



Biodiversity Certification

by Holly Park

Biodiversity certification is a strategic, landscape scale approach to determining areas suitable for development and areas of high conservation value that require protection at an early stage in the planning process. Biodiversity certification switches off the requirement for site-by-site threatened species assessment for subsequent development.

Biodiversity certification was introduced in 2004 amendments to the *Threatened Species Conservation Act 1995* (TSC Act). Parliament is currently considering a Bill that would amend the biodiversity certification process: the *Threatened Species Conservation Amendment (Biodiversity Certification) Bill 2010*. This paper provides a brief overview of biodiversity certification under the current and proposed regimes.

1 THE CURRENT REGIME

The *Threatened Species Legislation Amendment Act 2004* introduced biodiversity certification into the TSC Act, with the relevant provisions commencing in October 2005.¹ The rationale for biodiversity certification is that biodiversity assessment is undertaken at the strategic planning phase, rather than on a site-by-site basis, providing greater certainty for

biodiversity outcomes, development applicants, local governments and other stakeholders.

The legislation provides for two types of biodiversity certification:

- biodiversity certification of the native vegetation reform package;
- biodiversity certification of environmental planning instruments.

1.1 The native vegetation reform package

In accordance with the legislation, the Minister can and has conferred biodiversity certification on the native vegetation reform package, which consists of the *Native Vegetation Act 2003*, the regulations and a range of associated standards, plans and guidelines. This means that activities carried out in compliance with the *Native Vegetation Act* do not require threatened species assessment.²

1.2 Environmental Planning Instruments

Under Division 5 of the TSC Act, the Minister for Climate Change and the Environment can grant an environmental planning instrument - a state environmental planning policy (SEPP) or a local environmental plan (LEP) - biodiversity certification if the Minister is satisfied that the instrument

will lead to the 'overall maintenance or improvement of biodiversity values'. This is the primary test for biodiversity certification. Before conferring biodiversity certification on an environmental planning instrument, the Minister may also consider matters such as social and economic outcomes and the most efficient and effective use of available resources.³

1.2.1 'Improve or maintain' test

The legislation does not specify how the test to 'improve or maintain biodiversity values' should be assessed. In its advice on biodiversity certification, the Department of Environment, Climate Change and Water (DECCW) has advised that an environmental planning instrument⁴ will be considered to 'improve or maintain biodiversity values':

... if its provisions will retain areas identified as being of high biodiversity value as well as counterbalance any loss in biodiversity value as a result of the proposed development or clearing. Areas of high biodiversity value must be retained because their loss cannot be offset by positive actions elsewhere. Obviously (environmental planning instruments) that propose to lose large areas of biodiversity value will need to implement a greater number or more significant actions to offset that loss.⁵

Whilst there is no specific definition or assessment methodology for 'improve or maintain biodiversity values' in relation to biodiversity certification, both the biobanking and the native vegetation legislation also utilise a similar 'improve or maintain' test and provide differing methodologies for determining whether this test has been met. This is discussed in further detail below.

1.2.2 Effect of biodiversity certification

Once biodiversity certification is conferred on a planning instrument, subsequent development under Part 4 or Part 5 of the *Environmental Planning and Assessment Act 1979* (EP&A Act), which is undertaken in accordance with the planning instrument, will generally not require threatened species assessment.⁶ Biodiversity certification essentially replaces the traditional system of site-by-site threatened species assessment under the EP&A Act. However, biodiversity certification does not remove the need for threatened species assessment for development under Part 3A of the EP&A Act. Nor does biodiversity certification remove the need to undertake assessment in accordance with the Commonwealth EPBC Act.⁷

Conditional biodiversity certification may be granted (e.g. restricted to a specified area of land or a particular ecological community) in which case certain developments, areas or species may still require individual threatened species assessment.⁸ Biodiversity certification cannot apply to land declared as critical habitat.⁹

1.2.3 Administrative arrangements

Biodiversity certification can be granted for a specified period of up to ten years, with a possibility of extension under prescribed circumstances. If not specified, the certification is valid for ten years.¹⁰ The Minister has the power to suspend or revoke the biodiversity certification in certain circumstances.¹¹

1.2.4 Application

Biodiversity certification is primarily targeted at urban and coastal areas facing, or likely to face, development

pressure.¹² To date only one planning instrument has been granted biodiversity certification, the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (Growth Centres SEPP) covering the north west and south west Sydney growth centres. The Minister is currently considering proposals for biodiversity certification of the Albury LEP and the Wagga Wagga LEP.

