



Cumberland Bird Observers Club

PO Box 550, Baulkham Hills NSW 1755

www.cboc.org.au

30 March 2017

Re: CBOC Submission on the *Environmental Planning and Assessment Amendment Bill 2017*

Dear Sir/Madam,

Thank you on behalf of Cumberland Bird Observers Club (CBOC) for the opportunity to comment on the *Environmental Planning and Assessment Amendment Bill 2017*.

CBOC is a community organisation with about 500 members, interested in the observation and conservation of native birds and their habitats in NSW and wider.

The current *Environmental Planning and Assessment Act 1979* continues to favour developers and big business, and in many instances delivers harmful outcomes for the natural environment. The *Environmental Planning and Assessment Amendment Bill 2017* (draft Bill) has provided an opportunity to update and improve legislation which governs how future development should be planned in NSW, and which should also include more effective measures to prevent or minimise further damage to the State's natural environments and biodiversity caused by development. The redrafting should also establish means for augmenting the engagement of local and wider communities of people in planning decisions affecting biodiversity. (and other values).

As an organisation with a primary interest in wildlife conservation, CBOC opposes several proposals in the draft Bill that would be likely to weaken or hamper existing environment protection measures; or fail to use opportunities to improve protection; or unduly restrict the public's rights to reviews or challenges of decisions compared with the rights of development proponents. Proposals we consider deleterious (backward steps rather than improvements) are discussed below, with suggestions for improvement in some cases.

Objects of the Act

The EPA Act's current objects include 'to encourage ecologically sustainable development' (ESD), defined to include the key principles of ESD. The draft Bill proposes to change this to:

'facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment'.

The proposed object to 'facilitate' ESD would water down what the Act is intended to achieve, by interpreting ESD as a basic 'triple-bottom-line' approach to environmental planning and assessment.

We recommend that ESD be the overarching Object of the Act, instead of one of many equally-weighted objects.

Environmental assets

Reliable data on environmental assets and their condition is a vital input to decisions on strategic land-use planning and development, because environmental impact assessments (EIA) and evaluation are key functions of the NSW planning system. Numerous past expert reviews highlighted the under-investment in environmental data in NSW, and its lack of integration in planning frameworks. We consider this matter should be addressed as soon as possible, with extra resourcing that recognises its importance.

Community participation plans and principles

The adoption of these is a positive idea. However, it is proposed that planning authorities will only be required to consider the principles when formulating the participation plans, not when implementing them or to show how their plan complies. Further, the provisions of a community participation plan are only mandatory if a plan identifies them as mandatory. Plan obligations should be mandatory by default, unless otherwise identified in the exhibited draft Plan.

We understand that local Councils will be required to develop and publish new Local Strategic Planning Statements, which would outline a vision, planning priorities and actions for the local area, taking account of regional and district plans and the local council's Community Strategic Plan. The community's role in preparing these local statements should be clarified; its participation may often be important, not least on environment issues. The draft Bill has no mandatory community participation requirements relating to the statements.

Integrating Planning Act with biodiversity conservation laws and aims

The proposed Bill needs to include additional amendments to integrate biodiversity and ecological integrity as fundamental considerations across all decision-making processes. This is essential to implementing recommendation 15 of the Independent Biodiversity Conservation Panel's 2014 report (often referred to by Government), to ensure that biodiversity priorities are well embedded in State Environmental Planning Policies and regional plans.

Efficient approvals and advice from NSW agencies (concurrences)

We object to the proposal to empower the Planning Secretary to take the place of environmental agencies, including the Office of Environment and Heritage (OEH) or the EPA. Such a move would concentrate too much decision-making power in the Planning Department in cases where expert environmental advice or co-approval of decisions is important and/or appropriate.

Effectively, the draft Bill would permit the Planning Secretary to determine which agency should prevail in the event of a conflict, without reference to decision-making criteria. In such cases the Secretary could decide which agency's standard is preferred. This could well result in consistently lower environmental protection standards, a problem likely to be further exacerbated by the lack of clear environmental goals and targets in NSW.

