one threatened species or ecological community
- irreplaceable biological distinctiveness
- ecological processes or ecological integrity, or
- outstanding ecological value for education or scientific research.

The definition in the Act provides the framework within which this criteria should be interpreted. Specifically the criteria are intended to be limited by state/national/global importance and 'significant contribution' requirements.

Unlike the existing notion of 'critical habitat', the concept of an AOBV is not necessarily limited to nor associated with threatened entities. AOBVs may provide other significant contributions to biodiversity conservation such as conserving species diversity, maintaining landscape connectivity or supporting migratory species. AOBVs will be declared according to scientific criteria intended to protect irreplaceable areas of biodiversity.

Key policy settings for AOBV include:

- a power for the Minister to declare, amend or revoke an AOBV
- that the recommendation of areas is informed by rigorous evidence and evaluated against scientifically based criteria as prescribed in the regulations. The specific criteria for declaring an AOBV is specified in the Regulation (see box A.1).
- the prioritisation of stewardship activities on AOBVs. Under the Act the Minister will seek to enter into a PLC agreement with the landholder to support conservation.
- impacts on AOBVs will be incorporated into the planning system and the biodiversity offsetting scheme. Under the *Biodiversity Conservation Act 2016*, the biodiversity offsets scheme (including the BAM) applies to developments that are "likely to significantly affect threatened species" (s. 7.2). Developments are "likely to significantly affect threatened species" if they are carried out in an AOBV or if the BOS threshold is exceeded or found to be significant under the modified '7 part test'.
- an offence (with associated defences such as planning approval) to damage an AOBV.

The AOBV provisions are a way to prioritise the conservation of sites that are of strategic importance to the future of biodiversity. They build off the existing 'critical habitat' provisions under the current *Threatened Species Conservation Act 1995*.

Impacts of the regulations

The draft Regulation provides additional detail on how to assess if an area meets the eligibility requirements of the Act.

3.2 Criteria of an AOBV, specified in Regulation

1 An area makes a significant contribution to the persistence of multiple species or at least one threatened species or ecological community if:

a) it provides resilience during periods of environmental stress that is important for their continued existence, or

b) it sustains adaptive capacity or evolutionary potential because it contains high levels of unique components of genetic diversity that will enable species to adapt to changing environments or it functions as an important ecological or evolutionary refuge able to sustain viable populations of species at risk due to climate change or other environmental stresses, or

c) it supports migration or dispersal of animals and plants, currently or in the future, that will contribute significantly to the persistence of species at risk, or

d) it is habitat critical for the survival of a threatened species.

2 An area makes a significant contribution to the persistence of irreplaceable biological distinctiveness if::

a) it has a very high structural, functional or compositional diversity, or

b) it is an essential site for the persistence of evolutionary or ecological distinctive species, endemic species or ecological communities, or

c) it is an essential site for the persistence of 2 or more threatened species or ecological communities in any combination.

3 An area makes a significant contribution to the persistence of ecological processes or ecological integrity if:

a) it has ecological integrity, being an area that is:

i. an outstanding, relatively intact example of a functioning ecosystem type, or if a fully intact ecosystem does not remain, then the best remaining example of that ecosystem type that contributes to maintaining the persistence of biodiversity and ecological integrity, or

ii. the most intact remaining site of a species occurrence that provides habitat requirements vital to the conservation of a species, or

iii. the last known remaining site of a species occurrence, or

b) it is a primary contributor to the continuation of essential ecological processes,, or

c) it is an essential site for a significant proportion of the population of a species during one or more key life history stages or processes.

4 An area makes a significant contribution to the persistence of outstanding ecological value for education or scientific research if it contains established infrastructure or data related to long-term ecological research monitoring programs that establish an irreplaceable historic baseline, being the best site anywhere in NSW for long-term research on particular species, ecological communities or ecological processes,

The Regulation also allows the Environment Agency Head to publish guidelines on the application of the criteria. Appropriate consultation between the NSW environment and planning agencies is also required in relation to the guidelines.

It is envisaged that an AOBV declaration will only be conferred on sites which demand maximum priority as sites managed for biodiversity conservation because of their contribution to biodiversity value of state, national or global significance. Under the Act, the Minister, in declaring a site as an AOBV, must first receive a recommendation from OEH.

Expected net benefits

The key benefits expected to arise include greater rigour in the approach to identifying key areas of high biodiversity value and prioritising public expenditure on conservation to maximise biodiversity gain. The proposed criteria build on existing protections for threatened entities by allowing sites that have other important biodiversity values to be identified as an AOBV. The proposed AOBV criteria were informed by the IUCN Standard for the Identification of Key Biodiversity Areas. The IUCN KBA standard builds on more than 30 years of experience in identifying important sites for different taxonomic, ecological and thematic subsets of biodiversity[12].

Prescribing the AOBV criteria in the regulations will also provide more clarity to the community and stakeholders (currently, there are no detailed criteria for critical habitat). The criteria provide a system that can be applied consistently and in a repeatable manner.

Having said this the AOBV criteria is only intended to apply to the most valuable sites for biodiversity conservation then there may not be a large number of sites that would be declared. If this is the case the benefits in terms of improved biodiversity values would not expected to be large. The costs to government associated with managing a relatively small number of sites would also be small. As AOBVs will be a priority for government investment, an AOBV declaration can help landholders access funds via a Private Land Conservation Agreement (PLC) in exchange for management of the land.

There is also likely to be an additional cost to the NSW Government of compiling 'rigorous evidence' to inform recommendations.

Regulating human interactions with wildlife

A new risk based approach is proposed to regulate human interactions with wildlife. Under the current framework the *National Parks and Wildlife Act 1974* (NPW Act) prescribes that it is an offence to undertake activities that impact on protected and threatened species unless the activity is authorised under other laws or authorised by ***a***

[12] https://www.iucn.org/theme/protected-areas/wcpa/what-we-do/biodiversity-and-protected-areas/key-biodiversity-areas

licence issued by OEH or are a specified defence under the NPW Act.[13] The new approach differentiates between high and low risk activities. OEH[14] has stated:

> In assessing the level of risk for certain activities, the Office of Environment and Heritage (OEH) will consider both the *activity* and the *species* that may be impacted. People wanting to undertake lower risk wildlife activities will no longer require a licence.
>
> This approach will result in a significant reduction in the number of licences, which will allow government to better direct enforcement efforts and more effectively regulate higher-risk activities. It seeks to reduce red tape and administrative burden for people wanting to undertake lower risk wildlife activities, while ensuring that people undertaking higher risk activities are effectively regulated.

This new approach in which activities are assessed against the level of risk to biodiversity will result in three broad categories ranking from low to high risk.[15]

- Exempt activities that will be listed the Biodiversity Conservation Regulation, but still involving the requirements of observing prohibitions against cruelty to animals and other legislated protections.
- Activities that will be allowed in accordance with an enforceable code of practice.
- Licensed activities including higher risk activities such as harming threatened species, pet shops selling native wildlife, and keeping higher risk reptiles. Considerations in granting licences include impacts on threatened species and ecological communities,- including species survival impacts, impacts on the extent of and condition of ecological communities.
- Some activities will also be prohibited and not allowed under an exemption, code or licence (e.g. harming koalas).

It is noted that a similar risk based approach is already applied to the list of protected plants under the current legislation. The current plant licences apply to all protected plants but include different licence conditions according to risk.

Impacts of the regulations

Regulations for Part 2 of the BCA include provisions for protection of animals and plants under the categories:

- Offences and defences that build on provisions in the BCA.
- Unprotected fauna — these are the current exemptions for harming native birds that damage crops.
- Possession of exempt animals — these are the current list of 41 birds that can be kept and traded without a licence.

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13 The defence includes, for example, approved developments and forestry activities, as well as exemptions (locally unprotected birds, aboriginal cultural activities).

14 OEH (2016) Biodiversity Legislation Reforms – Fact Sheet: A new risk-based approach to regulating wildlife activities.

15 Harm is only one type of activity that could impact on biodiversity. Other activities are dealing and possessing, liberating animals, damaging ecological communities.

- Codes of practice — the regulation includes provisions that specify the limits to which a code can be used as a defence under the BCA and arrangements for the creation of new codes.
- Administration of biodiversity conservation licences — these formalise licensing arrangements and include provisions such as eligibility criteria for applicants, matters for consideration during licence assessment and fee provisions.
- Marine mammal interactions — these provisions specify approach distances for various interactions with marine mammals.
- Management plan arrangements — these provisions enable management plans to be created in regards to commercial activities that have the potential to adversely affect any species or group of species and also allow existing plans under other legislation to be adopted.

Expected benefits

The substantive benefit from this new approach which replaces 'universal' licensing is the anticipated reduction in administration and compliance costs. There will be better allocation of regulatory effort. OEH[16] have stated that:

> OEH currently issues more than twenty different types of licences. The new risk-based approach to wildlife interactions is likely to see codes of practice developed for low risk activities over time.
>
> This would significantly reduce the number of licences and government can concentrate on enforcement efforts and more effectively regulating higher-risk activities.

The expected benefits are summarised in table 3.3.

3.3 Expected benefits of protection of animals and plants

Key elements of benefits stream
Environment
Greater environmental benefits due to: ▪ more effective targeting of regulation and enforcement efforts to higher-risk activities. ▪ addition of approach distances for dugongs and addition of unmanned aerial vehicles (drones) to existing provisions on operating aircraft to approach marine mammals ▪ allowing codes and management plans to include requirements for registration and record keeping ▪ Inclusion of offences for non-compliance with codes and management plans to deter non-compliance ▪ Inclusion of new provisions on licence eligibility (fit and proper person test) and assessment criteria
Economic
▪ Reduced administrative burdens for government due to new provisions for making codes (will reduce the overall number of licences required to be issued and administered)
Social
▪ Reduced administrative burden for community members undertaking low risk wildlife activities which will no longer require a licence (I.e. may be able to occur under a code).

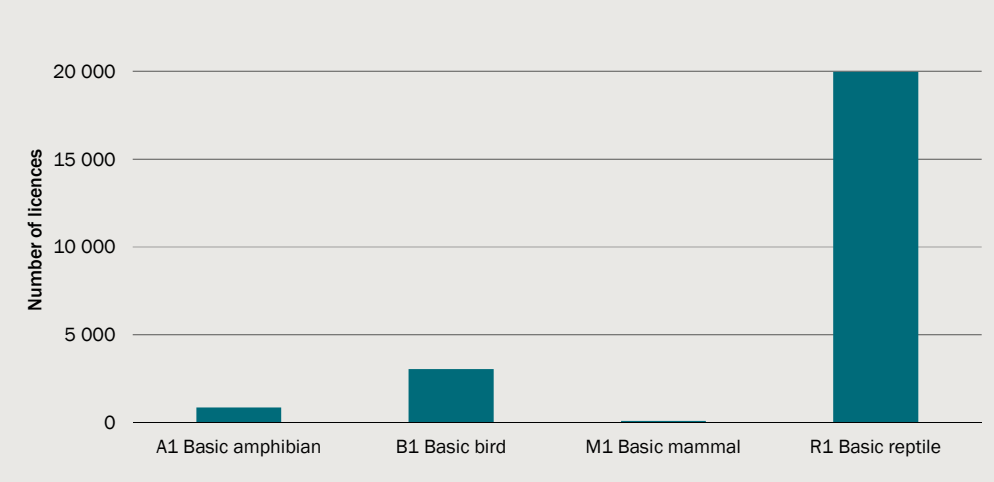
16 OEH (2016) loc. cit.

Enabling better regulatory focus on higher risk activities should confer additional but difficult to quantify benefits in terms of the survival and enhancement of threatened species and communities. The eligibility criteria provisions should also reduce risks of illegal trading and reduce animal welfare risks from licensing inappropriate persons. These gains may be difficult to quantify given that it is long term probabilistic and dependent on a range of other factors.

Another expected benefit from the reforms is the reduced administrative burden for community members undertaking low risk wildlife activities which will no longer require a licence and, instead, being covered by a Code of Practice.

There are estimated to be over 34 000 licences issued by the OEH related to wildlife activities (based on data as of December 2015). Of this, around 24 020 licences are relate to Native Animal Keeper Licence (AKL) Class 1 licences. Basic reptile licences are the largest group in this category, making up close to 20 000 licences, followed by 3 067 B1 Basic Bird licences and 877 A1 Basic Amphibian licences (chart 3.4). There are only around 100 M1 Basic Mammal licences.[17]

3.4 Native Animal Keeper Licence (AKL) Class 1, licence numbers



Data source: NSW OEH

The proposed reforms in the regulation will facilitate the making of a Code of Practice for reptile keeping which will cover lower risk species.[18] If made, it is estimated that around 10 000 holders of the R1 Basic Reptile Keeper licence would no longer required to be licenced and would, instead, be covered by the Code of Practice. It is also expected that there will be administrative cost savings to reptile keepers from the time no longer required to be spent on preparing information for the licence.