1.2.5 Legal Challenge

In 2008, the True Conservation Association, represented by the Environmental Defender's Office, legally challenged the conferral of biodiversity certification on the Growth Centres SEPP. The True Conservation Association argued that the biodiversity certification of the Growth Centres SEPP was granted prematurely and was based on inadequate information. They argued that the Minister had no rational basis for concluding the SEPP would maintain or improve biodiversity values.¹³

Prior to the court hearing, the Government passed the *Threatened Species Conservation (Special Provisions) Act 2008*, 'to remove doubts about the validity of the original certification of the Growth Centres SEPP'.¹⁴ The legislation operated retrospectively to directly confer biodiversity certification on the Growth Centres SEPP.¹⁵ This removed the grounds for the legal challenge, avoiding the need for the Minister to prove to the court that the test of maintaining or improving biodiversity values had been met.¹⁶

2 THE PROPOSED REGIME

Parliament is currently considering the Threatened Species Conservation Amendment (Biodiversity Certification) Bill 2010 (the Bill), which amends the process for biodiversity certification. The Bill was introduced in the Legislative Assembly on 20 May 2010. It proposes a new Part 7AA for the TSC Act. The Agreement in Principle speech stated:

...this bill delivers better environmental outcomes, ensures decisions are objective, reduces administrative processes and achieves real cost savings.¹⁷

The Bill introduces a number of key changes, as outlined below.

2.1 Certification conferred on land

Under the Bill, biodiversity certification will be conferred on specified land rather than on environmental planning instruments.¹⁸ Biodiversity certification granted under the current regime will continue to have effect. The application for biodiversity certification must be made by a planning authority.¹⁹

2.2 Biodiversity Certification Strategy

Prior to applying for biodiversity certification, the planning authority must prepare a biodiversity certification strategy. The strategy must set out the biodiversity conservation measures that will be implemented to ensure biodiversity values are improved or maintained. The strategy must identify:

- Land proposed for certification;
- Land proposed for conservation (any land on or in respect of which conservation measures are to be implemented);
- Proposed conservation measures;

- Parties responsible for the implementation of the conservation measures.²⁰

2.3 *Biodiversity Certification Assessment Methodology*

As noted, under the existing legislation the need to ‘improve or maintain biodiversity values’, which is central to the current biodiversity certification regime, is not defined or otherwise elaborated upon. In the Agreement in Principle speech for the Bill, the Minister stated:

The existing legislation is deficient in that it does not define the term “improve or maintain biodiversity values”.²¹

Under the Bill on the other hand, biodiversity certification is said to ‘improve or maintain biodiversity values’ if certain conditions are met: (a) where the Minister makes a determination based on a biodiversity certification assessment that the overall effect is to ‘improve or maintain biodiversity values’; and (b) that determination is in accordance with the Biodiversity Certification Assessment Methodology.

Further to this, the Bill provides for the Minister to establish a Biodiversity Certification Assessment Methodology, which is the scientific process for determining whether biodiversity certification ‘improves or maintains biodiversity values’.

The biodiversity certification assessment methodology assesses:

- The loss of biodiversity values on land proposed for biodiversity certification; and
- The impact, or likely impact of proposed conservation measures on land proposed for biodiversity conservation.²²

The methodology aims to provide a transparent, consistent approach to biodiversity certification, increasing the objectivity and legal certainty of biodiversity certification decisions.²³ The assessment methodology was developed by DECCW in consultation with key stakeholder groups.²⁴

As noted above, an ‘improve or maintain’ test is also utilised in both biobanking and native vegetation regulation. Biobanking adopts the Biobanking Assessment Methodology to determine whether development will ‘improve or maintain biodiversity values’. The *Native Vegetation Act* utilises the Environmental Outcomes Assessment Methodology to determine the broader premise of whether clearing of vegetation will ‘improve or maintain environmental outcomes’.

The Biodiversity Certification Assessment Methodology proposed under the Bill will be a third different assessment methodology. A [draft Biodiversity Certification Assessment Methodology](#) is currently publicly available and will be formally exhibited upon passage of the Bill. It remains to be seen whether the final methodology adopted will deliver similar outcomes to the current regime, or the biobanking or native vegetation methodologies.