A mooted "review" of referrals and concurrences to "identify unnecessary requirements and alternative tools to assess less complex risks" needs to be consultative, transparent, evidence-based, and clearly reasoned. The review should also consider the effect of changes to concurrences arising from the *Biodiversity Conservation Act* 2016. Any weakening of environmental concurrences would be regarded with much suspicion by the broad community.

Transferrable conditions

We understand this would allow development consent conditions to lapse after a certain time if they are ‘adequately addressed’ in conditions later imposed under other approvals (e.g. a pollution licence or mining lease). The language on this subject in the draft Bill is weak and not objective, and does not require equivalent standards, despite the apparent intent that transferred conditions will not permit greater impacts than the original consent. It is not made clear how this would work in practice.

If the notion of transferrable conditions were to be used, safeguards for environmental protection, transparency and consultation would be needed, such as:

- * requiring transferred conditions to *clearly maintain or improve on* the existing level of environmental protection;
- * requiring a mandatory public consultation process that is equitable to the community and the proponent.

A power to update consents would be a better alternative than the ‘transferrable conditions’ proposal. It would allow primary consent conditions to evolve with technology, updated monitoring data, other licences, and community expectations.

Merits review restrictions

The draft Bill most unfortunately perpetuates the current practice of removing third party (e.g. community) appeal rights when a ‘public hearing’ is held by the Planning Assessment Commission (PAC – to be renamed the Independent Planning Commission, IPC). The right of community members to appeal significant planning decisions ‘on the merits’ is an essential part of a good planning system and very important for promoting community confidence in planning and development assessment procedures. A proposal for the Minister to decide if third party appeal is allowed deprives the community of a fundamental avenue for review and participation in planning.

We note that ICAC has said that limitations on third party appeals mean ‘an important disincentive for corrupt conduct is absent.’ Public hearings are an inadequate substitute for a merits appeal in the Land and Environment Court.

Developers already enjoy much wider review and appeal rights than the community, even for ‘designated development’. The draft Bill actually increases this disparity, giving proponents new avenues for internal review of refusals or approval conditions for more complex projects, with no public input.

Major projects exempt from concurrences and refusal due to serious impact

Certain major projects, such as mining in an environmentally sensitive area, are automatically classed as “State Significant” because of the area’s significance and sensitivity. An Environmental Impact Statement is prepared, but perversely, the project becomes exempt from permits and expert consideration of impacts, including for threatened species (terrestrial and aquatic).

The new Bill should ensure that projects with the greatest impacts (often including State Significant Development and Infrastructure) receive the greatest scrutiny. We recommend clarifying the role of expert environmental agencies in assessing major projects. The community

needs to be assured that major projects – public or private – are not approved at excessive cost to other values, such as biodiversity.

Discretion to reduce required offsets, and approve serious impacts

Major projects (State significant Development and Infrastructure) should not be exempt from mandatory conditions to avoid, mitigate and (*as a last resort*) directly offset their impacts on biodiversity, threatened species and ecosystems. By their very nature, major projects often have the most significant environmental impacts. Any major project approval should therefore impose non-discretionary conditions to fulfill any offset requirements identified by the Biodiversity Assessment Method - BAM, and biodiversity assessment report.

"Serious and irreversible impacts" – a concept yet to be defined, and proposed to apply to the planning system once the *Biodiversity Conservation Act* 2016 commences – must act as a 'red flag' for unacceptable impacts to biodiversity. This test (not to be regarded as relevant only seldom) should consistently trigger mandatory refusal of both major and non-major projects, and also Part 5 projects, with oversight, advice or concurrence from OEH as to any relevant redesign or relocation. (We further consider "Serious and irreversible impacts" should be restated as "Serious OR irreversible impacts".)

