PIA NSW Submission into NSW Biodiversity Legislation Review

Introduction
The Planning Institute of Australia NSW Division (PIA NSW) is pleased to have the opportunity to provide a response to the Independent Biodiversity Legislation Review Panel Issues Paper dated August 2014. This submission builds from our initial response to the NSW Biodiversity Legislation Review provided to the Minister for the Environment on 14 August, 2014 (attached).

PIA NSW hopes this Submission will assist the Independent Review Panel in preparing the interim report to the Minister and we welcome the opportunity to engage with the Panel on any aspect of the submission.

This Submission focuses on the Issues Paper themes that have the most relevance to PIA NSW:

- Theme 1: Objects and Principles for Biodiversity Conservation
- Theme 3: Conservation in Land Use Planning
- Theme 4: Conservation in Development Approval Processes
Theme 1: Objects and Principles of Biodiversity Conservation

Recovery Plans

Recovery plans, as required under the Threatened Species Conservation Act 1995, are an effective mechanism for the ongoing planning and management of sites and species. Recovery plans should be prepared and finalised in a timely manner after a determination by the NSW Scientific Community, and should be reviewed regularly and assessed as to their efficacy by the Scientific Committee or their delegate. From a land use planning perspective, recovery plans should give greater certainty to the planning professionals. Recovery plans should articulate what potential, incidental and off-site impacts may arise due to development and give guidance as to how development can (or cannot) co-exist.

Theme 3: Conservation in Land Use Planning

Strategic Planning and Biodiversity Conservation

PIA NSW acknowledges that strategic planning is critical to facilitate and deliver biodiversity conservation.

Adequately implemented, strategic planning has the potential to ensure connectivity, protect areas and corridors with high biodiversity values, and identify sympathetic land uses within and surrounding conservation areas.

Unfortunately, strategic planning often occurs before any comprehensive biodiversity assessment is undertaken and therefore compromises the guidance and direction given to the local community and land-owners under the resultant strategies.

Biodiversity assessments should occur early enough in the plan making process as to ensure biodiversity values are identified early and properly considered, to inform strategic planning.

Biodiversity Information Available

Similarly in relation to plan making, at the time of preparing strategic plans, there is often fragmented or little information on areas of high terrestrial and aquatic biodiversity value. Often, such information becomes available only after plans are drafted or adopted. This creates the challenge to assess cumulative impacts from development resulting from the plan and the challenge of prioritising areas that should be protected by the plan and areas where resources would be better allocated.

Further, effects of climate change on biodiversity are often unknown, not well understood or not considered when undertaking strategic planning. Climate change effects such as changes on species migration patterns or corridors or habitat shifts should be considered in the strategic planning phase as strategic planning has the potential to facilitate the adaption of biodiversity to climate change.
Biodiversity information should be readily available in a central location and in an appropriate format to be used for and incorporated into the strategic plan.

Need for a more strategic approach

The current planning system tends to be more focused on sites and projects, which makes it difficult to look at biodiversity values and impacts on these values from a more strategic perspective. There needs to be integration between web / biodiversity corridors and strategic planning at various scales from state, to regional, to local government area / growth centre level.

PIA NSW notes the current metropolitan planning strategy (Draft Metropolitan Strategy for Sydney to 2031) contains limited recognition of biodiversity values unless these values are associated with environmental services or constraints to development (eg. water supply catchment, flood prone area). Strategic Regional Land Use Policies on the other hand, do acknowledge biodiversity values and challenges faced by these values (eg. New England North West and Upper Hunter Strategic Regional Land Use Plans).

Slow Biodiversity Assessment Process

Theme 3 of the Issues Paper states “Biodiversity certification offers planning authorities streamlined biodiversity assessment process for areas marked for future development at the strategic planning stage, along with a range of secure options for offsetting impacts on biodiversity”.

Feedback received from planning practitioners indicates that the process is far from fast and simple. There is an opportunity to improve the efficiency of the biodiversity certification process, for example, by improving the quality of mapping, data and surveys and having them in a centralised location and in a readily available format. The proposed E-Planning framework for NSW readily leads itself to this role.

Role of the NSW Scientific Committee and listing of Rare and Endangered Species and Communities

The objects of the Threatened Species Conservation Act 1995 and how this is informed by the nomination process, review and ongoing evaluation of determinations by the NSW Scientific Committee, should continue to support conservation.