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17 There are currently only 2 species of native mice allowed to be kept as pets and that there is no intention to expand the list of native mammals to be kept as pets.

18 Note that the reptile code is not "introduced" by the regulation and may be approved after the regulation commences.

Pension Card holders also receive a discount; 4,364 Animal Keeper Licences and 526 Companion Animal Keeper Licences are currently issued to Pension Card holders (18 per cent and 16 per cent of issued licences, respectively).

Time taken to determine a licence application varies depending on licence class.

- Some licence classes can be applied for online and are automatically issued (eg. currently 2,694 Companion Animal Keeper Licences and 18,692 Native Animal Keeper Licences have been issued online).
- Other licences require site or premises inspections and/or expert advice.[19]

If we assume that the current fees are reflective of the costs and the licences are allocated equally between full fee applications made in person and online applications, on average the cost will be around $49 per application.[20] Applied across the 10 000 licences that will no longer be required to be licensed, this equates to around $0.5m in savings. Savings would be less if the code includes record keeping and registration requirements. Any savings to government could be re-directed to compliance for high-risk activities, although a final decision regarding this has not been made.

Offsetting these gains is the additional cost to government of developing the Codes. Costs include costs of developing draft codes based on research, internal and external stakeholder consultation, public exhibition, Legal Branch review, executive and ministerial approval, formatting and publication on the OEH website and any subsequent stakeholder communications. In most cases costs will be absorbed by the relevant business units and it is assumed that additional resources will not be required to prepare these documents.

19 It is not proposed that these types of licences will be replaced by codes.

20 The weighted average fee is based on the current fee structure applies and assumes 78% on-line applications, 18% pensioners and 4% 'standard' licences. Where 2 year and 5 year applications are available, we assume licences are evenly split between these categories.

4 Private land conservation

NSW's national parks and reserves protect many sensitive environments, provide natural places for our wildlife to live, and protect sites of cultural and historic significance. These and other public lands (such as travelling stock reserves and state forests) provide significant protection for biodiversity in NSW.

Landholders who protect the plants and animals on their land (known as 'private land conservation') also play an important role in keeping biodiversity across NSW healthy. Healthy biodiversity and ecosystems in turn support healthy and productive landscapes. Many landholders carry out important actions that protect wildlife, restore habitats, and enhance the diversity and quality of ecosystems at their own cost. The importance of private land for biodiversity conservation has long been recognised, with many threatened species and ecological communities found only on privately owned and managed lands. Our goals for conserving biodiversity cannot be achieved without supporting private landholders.

The new private land conservation framework will deliver a full range of initiatives and incentives to support landholders who want to establish a protected area on their land and manage biodiversity to improve its quality on their properties

Reforms to private land conservation include:

- government investment in private land conservation
- the new Biodiversity Conservation Trust
- the Biodiversity Conservation Investment Strategy, and
- the new framework of conservation agreements.

Changes under the reform package

Outsourcing Program Delivery

The proposed new private land conservation framework provides a more streamlined and strategic approach to private land conservation. It will be supported by the new Biodiversity Conservation Trust, which will deliver unprecedented government investment in private land conservation guided by a Biodiversity Conservation Investment Strategy.

The *Biodiversity Conservation Act 2016* (BCA) includes a strengthened governance framework for the Biodiversity Conservation Trust (Trust) to guide and support the Trust to fulfil its substantial responsibilities under the biodiversity offsets scheme and private land conservation program.

The BCT will be subject to the direction of the Minister for the Environment and the Minister will approve the Trust's business plan. Directions will be published to ensure transparency.

The *Biodiversity Conservation Act 2016* establishes a more appropriate level of ministerial oversight for the scope and scale of the Trust's activities and the significant public funds it will manage.

The Trust will publish information about its approach to biodiversity offsets and private land conservation and outcomes achieved through its business plan, annual reporting and other communications.

The BCT will be able to enter into and administer voluntary private land conservation agreements with landholders. Reverse auctions may be one of the mechanisms the BCT uses to distribute funds to landholders.

The BCT will replace the Nature Conservation Trust and centralise the delivery of private land conservation mechanisms that are spread across various government bodies, including the Minister for Environment, Local Land Services, the Office of Environment & Heritage and others. For example, the government currently directly administers conservation agreements and wildlife refuges under the *National Parks and Wildlife Act 1974*. It also administers the Biobanking Scheme under the *Threatened Species Conservation Act 1995* and the remaining registered property agreements that were established under the now-repealed *Native Vegetation Conservation Act 1997*. The administration of 'incentive' property vegetation plans under the *Native Vegetation Act 2003* is currently delegated to Local Land Services.[21]

The Independent Biodiversity Review Panel recommended (recommendation 22) outsourcing the administration of all private land conservation mechanisms to a third party program manager as it would "remove duplication and uncertainty while delivering NSW Commission of Audit (2012) recommendations towards local delivery, devolution of government programs, reduced duplication, transparent environmental priorities, improved collaboration and reduced red tape."[22]

The Independent Biodiversity Review Panel anticipated that the benefits of outsourcing delivery of private land conservation mechanisms would be that the government could "shift resources and effort away from monitoring individual agreements. The Government would instead need to ensure the Trust is adequately resourced and supported to perform its functions."

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[21] OEH (2014) Biodiversity Legislation Review OEH Paper 3: Conservation Action

[22] Byron, N., et al, 2014, *A review of biodiversity legislation in NSW: Final Report. Independent Biodiversity Legalisation Review Panel.p53*

Streamlined framework

The *Biodiversity Conservation Act 2016* also establishes a new framework for private land conservation that rationalises the existing seven different types of conservation arrangements into three tiers of voluntary private land conservation agreements.

There will be three types of Agreements with landholders. Each tier will have varying management needs and funding for landholders. The Agreements include:

- Biodiversity Stewardship Agreements will provide an opportunity for an upfront market payment and permanent stewardship payments for permanent protection and management of biodiversity. Essentially, the Trust will purchase biodiversity credits (assessed using the BAM) from landholders. Biodiversity stewardship agreements are designed to last permanently. Agreements are registered onto the land title and apply to all current and future owners of the site. Biodiversity stewardship agreements are similar to existing Biobanking Scheme agreements established under the *Threatened Species Conservation Act 1995.*
- Conservation Agreements are permanent or time-bound agreements that will be supported by stewardship payments to landholders that reflect the level of management actions required. These agreements will typically be used for higher conservation value land where management actions are being undertaken to protect existing biodiversity values. Conservation agreements are placed on a property's title and may apply permanently or for an agreed period of time. Conservation agreements will replace a range of existing conservation agreements available under the *National Parks and Wildlife Act 1974* (NPW Act) (conservation agreements), *Nature Conservation Trust Act 2000* (trust agreements) and *Native Vegetation Act 2003* (incentive and conservation Property Vegetation Plans).
- Wildlife Refuge Agreements are an entry level option for landholders who want to protect the biodiversity on their property, but do not wish to enter into a long term or permanent agreement on their land. These agreements are less restrictive than the other types of private land conservation agreements. While wildlife refuge agreements will be registered on the title of the land, they will not be binding to future landholders, and landholders will be free to terminate their agreement at any time. Wildlife refuge agreements replace the current provisions for wildlife refuges under the *National Parks and Wildlife Act 1974* but are similar in scope. These Agreements will be able to be terminated at any time or converted into higher forms of agreements, and may be eligible for grants.

This new framework is intended to remove duplication, improve incentives and reduce barriers for landholders to enter into long-term private land conservation. It will deliver more targeted on-ground conservation outcomes through provision of better support to landholders across a more consolidated system.

Biodiversity Conservation Investment Strategy

The *Biodiversity Conservation Act 2016* requires the Minister for the Environment to make a Biodiversity Conservation Investment Strategy (BCIS), in consultation with the public. Currently there is no overarching framework or strategy that guides state-wide

prioritisation of effort in building a private land-conservation network in NSW. A statutory state-wide prioritisation mechanism was recommended by the Independent Biodiversity Review Panel to provide for better focused biodiversity outcomes on private land.

This strategy will guide the government and the Trust's investment in biodiversity conservation across the state. This will take into account areas in NSW where biodiversity is currently protected on public and private land.

Investment will be targeted to agreed priority areas. These will include:

- areas of high conservation value
- areas containing key habitats, threatened species and vegetation communities that are not well represented in the public reserve system
- areas that provide important links to isolated areas of native vegetation.

Priority areas will also include Areas of Outstanding Biodiversity Value (AOBV), as they contain biodiversity values important to the whole of NSW. Prioritising AOBV for investment will ensure landholders have access to ongoing support for maintaining these irreplaceable areas.

The key benefit of the BCIS is that it will enable strategic investment to those areas that will contribute best to the conservation of biodiversity at the bioregional and state scales.

Government funding

The NSW government has committed $240 million over five years to private land conservation, and $70 million per annum (escalated) ongoing thereafter, subject to performance reviews. Funding will start in 2016/17, ramping up to over the first five years, so that organisational and market capacity can build over that period.

Impact of the regulations

Although there are significant changes under the PLC component of the reform package, the primary elements in the regulations relate to Biodiversity Stewardship Agreements, although there are also some reimbursement provisions relating to Conservation Agreements.

Biodiversity Stewardship Agreements (BSAs) correspond to Biobank Agreements under the previous arrangements. To some extent, the proposed regulations carry over existing policy settings from the current *Threatened Species Conservation (Biodiversity Banking) Regulation 2008* (Biobanking regulations). There are however, some relatively minor changes to policy positions (see table 4.1 for a summary of key changes). The potential impacts of these changes are discussed in further detail below.

4.1 Impact of changes in regulations

Regulations	Change	Impacts
Criteria for land to be eligible to be designated as biodiversity stewardship site	▪ Analogous the existing regulations (clause 11(1) by preventing 'double counting' of biodiversity offsets at a single site. ▪ Key policy change is land (currently in clauses (d)-(e)) - existing biodiversity conservation requirements may be eligible to become a BSA, so long as the credits generated are immediately retired.	In limited circumstances, some land with existing biodiversity conservation requirements will be eligible as a biodiversity site (that was not previously).
Provisions for whether the owner of a site is a fit and proper person to enter, and fulfil obligations imposed by BSA	No change from existing regulations	No impacts
Grounds on which a Minister may decline a request to enter a BSA	▪ Allows the Minister to decline a request to enter a BSA under specified (and seemingly reasonable) circumstances. ▪ Nevertheless, the regulations give the Minister discretion to decline a request to enter a BSA for any reason considered sufficient.	▪ Likely to have minimal impact. ▪ Impacts will depend on how Ministerial discretion is applied.
Circumstances in which the Minister may determine that an application to vary a BSA does not need to be accompanied by a BSAR	Under the regulations, a BSA may be varied without the need for a BSAR if: ▪ the variation is minor (see below) ▪ in the Minister's opinion, the changes proposed will not significantly impact the retention or improvement of biodiversity values. As there is no requirement under the current arrangements for the equivalent of a BSAR to accompany an application to vary a Biobanking agreement, the regulations effectively preserve what currently happens in practice.	No impact.
Minor variations to BSAs	Allows minor changes may be made to a BSA (related to management of the site) without consent or consultation otherwise required. There are requirements under the current legislation for consent or consultation when a Biobanking agreement is varied. The change in regulation means that minor variations would avoid these requirements.	▪ No impact.
Variations to accommodate multiple new owners	Makes provision for the event that the title of a BSA site is varied to accommodate multiple new owners (there are no such provisions under the previous arrangements).	▪ Impact likely to be minor. ▪ Less costly resolution of responsibilities. ▪ Better compliance with requirements.
Reimbursement of owner or Minister by holder of mining or petroleum authority of site establishment costs	Allows owner or Minister to be reimbursed if BSA () and CAs () are varied or terminated due to a petroleum or mineral authority is issued. The reimbursement settings are slightly different for BSAs and CAs.	▪ Minimal net impact. ▪ Reimbursement is mostly a transfer from holder of mining or petroleum authority to owner or Minister. ▪ The additional cost on mining proponents is unlikely to deter mining activity to any significant extent.

Regulations	Change	Impacts
Fees	▪ Rationalisation of fee structure. There will be an increase in fees to enter into, terminate or vary an Agreement but other fees will no longer be obtained (e.g biobanking statement fee).	▪ Increase in cost for land owners. ▪ Increase in revenue generated by Government. ▪ Assuming that the proposed fee structure is broadly cost-reflective (implying they were not previously), the benefits will outweigh the costs

Source: CIE based on information provided by OEH.

The establishment of the BCT is also relevant to private land conservation. However, the regulations relating to the BCT are covered elsewhere in this report.

Eligibility of land to be a biodiversity stewardship site

The Biobanking regulations essentially aim to prevent double-counting of biodiversity offsets, by excluding land from being designated as a biobank site if biodiversity conservation measures are already required under alternative offsetting arrangements (including under a property vegetation plan approved under the *Native Vegetation Act 2003*, a development consent under the *Environmental Planning and Assessment Act 1979,* a conservation agreement under the *National Parks and Wildlife Act 1974* or any other Act).