Environmental Impact Assessment improvement for major projects

To increase objectivity of the new Biodiversity Assessment Method, independent environmental impact assessors should be allocated from a pool of accredited assessors to work on proposed projects. This process is critical to public assurance on lack of pro-developer bias, but the draft Bill does not enact it; so public distrust of the objectivity and accuracy of EIAs may continue.

Modern approaches to managing impacts

We have very strong reservations about the expanded use of offsets as a legitimate or effective means of managing the impacts of developments. There is significant scientific debate about whether offsets work in practice – that is, ensuring 'no net loss' of biodiversity. It is quite obvious that genuine "no net loss" can rarely be achieved. It is essentially restricted to cases where replacement habitat, of an area at least as great as that impacted, can be accurately re-created **and is ecologically functional before the original area is impacted.**

Recent proposed offsetting policy and practice in NSW (as outlined in the Biodiversity Offsets Policy for Major Projects and the *Biodiversity Conservation Act* 2016) has strayed alarmingly far from accepted offsetting principles. Proposals to: allow developers to pay money in lieu of finding physical offsets; count "promises" of restoring mature woodland on open-cut mines (a very long-term and difficult process) as equivalent to offsets; water down the "like for like" principle of offsetting; and failure (so far) to define conditions that will trigger refusal of impacts on threatened ecological communities or species - all these (and more) rob the NSW offsetting policy of credibility and legitimacy as a means of halting or even slowing the severe decline of wildlife in this State.

Expanded scope for internal review (for proponents only)

Proposals in the draft Bill that developers could be able to seek internal government review of decisions or conditions of consent that they don't like, while denying the community the right to

participate, appear as yet another "free kick" for developers and a way for them to try circumventing unwelcome environmental controls or limitations on their projects.

The reality with this proposal and some others in the draft Bill is that the community's rights to have input in planning decisions, and appeal rights in planning matters, continue to be actively curtailed, while proponents' review rights continue to be expanded. Not allowing community involvement in internal reviews would further reduce transparency, fairness and public confidence in decision-making, when the legislative changes ostensibly aim to do the opposite. Proposals for internal government reviews should be withdrawn.

We note that a number of the proposed changes in the draft Bill will require amendments to the EPA Regulations, and these should be publicly exhibited with opportunity to comment, before being finalised.

Conclusion

Instead of aiming to improve measures to safeguard environmental values (including biodiversity) alongside development projects, and promoting more effective community involvement in planning decisions, the draft *Environmental Planning and Assessment Amendment Bill 2017* frequently appears to promote the opposite. Proposed increased rights and opportunities for developers to appeal against rulings and avoid rigorous scrutiny of their projects contrast with diminished community appeal rights and opportunities to scrutinise proposals. This all points to a danger of less care being required in future to safeguard environment values (notably wildlife) during developments of all scales.

Similar themes of reducing protections for biodiversity (even including threatened entities), increasing rights for development interests, and/or limiting public input and involvement in important decision making, run strongly through various parts of other recent new legislation including that governing biodiversity conservation and native vegetation clearing (Local Land Services amendment).

New legislation or amendments reflect the values and attitudes of those with the power to write them at a given time. In the present case, we can only appeal to decision makers on planning policy to regard healthy environments (including clean water, clean air, and natural flora and fauna) as assets worth caring about and maintaining as much as human-centred infrastructure and money-making.

We request that the draft *Environmental Planning and Assessment Amendment Bill* be amended, in order to:

- Eliminate sections that give unfair advantage to development proponents (of all scales) or hamper public input or appeal rights.
- Ensure that decisions involving wildlife values are made on the basis of adequate, reliable data and expert opinion, and cannot be changed on the discretion of government members or bureaucrats.
- Ensure full environment assessment and approval processes are followed for all project types, including SSD, SSI and mines and gas extraction.

- Build in mandatory refusal of impacts on Threatened ecological communities.
- Avoid dependence on offsetting, especially less legitimate proposals.

Yours sincerely,

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