The listing of species or communities needs greater coordination and, where justified, consistency in how communities are defined. For example some communities can be defined by the presence of just one species (for example Blue Gum High Forest) while others have a much broader definition, as would seem to be more appropriate from an ecological community perspective. For the planning profession this has and continues to lead to ambiguity and contestability as to if and how an area can be managed and or developed.

Broadening of the scope for protection of endangered species and ecological communities
There is an opportunity as part of these reforms to broaden the powers under the Threatened Species Conservation Act 1995 to include rare or endangered ecosystems (not just species and vegetation communities). This would support a higher degree of protection and management (through recovery plans). For example, such amendments could support the protection of hydraulic catchments that provide significant biodiversity benefit and serve as examples of otherwise underrepresented or ‘endangered’ landscapes.

**Theme 4: Conservation in Development Approval Processes**

*Development Approval Process and Biodiversity Assessment*

It is unclear within the planning assessment and approval process how biodiversity impacts have been avoided or minimised whenever possible before considering the alternative of compensation to avoid net losses. The legislation review should provide clear guidance to development assessment practitioners, that are considered reasonable alternatives to avoid and minimise clearing before proposing clearing and biodiversity losses in accordance to the mitigation hierarchy principles (that is, firstly avoiding impacts, secondly minimising impacts and lastly offsetting residual impacts). PIA NSW believes the proper application of mitigation hierarchy principles in the development approval process is instrumental in delivering good biodiversity outcomes.

The current biodiversity system is species / ecological communities focussed). Although there is some value in identifying vulnerable or endangered species / ecological communities within their own context, ecological conservation can only be effective if the support environment retains integrity to conserve the greater eco-system.

**Achieving ESD goals**

Biodiversity values should be one of the matters to be considered to deliver broader ESD goals. In some cases, the broader social and economic benefits of a development (eg. a public transport or essential infrastructure project) outweighs the loss of biodiversity values resulting from the project by ultimately resulting a in a triple bottom line that delivers ESD goals.

In other developments however (eg. mining or housing development) the achievement of ESD goals through the loss of biodiversity values may be less clear.

In this regard, it would be critical that the legislation review results in clear guidelines / principles as heads of consideration on what is acceptable or not in terms of loss of biodiversity values, when it comes to determining an application on its merits. The *Warkworth Mining Limited and Anor v Bulga Milbrodale Progress Association Inc* (2014) Land and Environment Court decision may be a good starting point to define such guidelines / principles.

**Biodiversity Offsets**

Biodiversity offsets result in an offset ratio to be implemented, but there is a need for long-term monitoring that these ratios actually deliver the necessary environmental conditions to effectively provide for species / ecological communities' retention and importantly, continued proliferation. Adequately implemented, Biobanking is a good way to ensure long term monitoring and reporting is carried out.
Legislation review should provide encouragement for project’s proponents, where biodiversity values are impacted to think, outside the box, with regards to management and offsetting and not just rely on land based offset options. The current offset system requires that 90% of an offset must be land based with an allowance of 10% for non-land based options. Such prescriptive requirements do not encourage innovative thought on how impacts to biodiversity can be offset in the context of the specific project impacts on both the local environment and the sub regional and regional environment. Greater flexibility should be provided in the ways offsets can be delivered and at the same time such flexibility should not compromise the biodiversity offset aims and principles.

Offsets should not be narrowly focussed on ratios. The ecological outcome is what is important and step ratios can then be identified to achieve the outcome. We recommend an ecological outcome focus in order to develop a suitable ratio to achieve this.

Commonwealth and State Approval Processes

In light of the proposed bilateral agreement with NSW and Commonwealth which will accredit NSW to oversee both the assessment and approval processes for projects that have to be considered under the EPBC Act, there needs to be a clear process as to how Commonwealth MNES would be addressed in State systems to ensure that matters of National Environmental Significance are properly assessed.

Currently, bilateral agreements apply on a case by case basis and only for certain projects. Bilateral agreements should be rolled out to ‘Part 4’ developments so they can benefit and streamline EPBC approvals.

A single strategic assessment that adequately assesses potential impacts that met both Commonwealth and State assessment processes is supported by PIA NSW.