The proposed regulations carry over the existing provisions, with some minor variations to the policy effect by allowing BSAs on sites with existing biodiversity conservation requirements in the following limited circumstances.

- The public authority or statutory office holder that imposes the requirement (or Minister administering the relevant legislation) advises in writing that the biodiversity conservation requirements are not intended to be for biodiversity offsetting purposes. This effectively allows sites that are not used for offsetting purposes to become a BSA site if the site is not an existing offset site.
- The BSA is entered into to meet a legal obligation to carry out biodiversity conservation measures and any credits generated will be retired upon commencement of the BSA and cannot be traded or used to meet any other biodiversity offset obligations. This essentially allows an existing offset arrangement to be replaced with a BSA under the new legislation.

The impact of the regulation (relative to the status quo) is that in some circumstances land owners will have the option of using a BSA to meet their existing obligations. This is not currently permitted under the Biobanking Regulation. However, any credits generated will be discounted through the BAM, to ensure that there is a genuine gain from the 'upgrade' to the BSA.

The primary benefit would be improved management outcomes by having the site subject to a BSA (with in perpetuity protection plus management costs).

The net impact would depend on:

- the number of sites that the regulation would apply to
- the number of site-owners that would take up the opportunity of entering into a BSA

- the extent to a BSA provides more secure biodiversity improvements, compared to the alternative under the current legislation.

This is unknown and therefore it is not possible to quantify the impacts.

Fit and proper person test for a BSA

The proposed regulations effectively specify the fit and proper person test that applies to persons entering into and fulfilling obligations imposed by a BSA. This largely reflects the existing arrangements under the Biobanking regulations which allows the Minister to consider previous compliance with relevant legislation (various environment protection legislation) and a range of other matters.

In addition to the matters which may be considered by the Minister under the Biobanking regulations, the proposed regulation also:

- adds that the Minister may consider action taken by the person (or by anybody corporate of which the person is or was a director) to address past contraventions of any relevant legislation
- clarify that the list of past contraventions only covers those known to the Minister.

These changes are minor clarifications and are expected to have little impact.

Grounds for declining a request to enter into a BSA

The proposed regulations specify the grounds for the Minister declining a request to enter into a BSA. There are no corresponding regulations under the existing regulatory framework.

Nevertheless, several of the grounds specified in the proposed regulations are effectively circumstances where the applicant has not complied with the requirements of the BCA in relation to applications to enter into a BSA, including:

- the application is not accompanied by the relevant fees or contributions
- the applicant fails to provide any further information that the Minister requests, within the period specified by the Minister, or
- if the biodiversity stewardship assessment report has not been prepared properly.

In these cases, the regulation is effectively clarifying that the Minister may decline a request to enter into a BSA where the applicant has not complied with the application requirements set out in the Act.

The regulations also specify that the Minister may decline a request to enter into a BSA:

- if the application is illegible or unclear
- the application relates to a site that has been the subject of a previous application that was refused by the Minister and the application is not materially different from the previous application, or
- for any other reason the Minister considers sufficient.

The first two of these reasons are entirely reasonable and it seems unlikely that the Minister would have entered into a Biobanking Agreement under the previous regulatory framework in these circumstances. As the regulations are formalising existing arrangements, the impacts are expected to be minimal.

It is noted that the regulations give the Minister significant discretion (i.e. for any other reason the Minister considers sufficient). The impact will depend on how the Minister exercises this discretion, which is unknown.

Changes to BSAs

There are several proposed regulations that relate to changes to BSAs after they have been entered into.

Circumstances where a BSAR is not required

The proposed regulations allow the Minister to determine that an application to vary a BSA does not need to be accompanied by a Biodiversity Stewardship Agreement Report (BSAR), as required under the BCA (s. 6.11)), where:

- the variation is minor, or
- in the Minister's opinion, the changes proposed will not significant impact the retention or improvement of biodiversity values intended to be achieved by the BSA.

As the cost of a BSAR could be at a minimum several thousands of dollars (depending on the complexity of the site), this regulation could significantly reduce the cost of varying a BSA, compared to a scenario where the regulation was not made.

However, the baseline used for this RIS is the current regulatory framework. As there is no requirement under the existing arrangements for the equivalent of a BSAR to accompany an application to vary a Biobanking agreement, the regulation effectively preserves the status quo (i.e. there is no impact).

Minor variations

The proposed regulations allow the Minister and the current owners to avoid the consent or consultation requirements for:

- minor variations to the management actions or plans or the timing of payments for management actions set out in a BSA; or
- changes to any part of a BSA that:
  - correct any minor error or omission in the methodology, such as a spelling or grammatical error, a redundant or obsolete reference, obviously missing words, or wrong cross-references, or
  - address matters that are of a consequential, transitional, machinery or other minor nature.

There is no explicit regulatory requirement for consent or consultation when a Biobanking Agreement is varied under the current regime. However, there are standard

provisions in Biobanking Agreements that enable land owners to make minor changes to management actions if those actions are required to improve biodiversity values. The change from the current arrangements would therefore seem to be relatively minor.

The Biodiversity Conservation Regulation specifies that minor variations to BSAs will be updated in the Register. However, it is not clear that the change encapsulated in the regulations will lead to improvements in the documentation of minor changes.

Variations to accommodate multiple new owners

The new provisions are intended to support variations to BSAs where there are new, additional owners (e.g. a property has transferred ownership to multiple owners following death or bankruptcy). These changes are more focused on resolving and streamlining the allocation of management actions and payments amongst the new owners for different parts of the site (where previously, only one person owned and had responsibility for managing the whole site).

In circumstances where a site is subject to a BSA, the proposed regulation allows the Minister to unilaterally vary the terms of the BSA after a process of negotiation and consultation to set out:

- which owners are required to carry out which management actions on the land, and
- which owners are entitled to what proportion of the management payments payable in relation to the site.

Effectively, these regulations allow the Minister to resolve disputes efficiently.

OEH's experience with situations involving multiple new owners of a site has highlighted the complexities, resulting in protracted negotiations over two years. Based on time estimates provided by OEH, we estimate that OEH's costs of dealing with a single case involving site splitting under the current arrangements could be more than $80 000 (table 4.2).

4.2 Estimated costs incurred by OEH on site-splitting case

	Time[a]	Estimated cost per day[b]	Total cost
	Days	$	$
Case Officer	50.00	870.41	43 521
Senior Legal Officer	20.00	797.64	15 953
Senior Team Leader	2.00	1 094.94	2 190
Financial Controller	0.75	1 582.09	1 187
Regional Director	3.00	1 582.09	4 746
Regional Staff	3.50	742.41	2 598
Approval of final variation by CEO	1.00	3 138.15	3 138
External legal review			10 500
Total			**83 833**

[a] OEH estimates. [b] See table 4.3 for details.

Source: CIE based on OEH estimates.

Daily salary estimates are based on the following.

- Annual salary estimates are based on publicly available information.
  - For non-SES OEH Officers, annual salaries are based on the average across the relevant Classification from the *Crown Employees (Office of Environment and Heritage and the Office of Environment Protection Authority) General Award 2015*.[23]
  - For OEH staff (assumed to be) at Senior Executive Service (SES) level, salaries are as reported in the OEH Annual report.[24]
    - For OEH staff (assumed to be) at SES Band 1 level, we use the average remuneration at this level.
    - For the CEO, we take the upper bound estimate for SES Band 3 level.
- Annual salaries for 2015/16 are inflated (by 2.5 per cent) to 2016/17 dollars and a on-cost multiplier of 1.75 is applied, consistent with the NSW Government Guidelines for estimating red tape savings.[25]
- To estimate daily savings, we divide the annual salaries (plus on-costs) by 230 working days per year (table 4.3).

4.3 Salary estimates

	Annual salary (2015/16)	Annual salary (2016/17) + on-costs[d]	Daily salary costs[e]	Hourly salary costs[f]
	$	$	$	$
Case Officer (Class 11)	111 607[a]	200 195	870.41	124.34
Senior Legal Officer (Class 9)	102 276[a]	183 457	797.64	113.95
Senior Team Leader (Class 14)	140 397[a]	251 837	1 094.94	156.42
Financial Controller (Senior Executive – Band 1)	202 860[b]	363 880	1 582.09	226.01
Regional Director (Senior Executive – Band 1)	202 860[b]	363 880	1 582.09	226.01
Regional staff (Class 8)	95 194[a]	170 753	742.41	106.06
Chief Executive (Senior Executive – Band 3)	430 450[c]	721 775	3 138.15	448.31

[a] Based on the average across the relevant Class from the *Crown Employees (Office of Environment and Heritage and the Office of Environment Protection Authority) General Award 2015*. [b] Based on the average remuneration in 2015/16 for Band 1 Senior Executives. [c] Based on the upper end of the range for Band 3 Senior Executives. [d] 2015/16 salaries are inflated by 2.5 per cent with an on-cost multiplier of 1.75 in line with the NSW Government's Guidelines for estimating red tape savings. [e] Annual salary (plus on-costs) divided by 230 working days per year. [f] Daily salary costs divided by 7 hours per day.

Source: Crown Employees (Office of Environment and Heritage and the Office of Environment Protection Authority) General Award 2015, pp. 16-17; Office of Environment and Heritage, *Annual Report 2015-16*, p. 117; NSW Government, *Guidelines for estimating savings under the red tape target*, February 2012, p. 13.

These estimates are based on a single case. The number of future cases and the extent to which the regulations will reduce these costs is not known.

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23 *Crown Employees (Office of Environment and Heritage and the Office of Environment Protection Authority) General Award 2015,* pp. 16-17.

24 Office of Environment and Heritage, *Annual Report 2015-16*, p. 117.

25 NSW Government, *Guidelines for estimating savings under the red tape target*, February 2012, p. 13.

To estimate the potential cost savings, we assume:

- the regulations reduced the cost by 50 per cent, and
- there will be one case of a protracted dispute relating to varying a BSA where there are multiple successors in title (e.g. where a property is divided following execution of a will) per year.

Under these assumptions, the cost savings for OEH could be around $43 000 per year or $323 700 in present value terms over 10 years, using a discount rate of 7 per cent. This excludes the impact on the costs for the other parties to the BSA.

Reimbursement of site establishment costs[26]

Under the BCA, the Minister may vary or terminate a BSA without the consent of the owner of the biodiversity stewardship site if a mining or petroleum authority is granted for the site and the Minister is of the opinion that the activity authorised by the mining or petroleum authority:

- will adversely affect any management actions that may be carried out on the land under the biodiversity stewardship agreement, or
- will adversely affect the biodiversity values protected by the biodiversity stewardship agreement.

Under the proposed regulation, the Minister may require the holder of the mining authority or petroleum authority to reimburse the Minister and the landholder's costs in establishing the BSA.[27] There are no corresponding regulations under the present regulatory framework.

The impact of the regulation are as follows.

- There is an additional cost to the holder of the mining authority or petroleum authority. Imposing additional costs on mining could potentially mean that some mining developments that would otherwise have been viable become unviable. However, the reimbursement requirements are likely to be small relative to the overall cost of developing a mine. The regulations are therefore unlikely to have much impact on the level of mining activity.
- The regulations would also result in a benefit to the Minister and the landholder. There are consultation requirements with Minister for Resources and Energy prior to entering into BSA.

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26 The exact costs will be a determined under the legal framework at a later stage based on the site-specific characteristics of the land. The RIS, therefore, should be interpreted as providing indicative costings.

27 The types of costs could include the cost to the landholder of engaging an accredited assessor to apply the BAM and support the landholder to negotiate an agreement. The cost of this service will vary depending on the size of the site, type of vegetation and accessibility of the site. As an example, based on recent experiences with BioBanking agreements, OEH estimates that an accredited assessor may charge between $12,000 and $20,000 for a 50 hectare site and up to $50,000 for a 200 hectare site.

As the regulations are unlikely to have much impact on the overall level of mining activity, these impacts are largely a transfer from the holder of the mining authority to the Minister and the land owner. This implies the net impact is zero.

The size of the transfer depends on the following factors.

- The number of BSAs that is varied or terminated due to the granting of mining or petroleum authorities. This is not known. However, the Minister for Resources and Energy must be consulted before a BSA is entered into. This is likely to limit the number of BSAs on land that will subsequently be released for mining activity
- The amount reimbursed if/when a BSA is varied or terminated.

Reimbursement provisions for Conservation Agreements

The only proposed regulations relating to Conservation Agreements are the reimbursement provisions in the event that a conservation area is varied or terminated (under s.5.23(7)) due to a mining or petroleum authority being granted that the Minister is of the opinion that the authorised activities:

- will adversely affect any management actions that are required or authorised to be carried out on the land under the agreement, or
- will adversely affect biodiversity protected by the agreement.

In these circumstances, the proposed regulations would allow the BCT to require the landowner to repay any amounts paid to it under the Conservation Agreement, which have not been spent or committed at the time the agreement is varied or terminated.

