

The new regime for assessing and
managing biodiversity impacts
associated with State significant
development: a critical review

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The challenge of legislative drafting ...

- P P Craig, *Legislative drafting* (Butterworths, 4th ed, 1996) p 128
 - *The process of drafting a law has as much in common with the children's game of snakes and ladders. The aim is the same of proceeding uninterruptedly from start to finish, preferably with bursts of acceleration. In both cases, that aim is rarely realised. The player lands on a snake and slithers down to a position she hoped she had passed for good. The drafter encounters problems – perhaps gains a clearer understanding of instructions or realises the draft just will not work – and must slither back to an earlier stage, perhaps to begin again. Too often the instructing officer pulls the ladder away by varying the instructions and deposits the unfortunate climber at its foot in an irritated heap. One must not press the analogy too far. Snakes and ladders is a game of chance. Drafting legislation is a game of skill.*



New regime for assessing and managing biodiversity in NSW

- *Biodiversity Conservation Act 2016 (NSW), Biodiversity Conservation Regulation 2017 (NSW) and the Biodiversity Conservation (Savings and Transitional) Regulation 2017 (NSW)*
- Commencement on 25 August 2017
- Extensive and complex reforms
- Key features included
 - New ways to assess and manage the biodiversity impacts of development
 - Streamlined approvals and dedicated resources to help reduce the regulatory burden

Focus and structure of presentation

- Examine the new process to be followed for assessment and management of biodiversity impacts associated with State significant development (**SSD**)
- SSD = very large development with a capital investment value of several million dollars (e.g. mining projects, new hospitals or educational establishments, etc)
- Three main parts:
 1. Identify key features of the "old regime"
 2. Identify key features of the "new regime"
 3. Reflect on critical observations made in the first and second parts and summarise key points



Part 1: Key features of the "old regime": An overview

- Legislative regulation split (unevenly) between the *Environmental Planning and Assessment Act 1979* (NSW) and the *Threatened Species Conservation Act 1995* (NSW)
- Established "a procedure for identifying and assessing the impacts of proposed activities [or development] on threatened species and their habitats, and then give the relevant decision-maker ... a discretion as to whether to permit the development or activity to proceed": see Robinson and Bland, "Biodiversity" in Williams (ed), *The Environmental Law Handbook* (Thomson Reuters, 6th ed, 2016) p 562.
- Process for assessing and managing biodiversity impacts involved eight main steps

Part 1: Key features of the "old regime": Eight main steps for assessment and management of biodiversity impacts of SSD

1. Secretary of DP&E would issue her environmental assessment requirements (**SEARs**)
2. SEARs would usually contain general requirements for assessment of biodiversity in accordance with the Framework for Biodiversity Assessment (**FBA**) and the requirements of OEH, as well as a requirement for the proponent to develop a strategy to offset residual impacts in accordance with the NSW Biodiversity Offsets Policy for Major Projects (**Offset Policy**)
3. OEH's requirements would be attached to the SEARs, and would contain some project specific requirements for biodiversity assessment
4. Proponent produces EIS with biodiversity assessment
5. EIS would contain proposed biodiversity offset strategy
6. Public exhibition and submissions
7. Proponent responds to the submissions received
8. Consent authority determines whether to grant development consent and, if granting consent, prepares conditions of that consent addressing biodiversity.

Part 1: Key features of the "old regime": Critique

- Criticism as being highly discretionary and ad hoc:
 - Robinson and Bland (2016)

... [T]he 'State Significant Development' and 'State Significant Infrastructure' processes that replaced [the Part 3A regime] retained the Part 3A characteristic that there [was] no legal obligation to prepare an SIS or participate in biobanking. Rather, biodiversity protection in the assessment of major project proposals [remained] a matter for ad hoc, discretionary determination.



NB: "Discretion" is difficult to represent visually, although Professor Dworkin suggests a doughnut is a good starting place: "Discretion, like the hole in the doughnut, does not exist except as an area left open by a surrounding belt of restriction": see Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) p 31.

Part 1: Key features of the "old regime": Summing up

- Robinson and Bland (2016) (emphasis added):
 - *An unwanted by-product of the difficulty of evolving a development assessment system that filters out unsustainable projects or aspects of projects is that the regulatory system has become inordinately complex. Numerous, separate assessment pathways currently exist for development that impacts on biodiversity: the NV Act for rural land clearing proposals, SIS requirements for some high impact projects (such as large, coastal subdivisions), but not others (such as State significant development), and offsetting policies that await legislative backing (for example, the NSW Biodiversity Offsets Policy for Major Projects (September, 2014)). It is hoped that the proposed new Biodiversity Conservation Act can integrate and simply the current regulatory silos.*

Part 2: Key features of the "new regime"

- Two main parts of relevance to SSD
 1. Part 6 of the BC Act, addressing the Biodiversity Offset Scheme
 2. Part 7 of the BC Act, addressing the biodiversity assessment and approval process under the EP&A Act, and its interaction with the requirements of the BC Act.