Exclusions

The protection of life and property remain key considerations for planning and development. However there is need to consider how these can co-exist with exclusions such as the Rural Fires Act 1997 permitting the clearing of vegetation around dwellings without approval. While the government has identified the need to remove or lessen red tape as part of its terms of reference for this review, there is an opportunity to examine how a more balanced position can be arrived at with respect to balancing the permissibility for clearing for the purpose of minimising bush fire risk and how this may affect listed species or communities at a local and regional scale. Such consideration should examine new and existing development.
PIA NSW initial response to NSW Biodiversity Legislation Review

Minister Stokes

PIA NSW would like to thank you for the opportunity to review and respond to the NSW Biodiversity Legislation Review.

PIA NSW will be providing a more comprehensive response to the legislation review by submission closing date of 5 September 2014.

However PIA NSW felt that it may be of benefit to the Legislative Review Committee to initially consider the attached principles that PIA NSW believes should apply throughout the NSW biodiversity legislation review and any resulting deliverables,

Should you have any questions please direct them to Mr David Ryan, President PIA NSW via the PIA NSW State Manager; nswmanager@planning.org.au or phone 02 8904 1011.

Please find the document referred to above.

Kind Regards

Christopher McRostie
PIA NSW State Manager
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<th>The legislation review and any resulting deliverables should:</th>
<th>Key matters to be considered</th>
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<td><strong>1. Have ability to proactively and quickly respond to changing circumstances without endlessly changing the Acts</strong></td>
<td>The rate of change (even in the quantum of science behind the legislation, policy, guidelines, etc), needs to be accommodated in the structuring of the Act/regulation/policy objectives.</td>
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<td><strong>2. Promote the sharing and easy access of information</strong></td>
<td>Often there is fragmented collection of information in regard to specific area, issue, project or assessment with no central collation of that information.</td>
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| **3. Have a logical structure and easily understood provisions. Roles and responsibilities of decision makers are logically and clearly defined. It should promote and facilitate transparency in decision making** | • Any amended legislation should have a structure easy to follow and deal with a particular matter in a single section avoiding the need of cross referencing  
• Updated legislation should streamline the roles and responsibilities of government authorities and ministerial portfolios  
• Decisions should be based on merits rather than legalities, and outcomes rather than processes. In this regard, it would be critical that the legislation review offer clear guidelines / principles as heads of consideration as to what is acceptable or not (particularly if mining is the proposed activity in regional centres and in housing expansion for urban centres such as Sydney). |
| **4. Encourage and facilitate an approach to biodiversity from a more strategic perspective** | • Existing situation emphasises sites and projects  
• Biodiversity management should be based on strategic plans and assessments  
• Strategic focus will provide a better understanding of the necessary requirements to achieve the effective conservation of biodiversity  
• There should be facilitation of effective measures to promote the value of the biodiversity conservation in sustainable development. |
| **5. Facilitate and encourage procedures that promote co-operative rather than adversarial decision making** | • Legislation review and deliverables should facilitate and encourage a collaborative approach within and between levels of government, agencies and stakeholders  
• It should facilitate and encourage innovative approaches for achieving desired biodiversity outcomes. |
| **6. Achieve a seamless integration with Commonwealth biodiversity legislative requirements** | • Bilateral agreements currently apply to selected types of development.  
• Bilateral agreements should be rolled out for all types of development and the process to follow streamlined and tuned |
| **7. Allocate appropriate resources for implementation** | One of the guiding principles in the terms of reference is ‘a focus on devolution to regional and local levels’. The review needs to ensure local government authorities are appropriately equipped and resourced to meet any additional responsibilities resulting from the legislation review |
| **8. Ensure that biodiversity planning is compatible with and informs spatially based land use planning and assessment** | • Integration between green web/biodiversity corridors at various scales (local/regional/national) is needed  
• The significance of any protection and or compromise of biodiversity outcomes related to an activity (with or without consent) must be cognisant of connectivity and recoverability (particularly in the case of listed species or communities). |
| **9. Reinforce the mitigation hierarchy principles (that is, firstly avoiding impacts, secondly minimising impacts and lastly offsetting residual impacts)** | The mitigation hierarchy principles are relevant in the context of protecting biodiversity and in particular listed threatened communities and threatened species. |
| **10. The complexity of processes should be proportionate to the complexity of the issue** | • Current biodiversity legislation comprises of stand-alone silos  
• There is an opportunity to improve the level of integration of Acts, policies, etc. to ensure that where they have a pervasive influence, they should not conflict or add complication across other legislation. |