Similar to the reimbursement arrangements for BCAs, the regulations also provide for the holder of a mining authority or petroleum claim to reimburse the parties to a Conservation Agreement. In particular, the holder of a mining authority or petroleum claim may be required to pay to the Environment Minister (who must pass on the respective portions to the landowner and/or the BCT):

- the costs incurred by the Environment Minister, BCT and the landowner in establishing the Conservation Agreement, and
- any amount that the BCT has paid to the landowner (or previous landowner) in connection with the Conservation Agreement that the BCT is not entitled to recover from the landowner.

The circumstances where a holder of the mining authority or petroleum title may be required to reimburse the Environment Minister, the BCT and the landowner are as follows.

- If the Conservation Agreement was registered **after** the mining authority or petroleum title was granted then the Minister can only **request** reimbursement.
- If the Conservation Agreement was registered on title **before** the mining authority or the petroleum title was granted then the Minister can **require** reimbursement.

As above, the regulations are unlikely to have much impact on the overall level of mining activity. These impacts are therefore largely a transfer from the holder of the mining

authority to the Minister, the BCT and the land owner. This implies the net impact is zero.

The size of the transfer depends on:

- the number of Conservation Agreements that are terminated or varied due to the granting of mining or petroleum authorities (this is not known), and
- the amount reimbursed if/when a Conservation Agreement is terminated.

The regulations also allow the BCT to recover any unspent money in relation to the conservation area. Again, this is a transfer from the landowner to the BCT.

Fees

The proposed regulations also specify the fees in relation to BSAs. The fees are expressed in fee units, with the value initially set at $100 per fee unit. In general, the fees set out in the proposed regulations are significantly higher than the current fees (table 4.4), although the impacts will be negated by other fees (e.g. biobanking statements) that will no longer be payable. As an indicator of the quantum of existing fees that will no longer be required, the application fee for a Biobanking statement is currently $11 900.[28]

4.4 Change in fees relevant to BSAs

	Current fees	Proposed fees		Change
		Fee units	Fee[a]	
	$	No.	$	$
Entering into an Agreement	714	25	2 500	1 786
Terminating an Agreement	833	25	2 500	1 667
Varying an Agreement to create additional biodiversity offsets	1 309	65	6 500	5 191
Varying an Agreement to accommodate additional owners	1 309	105	10 500	9 191
Varying an Agreement for other purposes	1 309	15	1 500	191

[a] The value of a fee unit will be initially set at $100.

Source: OEH, OEH website, http://www.environment.nsw.gov.au/biobanking/participants.htm, accessed 6 February 2017.

Funding regulatory services through user charges can have several advantages over funding from general government revenue (see box 4.5). However, poorly designed cost recovery arrangements could potentially reduce economic efficiency, such as where fees and charges are not closely linked to costs.

[28] OEH website, http://www.environment.nsw.gov.au/biobanking/participants.htm, accessed 22 March 2017.

4.5 Cost recovery for regulatory services[29]

In general terms, regulatory services provided by government can be funded through general taxation revenue or through some form of cost recovery arrangement. A well-designed cost recovery arrangement can have several advantages over general taxation funding. These advantages include:

- improving efficiency by forcing people and businesses to take into account the cost of operating the regulatory framework in making their decisions
- improving equity by ensuring that the beneficiaries of a regulatory framework pay for it
- reducing the call on general taxation revenue, and
- instilling cost consciousness in regulatory agencies.

Higher fees are an additional cost to land owners, but additional revenue for OEH. The net impact of fee increases depends on whether the fees are cost reflective. We assume that the proposed fee structure better reflects the (efficient) cost to OEH of processing the relevant applications.

This implies that the fees were previously under-recovering the costs associated with processing applications. Where costs are under-recovered, it can encourage over-use of the regulatory system, such as:

- land owners applying to enter into an Agreement, where the overall costs of entering into the Agreement outweigh the benefits;
- land owners applying to terminate an Agreement, where the cost of terminating the Agreement outweighs the benefits to the community; or
- land owners applying to vary an Agreement, where the cost of the variation outweighs the benefits.

Therefore, if the proposed fees are broadly cost-reflective — implying they were not cost-reflective previously — the benefits of this change will outweigh the costs.

[29] Productivity Commission, 2001, *Cost Recovery by Government Agencies*, Inquiry Report No. 15.

5 *Ecologically sustainable development*

The *Biodiversity Conservation Act 2016* introduces a number of reforms to achieve ecologically sustainable development including:

- a new Biodiversity offsets scheme
- a new scientific method called the Biodiversity Assessment Method (BAM).
- establishment of the Biodiversity Conservation Fund
- expansion of Biodiversity Certification

Biodiversity Offsets Scheme

The Biodiversity Offsets Scheme, established through the Biodiversity Conservation Act, provides a legal framework for:

- assessment of the biodiversity impacts of development and gain at an offset site
- determination of offset obligations by the consent authority
- meeting offset obligations.

Currently, formal offset arrangements consist of the following mechanisms:

- NSW Biodiversity Offsets Policy for Major Projects – this is required through government policy, to be used for all state significant development and state significant infrastructure under the *Environmental Planning and Assessment Act 1979.* This policy requires the use of the Framework for Biodiversity Assessment to assess impacts.
- Assessment of whether the development is likely to have a **significant effect on threatened species, populations or ecological communities** (and their habitats) – this is required to be completed for all development requiring consent under the EP&A Act. Concurrence from OEH is required if a development will have a significant impact, offsets may be negotiated through this process.
- The **Biobanking Scheme** which proponents can choose to use to assess and offset the biodiversity impacts of their development. The BioBanking Scheme is available, on a voluntary basis, to any development under the EP&A Act.
- Requirements and guidance by **local councils** in Local Environmental Plans and biodiversity offset policies (this varies across local government areas).

Under the *Biodiversity Conservation Act 2016*, the offset requirement will extend beyond the current base case to include all Part 4 non-SSD development that exceeds thresholds specified in the regulations (chart 5.1).

The regulations specify the biodiversity offsets scheme threshold which contains two elements:

- ***Area trigger*** – specifies the maximum area of proposed clearing at which the offset scheme applies
- ***Areas containing sensitive biodiversity values***- development that occurs in areas containing sensitive biodiversity values as mapped by the Environment Agency Head trigger the threshold.

If either element of the BOS threshold is triggered the proponent must apply the BAM and offsets scheme.

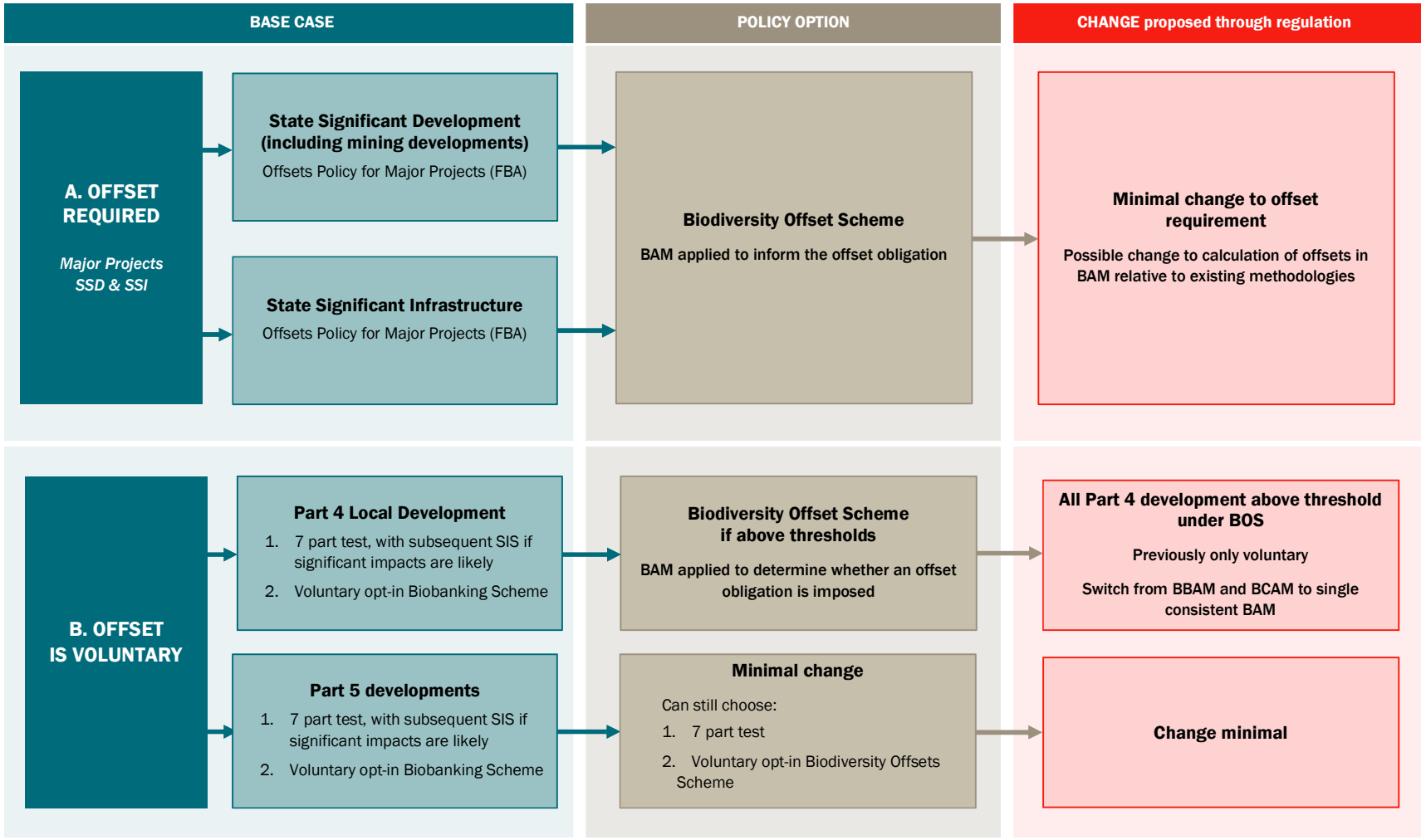
The biodiversity impacts of Part 4 local development are currently assessed by local governments who may choose to impose offset obligations as conditions of consent. The largest change associated with the Biodiversity Offset Scheme is for local developments that exceed regulated thresholds will be required to meet the requirements of the offsets scheme. This is a tightening of biodiversity conservation relative to the status quo where there is a range of assessment tools available to local government including:

- assessment of significance
- species impact statement
- biobanking statement
- consultation and negotiation during assessment
- flora and fauna surveys
- conditions of consent that require additional monitoring and assessment.

The proposed process for local development that exceeds the BOS threshold is set out in Chart 5.2 below.

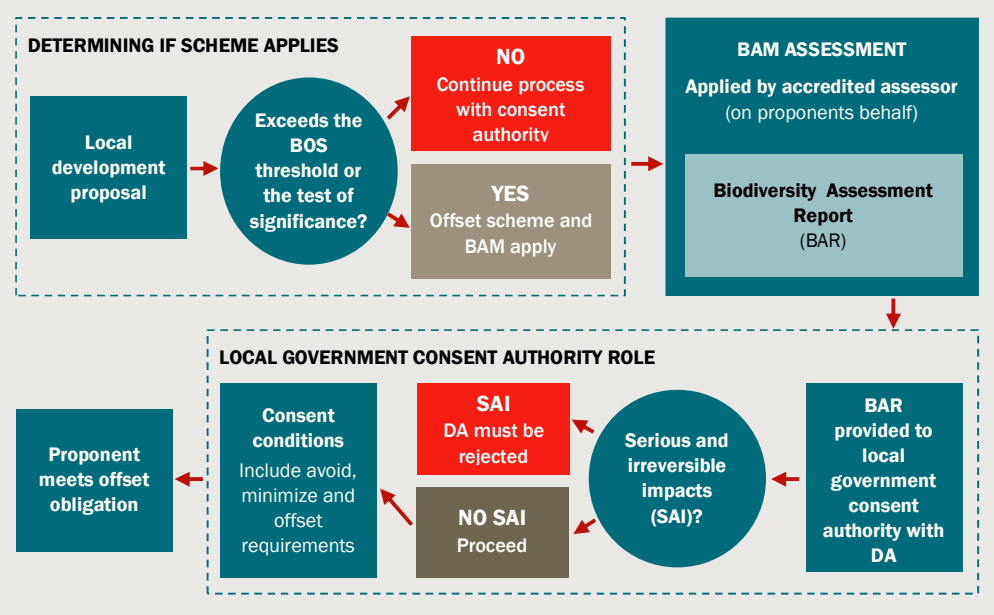
An analysis of the impacts of the thresholds specified in the regulation is discussed further below.

5.1 Offset requirement



Source: CIE.