Part 2: Key features of the "new regime": Part 7 of the BC Act

- Section 7.9

(1) This section applies to:

(a) an application for development consent under Part 4 of the [EP&A Act] for State significant development

...

(2) Any such application is to be accompanied by a biodiversity development assessment report unless the Planning Agency Head and the Environment Agency Head determine that the proposed development is not likely to have any significant impact on biodiversity values.

(3) The environmental impact statement that accompanies any such application is to include the biodiversity assessment required by the environmental assessment requirements of the Planning Agency Head under the [EP&A Act].

Part 2: Key features of the "new regime": Part 7 of the BC Act

- Upshot: absent both Agency Heads determining that the project is not likely to have any significant impact on biodiversity values, the new biodiversity offset scheme in Part 6 of the BC Act will generally apply because of the requirement in s 7.9(2) of the BC Act for the SSD DA to be accompanied by a BDAR. The BDAR needs to be prepared by an accredited person.
- Sections 7.14 and 7.16 of the BC Act impose obligations and powers on the "Minister for Planning" to consider or do certain things.
- These sections offer useful examples of where the legislators and legislative drafters with responsibility for the BC Act have struggled to ensure consistency in interactions between the BC Act and the EP&A Act
- Section 7.17 of the BC Act: modifications

Part 2: Key features of the "new regime": Part 6 of the BC Act

- Section 6.2(i) of the BC Act:
 - (i) The determination in accordance with principles prescribed by the regulations under this Act of serious and irreversible impacts on biodiversity values. The determination of such an impact by the relevant decision-maker will prevent the grant of planning approval for proposed development, but the determination will only be required to be taken into consideration in the case of State significant development ...*
- "Serious and irreversible impacts"
 - Echoes of the precautionary principle, but not quite the same
 - Application to SSD vs non-SSD, ordinary Part 4 development
 - What does the threshold mean, and how does one assess it?

Part 2: Key features of the "new regime": Part 6 of the BC Act

- Section 6.3 – identification of the specific impacts on "biodiversity values" that attract the application of the biodiversity offset scheme
- Section 6.5 – determination of "serious and irreversible impacts"
- Part 6, Divisions 4 and 5 – creation and transfer of biodiversity credits, and retirement of biodiversity credits
- Part 6, Divisions 6 to 8 – financial aspects of the biodiversity offset scheme
- Section 6.12 – the meaning of the BDAR and matters to be addressed

Part 2: Key features of the "new regime": Part 6 of the BC Act – the BAM

- Section 6.7 – establishment by the Minister of the BAM
- Section 6.8 – matters to be addressed by the BAM
- BAM has three primary stages:
 - Stage 1: "establishes a single consistent approach to assessing the biodiversity values on land ... [including] land proposed as a development site";
 - Stage 2: "impact assessment on biodiversity values where the land is a development site ... This stage includes the guidelines and requirements that apply the avoid, minimise and offset hierarchy for assessing direct and indirect impacts";
 - Stage 3: "assessment of the management requirements at a proposed biodiversity stewardship site and the likely improvement in biodiversity values that are predicted to occur over time"

Part 3: Concluding observations

- JB Ruhl, "Thinking of environmental law as a complex adaptive system: How to clean up the environment by making a mess of environmental law" (1997) 84 *Houston Law Review* 933, 941.

While many practitioners and commentators consider environmental law a mess, they mean so principally in the sense that it is a top-heavy, recondite infrastructure of regulatory prescriptions designed to centralize power, divide issues into sub-sub-sub issues, tightly manage outcomes, and thereby generally confuse every person responsible for enforcing or complying with its requirements. That mess – that nonadaptive heap of prescriptive and proscriptive commandments – has cut through the kind of messiness we need in environmental law. The adaptive, dynamical, sometimes chaotic forces found in complex adaptive systems must be present if the legal system is to respond effectively and creatively to the very same qualities present in the environment and society.

Part 3: Concluding observations

- Too early to assess the effectiveness of the new regime but, based on my experience so far:
 - the new regime appears to reflect the former type of (undesirable) mess referred to by Ruhl
 - there is a real danger that the new regime will likely prove to be ineffective in three main respects:
 1. Inefficient to apply and administer due to poor and ambiguous drafting
 2. Impractical for stakeholders to understand and work with (although that might improve over time)
 3. Incapable of delivering on at least some of the objectives that are set down in the BC Act and the EP&A Act