5.2 Offsets scheme process flowchart



Source: NSW OEH

Biodiversity Assessment Method

Biodiversity impacts at a development site and biodiversity gain at an offset site will be measured by the single consistent Biodiversity Assessment Method (BAM) which replaces the various methodologies that currently exist to calculate offset requirements for the different development streams. The Biodiversity Assessment Method will provide consistency in the calculation of offset requirements from land clearing and the creation of credits at biodiversity stewardship sites.

Offset rules

The Biodiversity offset rules govern how offset obligations can be met, these rules include the like-for-like and variation rules. The proposed offset rules differ slightly depending on whether the offset obligation is to be met by a proponent, the BCT or through biodiversity certification. The offset rules, including the options available to each stream, are proposed in the regulations and discussed below.

Demand for and Supply of offsets

The expansion of the biodiversity offsets scheme will increase the number of developments that must offset their impacts. This will increase the demand for offset sites. The offset rules will determine the type of credits that can be used to meet offset obligations, in this way they will affect the offsets market. These combinations of effects

on supply and demand will affect the price of offsets which in turn will affect the cost of development.

Greater flexibility to meet offset obligations

The proposed offset rules provide greater flexibility for developers to meet offset obligations. In the case where like-for-like credits are not available, and this is clearly demonstrated by the proponent, developers can meet offset obligations using the variation rules. A proponent may make a payment to the Biodiversity Conservation Fund to satisfy an offset obligation at any time.

Establishment of the Biodiversity Conservation Fund

The *Biodiversity Conservation Act 2016* establishes the Biodiversity Conservation Trust (BCT) which will manage the Biodiversity Conservation Fund. Key functions of the Trust include negotiating, entering into and administering private land conservation agreements and managing payments into the Biodiversity Conservation Fund via the Biodiversity Offsets Scheme. Under the Act, proponents can meet offset obligations through payment into the Fund from which the Trust is obligated to find the necessary offsets. The BCT will also manage the establishment of BSAs and administer the agreements. The BCT will therefore become both an active search agent for suitable landholder suppliers of Biodiversity Stewardship Agreements and a purchaser of the credits generated by these agreements. It will be, in this way, more than a simple brokerage service. It will join a number of other third party participants in the market, including ecological service specialists, who are expected to continue to operate. Under the *Biodiversity Conservation Act 2016* the legal obligation to meet the offset obligation will also be transferred from the developer to the BCT.

With regards to the Biodiversity Offsets Scheme, it is expected the Trust will generate value through its ability to exploit economies of scale and scope, unavailable to individual developers, and it should also be able to reduce overall risks by maintaining a portfolio of offset obligations.

Offsets payment calculator

Under the Biodiversity Conservation Act, an offsets payment calculator will be used to calculate the appropriate price to charge individuals and organisations that meet offset obligations through either:

- funding a biodiversity action listed on the schedule
- making a payment to the Biodiversity Conservation Fund.

The components of the proposed calculator model include:

- an estimate of the cost of acquiring the necessary conservation management actions
- the relevant BCT administrative costs (including search-related costs and other administrative costs)

- and a risk premium.

The cost of credits for covering any individual transaction with a developer is inherently uncertain. Full cost recovery, while not generally assured on an individual basis, is assumed 'on average' in the design of the price calculator. There will be gains and losses on individual transactions but the risk management techniques employed by the Fund will need to ensure a non-negative return to the Fund as a whole. The challenge is to estimate the *expected* cost of securing the necessary offsetting credits.

Serious and Irreversible Impacts

The approval authority must consider any potential serious and irreversible impacts identified by the accredited assessors as part of a BAM assessment. The approval authority will determine whether there are serious and irreversible impacts by applying the legislative principles that will be set out in the Biodiversity Conservation Regulations and guidance that may be provided by the Chief Executive of OEH.

The implications of a serious and irreversible impact set out in the *Biodiversity Conservation Act 2016* and *Local Land Services Amendment Act* are outlined in the table 5.3.

5.3 Implications of a serious and irreversible impact

Type of proposal	Approval authority	Role of the decision maker
Local development (Part 4, non-state significant development or infrastructure)	Local government	Cannot grant development consent
State significant development or State significant infrastructure	Minister for Planning or delegate	Required to: ▪ take the serious and irreversible impact (SAII) into consideration ▪ determine if there are any additional and appropriate measures that will minimise the impact if consent or approval is granted
Part 5 activity	Public authority	Required to: ▪ take the SAII into consideration ▪ determine if there are any additional and appropriate measures that will minimise the impact if the activity is to be carried out or approved
Biodiversity certification	Minister for the Environment	Required to: ▪ take the SAII into consideration in determining the application ▪ determine if there are any additional and appropriate measures that will minimise the impacts
Approval for clearing native vegetation under section 60ZF of the LLS Amendment Act	Native Vegetation Panel	Required to refuse to grant approval

Source: OEH.

Assessor accreditation scheme

The *Biodiversity Conservation Act 2016* requires that BAM assessments be undertaken by assessors accredited to use the BAM. The Act also requires the Environment Agency Head to prepare a draft scheme for the accreditation of BAM users (s. 6.10). The *Biodiversity Conservation Act 2016* (s. 6.10(4)) also specifies that the accreditation scheme **may** (without limitation) include:

- the qualifications or experience required for persons to be accredited to apply the biodiversity assessment method
- the accreditation of Public Service employees or other persons
- the procedure for applying for accreditation
- the grant of accreditation and the conditions on which it is granted
- the period for which accreditation remains in force
- the renewal, variation, suspension or cancellation of accreditation
- the payment of fees for applications for the grant or renewal of accreditation (including periodic fees while an accreditation remains in force)
- the provision of information by accredited persons to the Environment Agency Head and other persons in relation to biodiversity assessment reports prepared by the accredited persons
- the integrity of biodiversity assessment reports prepared by accredited persons (including the audit of those reports and the establishment of protocols on the engagement of accredited persons to ensure the independent exercise of their functions), and
- the information that an accredited person is required to obtain from a person requesting a biodiversity assessment report.

No regulatory provisions for the accreditation scheme have been proposed in the draft Biodiversity Conservation Regulation.

Summary of expected impacts of regulations

Key impacts of the policy settings in the Biodiversity Conservation Regulations will result from:

- expanded scope of the Biodiversity Offsets scheme (as defined through the proposed thresholds)
- proposed offset rules.

A summary of the expected costs and benefits to relevant stakeholders for these key impacts are outlined in table 5.4. The detailed assessment of Biodiversity Offsets Scheme settings in the regulation is set out below.

5.4 Summary of key impacts

Stakeholder(s) impacted	Costs	Benefits
Biodiversity Offset Scheme threshold		
Major project proponents	▪ Minimal change in terms of scope of development requiring proponent to apply a scientific method and avoid, minimise and offset biodiversity impacts (as determined by the consent authority)	▪ Minimal change in terms of scope of development requiring offset
Local development proponent	▪ Potential increased cost for development that exceeds threshold due to requirement to apply BAM and avoid, minimise and offset biodiversity loss (as determined by the consent authority). The extent of impact will depend on the approach currently being adopted by local governments.	▪ Potential cost and time savings due to standard, certain method and consistent approach across LGAs
Part 5 proponents	▪ Minimal change unless reforms induce proponents to shift to Biodiversity Offsets Scheme	▪ Minimal change unless reforms induce proponents to shift to Offsets Scheme
NSW Government	▪ Increased administration and compliance cost from broadening biodiversity offset scheme	▪ Reduced costs from reduced negotiation on appropriate offsets (as this will be governed by the offset rules
Environment	▪	▪ More development captured under BOS leading to increased biodiversity conservation
Landholders	▪	▪ More development captured under BOS leading to additional income stream for landholders to provide offset sites
Changes to offset rules		
Developers (Major projects and local development)	▪ Tightening of some offset rules could potentially increase costs	▪ Cost savings related to reduced holding costs and search costs ▪ Potential savings to some increased flexibility in offset rules
Environment	▪ Increased flexibility of some offset rules could have an impact on local environment	▪ Some changes to offset rules will have environmental benefits

Source: CIE.

Matters covered by the regulations – Part 6

Division 6.1 General

Prescribed impacts of action

Under section 6.3 of the *Biodiversity Conservation Act 2016,* impacts of actions on biodiversity values are subject to assessment and offset. However, there are certain

impacts of action on biodiversity values that do not clearly relate to clearing of native vegetation. These impacts will be assessed by the BAM but will not be subject to calculation of a credit retirement amount.

The impacts of action that are prescribed by the proposed regulations for that purpose are:

- Impacts of wind turbine strike on bats and birds
- Impacts of development on threatened ecological communities or threatened species habitat associated with:
  - karst and geological features of significance, crevices, caves and cliff lines
  - surface and sub-surface rock
  - human made structures or non-native vegetation
- Impacts of development, including subsidence or upsidence resulting from development such as underground mining, on hydrogeological processes and water quality for sustaining threatened species and threatened ecological communities
- Impacts of roads and vehicle strike on threatened species or threatened ecological communities
- Impacts of development on connectivity and movement (as set out in 1(b) and (c) above) of threatened species or threatened ecological communities

For major development there is minimal impact from the proposed regulation relative to the status quo because there is no change to the existing methods to determine the offset required in these unique instances. It is unlikely that Part 4 local development will cause impacts of action as listed above and therefore there is also minimal change with regard to Part 4 local developments.

Offset rules under biodiversity offsets scheme

The biodiversity offset rules govern how offset obligations can be met. They include an overarching rule set, within which is specific like-for-like and variation rules. The offset rules in the proposed regulation differ slightly depending on whether the offset obligation is to be met by a proponent, the BCT or by a biodiversity certification applicant.

The offset options available to each stream are broadly outlined in table 5.5[30] Table 5.6 outlines the proposed like-for-like and variation rules. Proponents and biodiversity certification applicants can apply the variation rules in table 5.6 if like-for-like credits cannot be found after following reasonable steps, except in the case of critically endangered entities for which the variation rules cannot be used. In addition to the options set out in Table 5.6, proponents and biocertification applicants can also meet an offset obligation by making a payment to the Biodiversity Conservation Fund. This option is established through the *Biodiversity Conservation Act 2016* and so is not considered further in this analysis.

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30 This table is a simplified version of the proposed offset rules and does not include offset rules applicable to critically endangered entities.

5.5 Proposed offset rules

Offset rules for proponents	Offset rules for Biodiversity Conservation Trust	Offset rules for biodiversity certification
Retire like-for-like credits **or** Fund a biodiversity action that is listed in the BAM and will benefit the entity impacted, **or** Commit to mine site rehabilitation to create the same ecological community or threatened species habitat (for major mining projects only)	Retire like-for-like credits or fund a biodiversity action that is in the BAM and will benefit the entity impacted	Retire like for like credits, **or** For strategic biocertification only: ▪ secure land with like-for-like values using the additional offset options identified in the BC Act, **or** ▪ any other conservation measure declared by the Environment Minister (no restriction on the type of biodiversity that can be secured)
Retire credits under the variation rules (not available for certain entities listed by the Environment Agency Head)	Retire credits under the variation rules	Retire credits under the variation rules (not available for certain entities listed by the Environment Agency Head)
	Fund a biodiversity action that benefits the entity impacted (but the action is not listed in the BAM)	
	Retire credits under the variation rules from anywhere in NSW (i.e. remove location restriction)	

Note: Offset options are listed in order of preference.

Source: OEH.

5.6 Proposed like-for-like and variation rules

Ecosystem credits		Species credits
Threatened ecological communities	**Vegetation providing threatened species habitat**	**Threatened species habitat**
Like-for-like rules		Like-for-like rules
▪ **The same threatened community**, and ▪ **Hollow bearing trees must be offset with hollow bearing trees**, and ▪ Within the same IBRA subregion, or an adjacent IBRA subregion, or **an IBRA subregion within 100km of the impact site**	▪ The same vegetation class, and ▪ The same or higher offset trading group, and ▪ **Hollow bearing trees must be offset with hollow bearing trees**, and ▪ Within the same IBRA subregion, or an adjacent IBRA subregion, or **an IBRA subregion within 100km of the impact site**	▪ The same threatened species anywhere in NSW
Variation rules		Variation rules
▪ The same vegetation formation, and ▪ The same or higher offset trading group, and ▪ **Hollow bearing trees must be offset with hollow bearing trees or artificial hollows, and** ▪ **Within the same IBRA region or an IBRA subregion within 100km of the impact site**		▪ **Plants for plants and animals for animals, and** ▪ The same or higher listing status, and ▪ Within the same IBRA subregion, or an adjacent IBRA subregion, or **an IBRA subregion within 100km of the impact site**

*Note: B*old text shows changes compared to the current offsets rules for major projects.

Source: OEH.

Impacts for major developments

For proponents of major development the offset rules provide increased flexibility to meet offset obligations in some aspects of the rules and decreased flexibility in other aspects, relative to the status quo.

Consistent with the proposed offset rules, the current offset rules for Major Projects require proponents to locate like-for-like offsets, or where this is not possible and the proponent can demonstrate reasonable steps to locate like-for-like offsets have been undertaken, the proponent can apply the variation rules.[31] Where credits under the like-for-like and the variation rules cannot be found current offset rules allow proponents to fund actions that benefit biodiversity, termed "supplementary measures" – these are broadly equivalent to biodiversity actions, however, they do not need to be listed in the BAM.

The proposed offset rules allow biodiversity actions to be funded as a first option without needing to seek credits. However, the biodiversity actions listed in the BAM are unlikely to capture all supplementary measures that would be allowed under existing legislation. In addition the biodiversity action must benefit the entity impacted, supplementary measures that benefitted other biodiversity could be funded under existing arrangements.

The like-for-like rules and variation rules for ecosystem credits are slightly more restrictive than the status quo because they require the offsetting of hollow bearing trees, which did not previously need to be specifically offset.

There is no change to the like for like rules for species credits. The variation rules for species credits have been made more flexible and significantly simplified. The current variation rules for species credits are highly complex, with many attributes required to be met to find a matching credit. This was attempting to direct the offset toward protecting habitat similar to what was lost so that the offset would, still benefit for the species impacted. However, after further technical consideration OEH has indicated that, in practice, these additional requirements do not improve biodiversity outcomes and so are proposed to be simplified.

The location requirement under the like-for-like rules for ecosystem credits and the variation rules for species credits is slightly less restrictive than the status quo as a new option has been added where the offset can be located in an IBRA subregion that is within 100km of the development (even if it is not adjacent to the IBRA subregion where the impact occurs). This addresses the perverse situation where an offset site may be very close to the impact but still may not be in an adjacent subregion because some IBRA subregions are long and thin (as required under the current rules).

The variation rules for ecosystem credits also set more restrictive location requirements by requiring offsetting within the IBRA region (or any IBRA subregion within 100km of the impact site). This is different to the current rules which allow state wide offsetting.

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31 State of NSW and Office of Environment and Heritage, 2014, *NSW Biodiversity Offsets Policy for Major Projects.*

The increased flexibility provided by some areas of the proposed offset rules may reduce the offset cost for proponents through reduced holding and search costs, particularly for species credits. The extent of the reduced holding and search costs will depend on which offset option proponents choose based on:

- the market price for credits determined by the demand and supply of credits
- the supply of credits which will influence proponent's search time to identify offsets.

The increased flexibility for proponents to meet offset obligations may result in reduced biodiversity outcomes in some situation relative to existing rules, while the decreased flexibility in other areas of the rules may result in increased biodiversity outcomes.

Impacts for local developments

For local developments, the offset rules will create standard requirements for the type of offsets that must be secured to meet an offset obligation. This will increase certainty and consistency compared to the status quo of ad hoc assessment and offsetting requirements set by individual consent authorities.

Principles for determination of serious and irreversible impacts

The proposed regulations specify the principles to determine whether an impact is likely to contribute significantly to the risk of a species or ecological community becoming extinct, because the impact:

- will cause further decline of a species or ecological community currently observed, estimated, inferred or reasonably suspected to be in a rapid rate of decline, or
- will further reduce the population size of a species or ecological community which is observed, inferred, estimated or reasonably suspected to have a very small population size, or
- is an impact on the habitat of a species or ecological community which is observed, inferred or estimated to have a very limited geographic distribution, or
- is an impact on a species or ecological community that is unlikely to respond to management and is therefore irreplaceable.

Impacts of the proposed regulation will occur where Part 4 development is prohibited. The key impacts are lost development value and preserved biodiversity value. However, as noted earlier, proposals for State Significant Development, State Significant Infrastructure and Part 5 development and biocertification are not prohibited if they are likely to have SAII. Instead, the consent authority must take the SAII into consideration and determine if there are any additional and appropriate measures that will minimise the impact if the activity is to be carried out or approved

The SAII principles provide environmental benefits in that impacts that will cause further species decline are avoided for non-major projects and that appropriate measures are taken to avoid and minimise these impacts from major projects.

Division 6.2 Biodiversity assessment reports

Biodiversity assessment reports

The proposed regulations require proponents to prepare a biodiversity assessment report. The regulations specify the following to be included in the biodiversity assessment report:

- The class or classes of biodiversity credits that can be retired in accordance with the "like for like" requirement in the offset rules
- Details of any proposal to fund a biodiversity conservation action in accordance with the offset rules
- Details of any rehabilitation biodiversity conservation action proposed in accordance with the offset rules
- Date of report and certification under clause 6.15(1) of the *Biodiversity Conservation Act 2016*
- Details of the qualifications and experience of:
  - the accredited person preparing the BDAR, and
  - other person who has conducted research or investigations relied on in preparing the BDAR.

Major project proponents currently complete the above reporting requirements through preparation of a biodiversity assessment report and biodiversity offset strategy. Hence there is no change in terms of a proponent's reporting requirement compared to the current regulations. However, the proposed expansion in scope of the Biodiversity Offsets Scheme required under the *Biodiversity Conservation Act 2016*, will require a greater number of proponents to prepare biodiversity assessment reports. It is estimated that approximately 6.5 per cent of local development will exceed the BAM threshold and therefore need to prepare a biodiversity assessment report.

Division 6.3 Creation, transfer etc of biodiversity credits

Corrections in relation to credit descriptions

This proposed regulation allows the Environment Agency Head to update the register to capture changes to credit descriptions. There is no impact associated with this proposed regulation as changes to credits relate to terminology and not credit value.

Deferral of payment of total fund deposit until subsequent credit transfer

This provision relates to scenarios where credits are transferred to a different owner due to circumstances not relating to a sale, for example, where credits are transferred as part of the distribution of a deceased estate. The provision enables deferral of the payment of the total fund deposit until a subsequent transfer so that payment is not required when credits are transferred to a new owner in these special circumstances.

There is no impact from this proposed regulation.

Determination of total fund deposit

This proposed regulation replicates clauses in the *Threatened Species Conservation (Biobanking) Regulation 2008* with additional provision for determination of the total fund deposit where a variation to a stewardship agreement results in either of the following two scenarios:

- the total fund deposit is varied and new credits are generated
- the total fund deposit is increased and no new credits are generated.

The existing legislation enables the above two scenarios to occur but without clear instruction on the processes. The proposed regulation provides certainty and clarity around the process required to alter the total fund deposit when a stewardship agreement is varied. There is minimal to no impact from this proposed regulation.

Division 6.4 Biodiversity Stewardship Payments Fund

Biodiversity Stewardship Payments Fund

This proposed regulation largely replicates clauses from the *Threatened Species Conservation (Biodiversity Banking) Regulation 2008* and hence there is no impact.

Biobank sites that become national parks or other reserves

This proposed regulation replicates existing arrangements under the *Threatened Species Conservation (Biodiversity Banking) Regulation 2008* and provides an additional amendment to allow funds from a former BSA site to be used to manage the reserve in which that site is located and remove restriction to limit use of funds only to the site itself.

It is intended the flexibility to use funds beyond the site boundary for management actions within the broader national park/reserve will increase biodiversity outcomes through enhancements in connectivity and biodiversity located in the site and the surrounding area.

The potential increase in biodiversity value from this proposed regulation has not been quantified due to the uncertainty about how funds will be used in these scenarios and the change in biodiversity outcomes.

Annual or quarterly reporting and policy of indemnity insurance

This proposed regulation specifies that existing clauses 37, 38, 39 and 41 of the *TSC (Biobanking) Regulation 2008* are not to be replicated. These existing clauses require the Fund Manager to:

- prepare annual reports on its management of the Fund during the financial year including financial statements and accounts
- prepare quarterly reports that summarise the financial position of the Fund and the performance of investments of money vested in the Fund during the 3 months immediately preceding the quarterly reporting date
- take out and maintain a policy of indemnity insurance.

Under the proposed reforms reporting requirements are specified in the *Biodiversity Conservation Act 2016* which requires the Biodiversity Conservation Trust to prepare annual reports. There is no longer a requirement to prepare quarterly reports. The removal of the requirement to prepare quarterly reports will reduce government costs by approximately $10 000 per year.[32] This will represent a net saving if the annual reporting completed by the Trust provides the necessary information to stakeholders at a suitable frequency

This cost saving is due to the reform package as a whole, not to the regulations alone. Given the regulations do not specify any reporting requirements, there is no impact associated with this regulation.

Division 6.5 Fees and administration costs

Fees payable in connection with biodiversity offsets scheme and administration cost recovery

The proposed regulations also specify the fees in relation to the biodiversity offsets scheme. The fees are expressed in fee units, with the value initially set at $100 per fee unit. In general, the fees set out in the proposed regulations are significantly higher than the current fees (table 5.7), although the impacts will be negated by other fees (e.g. biobanking statements) that will no longer be payable. As an indicator of the quantum of existing fees that will no longer be required, the application fee for a Biobanking statement is currently $11 900.[33]

5.7 Fees relevant to biodiversity offsets scheme

Administrative activity	Current fees	Proposed fees		Change
		Fee units	Fee[a]	
	$	No	$	$
Transfer of biodiversity credit	119	15	1500	1 381
Retire a biodiversity credit	595	15	1500	905
Retire a biodiversity credit (without a Biobanking statement)	12 495			-10 995
Annual contribution of owner of biodiversity stewardship site	1 309	15	1500	191

[a] The value of a fee unit is initially set at $100.

Note: Current fees are for 2016-17

Source: NSW Office of Environment and Heritage, *Information for participants,* http://www.environment.nsw.gov.au/biobanking/participants.htm

The net impact of fee changes depends on whether the fees are cost reflective. We assume that the proposed fee structure better reflects the (efficient) cost to OEH of processing the relevant applications.

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32 Estimate of cost savings based on Class 10 OEH staff spending 3 days per quarter to complete quarterly reports. Estimate based on 230 working days per year and 7 hours per day. On-cost of 75 per cent has been included.

33 OEH website, http://www.environment.nsw.gov.au/biobanking/participants.htm, accessed 22 March 2017.

Therefore, if the proposed fees are broadly cost-reflective — implying they were not cost-reflective previously — the benefits of this change will outweigh the costs.

Provision for money to be paid into Biodiversity Stewardship Operations Account

This proposed provision replicates clause under the *Threatened Species Conservation Act 1995* enabling funds currently paid into the Biodiversity Banking Account, which are not specified in the *Biodiversity Conservation Act 2016*, to be paid into the Biodiversity Stewardship Operations Account. The Biodiversity Stewardship Operations Account replaces the Biodiversity Banking Account in the *Biodiversity Conservation Act 2016.*

There is no impact from this provision which enables transition from the existing to the new scheme.

Fees for assessing sites and preparing management plans

This proposed regulation enables the Environment Agency Head and the Biodiversity Conservation Trust to charge a fee in instances where government officers undertake BAM assessments and reporting on proposed stewardship sites or prepare management plans (other than as part of the assessment of an application). An equivalent provision is included in the Threatened Species Conservation (Biodiversity Banking) Regulation 2008.

The fees are not determined in the proposed regulations. The fees will not have a net impact if the fees are cost reflective.

Matters covered by regulations - Part 7

Biodiversity offsets scheme threshold

Under the proposed biodiversity reforms, all development (excluding Part 5 development) will be subject to the offset scheme where biodiversity impacts exceed the threshold.

The proposed regulations specify the two elements of the Biodiversity Offsets Scheme threshold. If either element is exceeded the threshold is triggered and assessment using the BAM is required. The two elements of the threshold are:

- area trigger (table 5.8)
- area containing sensitive biodiversity values as specified by a map published by the Environment Agency Head.

5.8 Area triggers for Biodiversity Offsets Scheme threshold

Minimum lot size	Area of clearing
Less than 1 hectare squared	0.25 hectares or more
Less than 2 hectares	0.5 hectares or more

2 to 39 hectares	0.5 hectares or more
40-9999 hectares	1 hectare or more
1000 hectares or more	2 hectares or more

Source: OEH.

Impacts for Part 4 Local Development

The BOS threshold will alter the assessment pathway for Part 4 local development. As noted earlier, currently Part 4 local developments can use a number of pathways for assessing the potential impact on biodiversity including completing a 7-part test to assess significance of impact on biodiversity or opt-into the biobanking scheme. Other pathways include, for example, preparing a species impact statement or conducting flora and fauna surveys.

The BOS threshold specified in this proposed regulation will apply to development that requires consent, and proposed clearing in areas covered by the State Environmental Planning Policy (Urban Vegetation) 2017. Part 4 local development that either exceeds the area trigger (table 5.8) or is located in an area of sensitive biodiversity values will be required to apply the BAM to determine whether an offset obligation is to be met.[34]

Analysis of a sample of local government areas suggests that between 1 per cent (in Coffs Harbour LGA) and 10 per cent (in Penrith LGA) of 2015/16 part 4 development applications (DAs) might trigger the BOS threshold. In total, of the 6 811 DAs reviewed, an estimated 6.5 per cent could trigger the threshold. In practice, developments can be redesigned to avoid the triggers if the triggers are known in advance. Therefore, the estimate of 6.5 per cent of DAs being subject to the trigger is likely to overestimate the impact.

The requirement for local development that exceed the regulated threshold to apply the BAM and satisfy offset obligations may increase the cost of 6.5% of local development.

The extent of impact will depend on the approach currently being adopted by local governments. Under the current legislative framework, developments and activities need to undertake an assessment of significance (commonly known as the 7-part test) to consider any likely significant effect on threatened species, populations or ecological communities, or their habitat. Where the assessment of significance finds that the development or activity is *likely* to have a significant effect, the proponent must also prepare a species impact statement (SIS). Alternatively, instead of submitting a SIS the proponent can choose to voluntarily opt-into the Biobanking Scheme.

However, there is variation across (and likely within) local governments in the way they apply the range of assessment tools. Many local governments have their own policies on biodiversity assessment and offsetting. For example, the Clarence City Council has its own published biodiversity offsets policy underpinned by their own assessment method,

34 The BOS threshold does not apply to exempt or complying development. The BOS threshold does not apply to clearing of vegetation in rural areas that does not require development consent under the EP&A Act. This clearing is subject to provisions in the *Local Land Services (Amendment) Act 2016*.

"avoid, minimise, mitigate, offset" hierarchy, "maintain and improve" standard and other principles. Lake Macquarie Council similarly has its own offset requirements and policies in a number of its assessment guidelines including the Biodiversity Planning Policy and Guidelines for (LEP) Rezoning Proposals, and the Flora and Fauna Survey Guidelines. Many others have offset policies, assessment guidelines and other relevant planning requirements.

The legislated BAM provides a standardised method for assessing biodiversity impacts and calculating offset obligations. This would have cost and time savings for developers, as they will no longer need to negotiate on an ad-hoc basis with consent authorities.

Impacts on the environment

It is anticipated the Biodiversity Offsets Scheme threshold (primarily the broadening to include Part 4 local development) will improve biodiversity outcomes. Where local development exceeds impact thresholds, associated biodiversity losses that would otherwise have occurred under the current system are more likely to be offset under the new system.

Amendment to list of vulnerable threatened species or ecological communities

This provision specifies that species impact statements that have already been signed do not need to consider, as part of the assessment of significance, amendments to the list of vulnerable species unless the activity has not commenced or approval for the activity has not been given within 12 months after the species impact statement is signed and publicly notified with the development approval.

There is no impact as proposed regulation replicates existing provisions in the *Environment Protection and Assessment Act 1979.*

Modification of an activity approved under Part 5 of the EP&A Act

This proposed regulation specifies the options for a modification of an activity approved under Part 5 of the *Environment Protection and Assessment Act 1979* for two different scenarios:

- Where the proposed modification will reduce the activity's overall impact on biodiversity values the proponent is not required to complete a species impact statement. This provision replicates an existing provision in section 110E of the *Environment Protection and Assessment Act 1979.* There is no impact from the proposed regulation.
- Where the proposed modification is likely to result in an increase in the activity's overall impacts on biodiversity values, a proponent has the option to elect either:
  - to voluntarily opt-into the biodiversity offsets scheme, or
  - submit a species impact statement.

This is also analogous to the existing arrangements.

There is minimal impact from this proposed regulation as it replicates existing provisions for the above two scenarios. The key difference is that proponents who can voluntarily choose to opt-into the biobanking scheme under current legislation will instead, under the proposed reforms, opt-into the new biodiversity offsets scheme.

6 Biodiversity certification of land

Current regulatory framework

The biodiversity certification scheme is established under Part 7AA of the *Threatened Species Conservation Act 1995* (TSC Act). The Minister may confer biodiversity certification on land if satisfied that biodiversity certification will improve or maintain biodiversity values. There are no specific provisions for biodiversity certification in the Threatened Species Conservation Regulations.

Biodiversity certification offers planning authorities a streamlined biodiversity assessment process for areas marked for development at the strategic planning stage. The process identifies areas of high conservation value at a landscape scale. These areas can be avoided and protected while identifying areas suitable for development. Biodiversity certification offers a range of secure options for offsetting impacts on biodiversity.

After biodiversity certification is conferred on an area of land, development may proceed without the usual requirement under the *Environmental Planning and Assessment Act 1979* for site-by-site threatened species assessment.

A central element to biodiversity certification is the establishment of the Biodiversity Certification Assessment Methodology (BCAM) under section 126S of the TSC Act. BCAM is made by order of the Minister for the Environment and published in the NSW Government Gazette. The method includes an operational and policy settings.

Currently only planning authorities can apply to the Minister to have biodiversity certification conferred over an area of land. Planning authorities must submit a biodiversity certification assessment prepared in accordance with the BCAM.

New regulatory framework

The *Biodiversity Conservation Act 2016* modifies the framework for biodiversity certification replacing the existing scheme in Part 7AA *Threatened Species Conservation Act 1995* (NSW).

The new aspects of the scheme introduced by the *Biodiversity Conservation Act 2016* are:

- introducing a new category of 'strategic' biodiversity certification
- removal of restriction that only planning authorities can apply to enable any proponent to apply for biodiversity certification. Both individuals and planning authorities can now apply for biodiversity certification
- transfer assessment methodology from BCAM to BAM to make consistent across all development types
- proposals declared to be strategic can use a broader range of conservation measures to address biodiversity impacts through either:

- securing land with like-for-like values using additional offset options identified in the BC Act, or
- any other conservation measures declared by the Environment Minister.

The reforms remove the requirement for individuals to seek approval for biodiversity certification via a sponsoring council. The new aspects under the *Biodiversity Conservation Act 2016* means biodiversity certification will be available in both urban and rural settings and to all scales of development.

The draft Biodiversity Conservation Regulation includes a range of provisions to support the new biodiversity certification scheme.

Matters covered by the regulations

Appendix A.1 outlines the proposed changes to the regulations for Part 8 of the *Biodiversity Conservation Act 2016* and the likely impacts and data required for analysis, where relevant.

Other approved measures

The proposed regulations will enable measures to avoid and minimise harm on biodiversity certified land to be specified as 'other approved measures' in a biodiversity certification order. Hence these measures count towards addressing the loss on the biodiversity certified land and are subject to various enforcement mechanisms under the *Biodiversity Conservation Act 2016.*

There is no material impact from this proposed regulation as the current regulations also allow the Minister to determine such measures to be conservation measures which can be identified in a biodiversity certification order.

Prescribed criteria for Minister to declare Strategic Biodiversity Certification

The *Biodiversity Conservation Act 2016*, section 8.5(2) states the Minister is to take into account the criteria prescribed by the regulations when making a declaration of Strategic Biodiversity Certification.

The proposed regulations prescribe the following criteria for the Minister to take into account when making a declaration under s8.5(2):

- Size of the area or areas of land proposed to be biodiversity certified
- The applicable strategic plan/s for the region and district within which the land, proposed to be certified is located
- Any advice provided by the Minister for Planning regarding the proposal, and
- Environmental, social and/or economic outcomes the proposal could facilitate.

These criteria are not prescriptive, rather they are broad criteria which provide the Minister with significant scope when declaring biodiversity certification as 'strategic'. Given the broad and unspecific nature of these prescribed criteria it is unclear the extent

of the impact this proposed regulation will have on developers and the environment more broadly.

Consultation with the local council

The *Biodiversity Conservation Act 2016* expands the scope of biodiversity certification such that individuals can apply for biodiversity certification.

The proposed regulations require applicants, who are not planning authorities, to give the local council notice of the biodiversity certification application in writing. The notice should provide the council with a copy of the biodiversity certification application and provide a minimum of 42 calendar days for any submissions from the planning authority on the application. Any submissions received should be given to the Minister for the Environment with a response from the applicant.

The proposed requirement to consult with local council is analogous to the public notification requirements in relation to an application in s126N of the *Threatened Species Conservation Act 1995,* however the requirement will be applied to a broader scope of applications under the proposed regulations.

Under the proposed regulations non-planning authority proponents have the option to apply for biodiversity certification. There are costs and benefits associated with a biodiversity certification. The requirement to consult with local councils will impose costs on applicants including:

- Cost to prepare notice for local council
- Cost to prepare response to submissions received from planning authority
- Holding costs to applicant equivalent to the time required by local council to review the biodiversity certification application, the regulation requires applicants to provide a minimum 42 calendar days for submissions.

These costs to the proponent due to the regulation must be considered alongside the benefits to the proponent of choosing the biodiversity certification pathway. Inherently, if a proponent chooses to apply for biodiversity certification the benefits to the proponent of this additional option under the Act outweigh the costs. Hence if non-planning authority proponents chooses to apply for biodiversity certification, then the provision in the Act and supporting regulations create a net benefit to proponents.

It is unknown how many non-planning authority proponents will apply for biodiversity certification.

Biodiversity certification agreements are to be published on a website

The proposed regulations require biodiversity certification agreements to be published on a website maintained by the Environment Agency Head. OEH currently maintains a public register of orders conferring biodiversity certification.

Given the existing requirement for OEH to maintain a public register of biodiversity certification land, there is no impact from this regulation.

Additional grounds for suspension or revocation of biodiversity certification

Under the proposed regulations the Minister will have discretion to suspend or revoke a certification and the power to modify a certification where the Minister is no longer satisfied that the approved biodiversity conservation measures adequately address the likely impacts on biodiversity values of the biodiversity certification of the land.

The Minister currently has powers to suspend, revoke and modify certification under Division 9 of Part 7AA of the *Threatened Species Conservation Act 1995*. Hence no impact is expected from this regulation.

Consultation with public authority prior to revoking a biodiversity certification order

The proposed regulations require the Minister to consult with the relevant planning authority prior to exercising power under s8.21 of the Act to suspend or revoke a biodiversity certification.

There is currently no requirement for the Minister to consult prior to exercising power to suspend or revoke under Division 9 of the *Threatened Species Conservation Act 1995*.

The impact of this regulation will depend on the number of cases where a Biodiversity Certification is suspended or revoked per year. To date there have been no cases where the Minister has suspended or revoked a biodiversity certification.[35] The potential impacts of the requirement to consult in the event the Minister exercises powers under s8.21 include:

- cost of consultation to government, State government on Ministers behalf and the relevant public authority
- improved communication between parties may reduce conflict resolution processes following a biodiversity certification being suspended or revoked.

It is anticipated the costs and benefits will potentially balance each other to achieve an overall no net impact.

Biodiversity certification assessment report to be current at time of extension

A biodiversity certification assessment relating to a proposed extension is required under s126ZB of the *Threatened Species Conservation Act 1995*. However Part 7AA of the *Threatened Species Conservation Act 1995* does not specify that the assessment report relating to the extension must be current at the time of the extension.

The proposed regulations require the biodiversity certification assessment relating to an extension to be current at the time of the extension. This is to ensure consideration of

35 Information provided by OEH.

new listings or listing upgrades in determining whether or not an extension be granted.[36] This proposed regulation will impose costs on developers to prepare/revise assessment and to government to review the additional assessment report. However this is only in the event that the relevant assessment repot in not current.

Minister to have discretion to consider any failures for an application for extension / modification

The proposed regulations give power to the Minister to apply discretion to consider any failures to comply with approved conservation measures or other measures under the biodiversity certification, when making a decision in relation to:

- whether to extend the period of that biodiversity certification, and
- modification of that biodiversity certification.

This provision in the regulation is a safeguard against continuing non-compliance with obligations to undertake conservation measures and seeks to incentivise individuals to comply with existing agreements in order to enable future extension/modifications to be approved. This regulation intends to exclude those not suited to long term responsibilities of biodiversity certification – similar to a fit and proper person test. The extent of this impact depends on the degree to which applicants currently do not fulfil existing agreements. For example, if all parties are currently fulfilling existing agreements then there is no impact from this regulation.[37]

Consideration of land originally set aside to avoid or minimise impacts

This provision relates to the case where a proponent wants to modify a biodiversity certification by extending the area of land that is certified. The provision enables the Minister to consider whether or not that extended area includes land that was originally set aside to avoid or minimise impacts on biodiversity values.

This provision prevents extension of biodiversity certified land into areas that were set aside in the original certification to avoid or minimise impacts without consideration by the Minister and additional conservation measures where required. The cases where this scenario may apply in the future are unknown, and hence the benefit of this proposed provision are not quantified.

Fees for a biodiversity certification application

The proposed regulations specify new fees for a biodiversity certification application made under Part 8 of the *Biodiversity Conservation Act 2016* of:

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36 Section 6.15 of the *Biodiversity Conservation Act 2016* sets requirements in relation to the currency of biodiversity assessment certification assessment reports. A report has to be submitted with an application within 14 days of the accredited assessor certifying it.

37 OEH has indicated that, to date, there has been a high level of compliance with the offset commitments in biodiversity certification strategies.

- $5000 for a biodiversity certification application
- An additional fee of $1000 for each 100 hectares above the initial 100 hectares

There are no current fees payable by planning authorities who apply for biodiversity certification. The proposed regulations allow proponents that are not planning authorities to apply for biodiversity certification. These proposed new fees reflect the administration cost to government to process applications from non-planning authority proponents.

The net impact of the proposed fees will depend on whether the fees are cost reflective. We assume that the proposed fee structure reflects the (efficient) cost to OEH of processing the applications.

7 Miscellaneous reforms

Regulations relating to public registers

The proposed regulation will set out detail about what information is to be included in certain registers.

The proposed Regulation establishes two additional registers that are not currently specified in the BC Act:

- biodiversity credits wanted, and
- stewardship site expressions of interest.

However, these registers are currently implemented administratively by OEH. Consequently, there is no change arising from the regulations.

Appendix

A Summary of matters covered by the regulations

The matters covered by the regulations are summarised in table A.1.

A.1 Matters covered by regulation

Part 1 Preliminary	▪ Name of Regulation ▪ Commencement ▪ Definitions ▪ Additional biodiversity values (section 1.5 of the Act) ▪ Fee unit for purposes of this Regulation
Part 2 Protection of animals and plants	
Division 2.1 Protection of marine mammals	▪ Definitions ▪ Interfering with marine mammals ▪ Approaching marine mammals ▪ Operation of prohibited vessels approached by marine mammals ▪ Operation of vessels that are not prohibited vessels ▪ Operation of aircraft in vicinity of marine mammals ▪ Feeding marine mammals ▪ Swimming with whales, dolphins or dugongs
Division 2.2 Defences and other exclusions	▪ Defences provided by adopted codes of practice (section 2.9) ▪ Emergency response in respect of marine mammals (section 2.9) ▪ Authority to liberate homing pigeons (section 2.6 (3)) ▪ Harming snakes (section 2.9) ▪ Authority to harm or pick in reserved areas etc under NPW Act (section 2.9) ▪ Authority conferred by property management plan under former TSC Act (section 2.9) ▪ Protecting distressed animals (section 2.9) ▪ Landholder possessing naturally occurring plants on the land (section 2.9) ▪ Picking protected plants on private land by or with consent of landholder (section 2.9) ▪ Buying, selling or otherwise dealing in plants obtained from commercial plant grower (section 2.9) ▪ Authorised import or export of protected plants (section 2.9) ▪ Possession or retail sale of meat and other products (section 2.9) ▪ Harm to swamphens, raven, crow, cockatoo or galah (section 2.9) ▪ Exclusion of certain animals from offence of dealing in animals (section

	2.5) ▪ Exclusions from defence for acts done by Aboriginal persons for domestic purposes (section 2.8 (1) (k)) ▪ Acts authorised by joint management agreements
Division 2.3 Biodiversity Conservation Licences	▪ Assessment of application for licence (section 2.17) ▪ Persons eligible to hold a licence (section 2.17) ▪ Standard application fee for licence (section 2.12) ▪ Time for dealing with application for licence (section 2.17) ▪ Time for appeal against licence decisions (section 2.6 (4))
Division 2.4 Management plans for protection animals and plants	▪ Environment Agency Head may make or adopt management plans (section 2.19 (2) (d)) ▪ Public consultation on management plans ▪ Biodiversity conservation licences may require compliance with management plans
Division 2.5 Miscellaneous	▪ Definition of "relevant instrument" ▪ Registration of persons or premises in relation to dealing in protected animals or plants (section 2.19 (2) (b)) ▪ Tagging of protected animals or plants (section 2.19 (2)) ▪ Keeping of records etc with respect to dealing in protected animals or plants (section 2.19 (2) (c)) ▪ Offences relating to registration, tagging and record keeping (section 2.19 (2)) ▪ Prohibition on breeding native waterfowl with non-native waterfowl section 2.19 (2) (a))
Part 3 Areas of outstanding biodiversity value	
Division 3.1 Criteria for declaration	▪ Criteria for declaring areas of outstanding biodiversity value (section 3.2) ▪ Minister to publish map of area and reasons area eligible to be declared etc
▪ Division 3.2 Little Penguin declared area	▪ Definitions ▪ Companion animals prohibited ▪ Anchoring, mooring and access by vessels ▪ Fishing ▪ Interference with burrows or nests ▪ Interference with Little Penguins ▪ Directions given by a designated officer ▪ Defences
▪ Division 3.3 Wollemi Pine declared area	▪ Definitions ▪ Operation of Division ▪ Closure by public notice ▪ Closure by order ▪ Directions given by a designated officer ▪ Defences

Part 4 Threatened species and ecological communities – listing criteria	
Division 4.1 Criteria for listing of threatened species	▪ Specific eligibility criteria for determinations by Scientific Committee of threatened species listings (section 4.4) ▪ Reduction in population size of species ▪ Restricted geographic distribution of species and other conditions ▪ Low numbers of mature individuals of species and other conditions ▪ Low total numbers of mature individuals of species ▪ Quantitative analysis of extinction probability ▪ Very highly restricted geographic distribution of species—vulnerable species
Division 4.2 Criteria for listing of ecological communities	▪ Specific eligibility criteria for determinations by Scientific Committee of threatened ecological communities listings (section 4.5) ▪ Reduction in geographic distribution of ecological community ▪ Restricted geographic distribution of ecological community ▪ Environmental degradation of ecological community ▪ Disruption of biotic process or interactions in ecological community ▪ Quantitative analysis of probability of collapse of ecological community ▪ Very small number of locations—vulnerable ecological community
Division 4.3 Interpretation of listing criteria	▪ Application of Division ▪ Establishing matters or things in criteria ▪ Mature individuals ▪ Geographic distribution ▪ Severely fragmented ▪ Extreme fluctuations
Division 4.4 Procedure for listing	▪ Publication of notice preliminary determination (section 4.13(3)(c))
Part 5 Provisions relating to private land conservation agreements	▪ Criteria for determining if land eligible to be designated as biodiversity stewardship site (section 5.7 (3)) ▪ Fees payable in connection with biodiversity stewardship agreements ▪ Fit and proper person requirements for owners of proposed biodiversity stewardship sites (section 5.8 (5)) ▪ Other grounds on which Minister may decline a request to enter into a biodiversity stewardship agreement (section 5.8 (6)) ▪ Determination that application to vary biodiversity stewardship agreement need not be accompanied by assessment report (section 5.11 (7)) ▪ Minor variations of biodiversity stewardship agreements without required consents or consultation (section 5.11 (8)) ▪ Splitting of obligations and entitlements where different successors in title of different parts of biodiversity stewardship site (section 5.13 (3)) ▪ Reimbursement of site establishment costs of owner or Minister by holder of mining or petroleum authority on termination of biodiversity stewardship agreement (section 5.18 (11)) ▪ Reimbursement provisions with respect to termination of conservation agreements following grant of mining or petroleum authority (section

	5.23 (10))
Part 6 Biodiversity offsets scheme	
Division 6.1 General	▪ Additional biodiversity impacts to which scheme applies (sections 6.3 and 6.6 (2)) ▪ Offset rules under biodiversity offsets scheme (section 6.4) ▪ Like-for-like biodiversity credits (section 6.4) ▪ Variation rules under biodiversity offsets scheme (section 6.4 (4)) ▪ Ancillary rules of Environment Agency Head for purposes of biodiversity offset and variation rules (section 6.4) ▪ Offset and other rules applying to Biodiversity Conservation Trust applying Fund money towards securing biodiversity offsets (sections 6.31 and 10.12) ▪ Principles applicable to determination of "serious and irreversible impacts on biodiversity values" (section 6.5 (1))
Division 6.2 Biodiversity assessment reports	▪ Content of biodiversity development assessment reports (section 6.16) ▪ Content of biodiversity certification assessment reports (section 6.16) ▪ Content of biodiversity stewardship site assessment reports (section 6.16)
Division 6.3 Creation, transfer etc of biodiversity credits	▪ Change of class of biodiversity credit (section 6.4 (2) (a)) ▪ Deferral of payment of total fund deposit until subsequent transfer (section 6.21 (6)) ▪ Determination of total fund deposit (section 6.21 (6) and (7))
Division 6.4 Biodiversity Stewardship Payments Fund	▪ Definitions ▪ Separate accounts to be kept in relation to each biodiversity stewardship site (sections 6.34 and 6.36) ▪ Account balances (sections 6.34 and 6.36) ▪ Payments from biodiversity stewardship site account that has an operational deficit (sections 6.34 and 6.36) ▪ Payments from biodiversity stewardship site account that has an operational surplus (sections 6.34 and 6.36) ▪ Payments from biodiversity stewardship site account that has insufficient funds to cover payment (sections 6.34 and 6.36) ▪ Termination of biodiversity stewardship site account (sections 6.34 and6.36) ▪ Biodiversity stewardship sites that become national parks or other reserves (sections 6.34 and 6.36) ▪ Fund to be kept separate from other accounts (section 6.36) ▪ Winding up of Fund (section 6.34 (5)) ▪ Establishment of committees to advise and oversee Fund Manager (section 6.36) ▪ Directions to fund Manager by Minister (section 6.36)
Division 6.5 Fees and administration costs	▪ Fees payable in connection with biodiversity offsets scheme ▪ Biodiversity offsets scheme administration cost recovery from participants in scheme (section 6.38) ▪ Additional money required to be paid into the Biodiversity Stewardship Operations Account (section 6.39 (3) (e))

	▪ Fees for services provided by staff of Environment Agency Head or Biodiversity Conservation Trust (section 6.6 (2))
Division 6.6 Miscellaneous	▪ Proof of retirement of biodiversity credits (section 6.6 (2))
Part 7 Biodiversity assessment and approvals under Planning Act	▪ Biodiversity offsets scheme threshold (section 7.4) ▪ Clearing of area of land that exceeds threshold ▪ Clearing within sensitive biodiversity values land map exceeds threshold ▪ Amendments to list of vulnerable threatened species or ecological communities (section 7.10) ▪ Modification of Part 5 activity (sections 7.8 and 7.17) ▪ Modification of activity where proponent obtained biodiversity development assessment report (section 7.17 (4))
Part 8 Biodiversity certification of land	▪ Avoiding or minimising impacts of clearing and loss of habitat may be specified as related other approved conservation measures in order conferring biodiversity certification (section 8.3 (3) (c)) ▪ Criteria to be taken into account by Minister when declaring strategic application [section 8 (2)) ▪ Consultation with local councils on biodiversity certification applications (section 8.26 (6)) ▪ Publication of biodiversity certification agreements (section 8.20) ▪ Additional grounds for suspension or revocation of biodiversity certification (sections 8.21 (2) (d) and 8.22 (4) (d)) ▪ Consultation with planning authorities on proposed suspension or revocation of biodiversity certification following strategic application for certification (section 8.21 (3)) ▪ Currency of biodiversity certification assessment report (section 8.26 (6)) 61 ▪ Extension of period or modification of biodiversity certification (section 8.26 (6)) ▪ Fees payable in connection with biodiversity certification (section 8.26 (6) (a))
Part 9 Public consultation and public registers	▪
Division 9.1 Public consultation	▪ Exclusion of Christmas/New Year period (section 9.6)
Division 9.2 Public registers	▪ Public register of biodiversity conservation licences (sections 9.7 (1) (a) and 9.11) ▪ Register of private land conservation agreements (sections 9.7 (1) (c) and 9.11) ▪ Public register of biodiversity credits (sections 9.7 (1) (d) and 9.11) ▪ Public register of accredited persons who apply BAM (sections 9.7 (1) (e) and 9.11) ▪ Public register of remediation orders (sections 9.7 (1) (h) and 9.11) ▪ Public register of biodiversity credits wanted (sections 9.7 (1) (j) and 9.11) ▪ Public register of biodiversity stewardship site expressions of interest (sections 9.7 (1) (j) and 9.11) ▪ Correction of public registers (section 9.11)

	▪ Additional authority for restriction of access to information in public registers (section 9.10) ▪ Transitional provision relating to information about licences, agreements and credits under repealed Act
Part 10 Biodiversity Conservation Trust	▪ Preparation and publication of Trust business plan (section 10.7 (5)) ▪ Additional matters to be included in the annual report of Trust (section 10.12) ▪ Combination of Trust annual report with annual report as Fund Manager of the Biodiversity Stewardship Payments Fund (section 6.37)
Part 11 Regulatory compliance mechanisms	▪ Terms of interim protection orders (section 11.9 (2)) ▪ Time for appeal against interim protection orders (section 11.13 (2))
Part 12 Investigation powers	
Part 13 Criminal and civil proceedings	▪ Penalty notice offences (section 13.5) ▪ Certificate evidence of additional matters (section 13.31)
Part 14 Miscellaneous	▪ Provisions relating to members and procedure of Biodiversity Conservation Advisory Panel (section 14.2) ▪ Biodiversity information programs (section 14.3) ▪ Additional persons to whom functions may be delegated by Minister or Agency Head (section 14.4)
Schedule 1	▪ Penalty notice offences
Schedule 2	▪ Provisions relating to members and procedure of the Biodiversity Conservation Advisory Panel

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