2.4 *Conservation measures*

The Bill provides a list of conservation measures that can be utilised in biodiversity certification, including: development controls; conservation agreements; state infrastructure contributions; biobanking agreements; and reservation of land as a national park or reserve. The Bill also creates a new type of agreement, voluntary biodiversity certification agreements which are available to secure

conservation measures when third parties may be involved.²⁵

2.5 *Biodiversity certification agreement*

Under the proposal, a biodiversity certification agreement is the agreement entered into between the Minister and another person to confer biodiversity certification on land.²⁶ The agreement may be registered on the title to the land so that it is binding on successors in title.²⁷

2.6 *Effect of biodiversity certification*

The Bill makes administrative amendments to the effect of biodiversity certification on development under Part 4 and 5 of the EP&A Act. Under the current regime, development under Part 4 or 5 of the EP&A Act, undertaken in accordance with a biodiversity certified planning instrument, is taken to be development that is not likely to significantly affect any threatened species, population or ecological community or its habitat, i.e. the development does not require threatened species assessment. The Bill makes a consequential amendment, to refer to biodiversity certified land rather than planning instruments, in line with the changes outlined above.²⁸

The Bill provides further clarification of the provisions in relation to Part 4 and 5 development. It explicitly states that consent authorities and determining authorities do not need to consider the likely impact of the development on biodiversity values (despite any provisions of the EP&A Act).²⁹

The Bill also expands the provisions of the current regime for development under Parts 4 and 5 of the EP&A Act to developments under Part 3A. Accordingly, Part 3A development will

generally not require threatened species assessment if the project is carried out on biodiversity certified land.³⁰

Land that is granted biodiversity certification is also excluded from the operation of the *Native Vegetation Act*.³¹

2.7 *Administrative arrangements*

Under the Bill, biodiversity certification can be granted for a specified period of time. If no time period is specified, biodiversity certification operates indefinitely.³²

2.8 *Enforcement*

Under the current regime, if biodiversity certification is breached, the only course of action available to the Minister is to suspend or revoke the certification. In addition to these powers, the Bill would confer on the Minister the power to modify the certification;³³ issue an order to comply with the biodiversity certification; and impose a penalty for failure to comply with the order.³⁴ The Minister may also bring proceedings in the Land and Environment Court to remedy or restrain a breach of the biodiversity certification.³⁵

CONCLUSION

A major aim of the Bill is to deliver 'better environmental outcomes'.³⁶ Much will depend in this respect on the details of the Biodiversity Certification Assessment Methodology and their application. Further aims of the bill are to 'ensure decisions are objective, reduce administrative processes and achieve real cost savings'.³⁷

1 Division 5, sections 126 G-N TSC Act.
 2 Division 4 TSC Act.
 3 Section 126G TSC Act.
 4 Including any associated plans, strategies and agreements that form part of a planning package for an area.
 5 DECCW, *Questions and Answers: Biodiversity Certification*: <http://www.environment.nsw.gov.au/resources/threatenedspecies/07220biodivcertqa.pdf> accessed 28/1/2010.
 6 Section 126I TSC Act.
 7 DECCW, *Questions and Answers: Biodiversity Certification*: <http://www.environment.nsw.gov.au/resources/threatenedspecies/07220biodivcertqa.pdf> accessed 28/1/2010.
 8 Section 126H TSC Act.
 9 Section 78A 8(b) EP&A Act 1979.
 10 Section 126J TSC Act.
 11 Section 126L TSC Act.
 12 DECCW, *Questions and Answers: Biodiversity Certification*: <http://www.environment.nsw.gov.au/resources/threatenedspecies/07220biodivcertqa.pdf> accessed 28/1/2010.
 13 Environmental Defender's Office, *Past Cases - True Conservation Association v The Minister Administering the Threatened Species Conservation Act 1995*: http://www.edo.org.au/edonsw/site/casework_key_past.php#tca accessed 25/03/2010.
 14 NSW *Parliamentary Debates*, 25/6/2008 (H Tsang MP, Parliamentary Secretary).
 15 Section 18 conferred biodiversity certification on the Growth Centres SEPP and section 22 gave retrospective effect to the conferral of biodiversity certification from 14 December 2007.
 16 Environmental Defender's Office, *Past Cases - True Conservation Association v The Minister Administering the Threatened Species Conservation Act 1995*: http://www.edo.org.au/edonsw/site/casework_key_past.php#tca accessed 25/03/2010.
 17 NSW *Parliamentary Debates*, 20/5/2010 (F Sartor MP, Minister for Climate Change and the Environment).
 18 Section 126H of the Bill.
 19 Section 126J of the Bill.
 20 Section 126K of the Bill.
 21 NSW *Parliamentary Debates*, 20/5/2010 (F Sartor MP, Minister for Climate Change and the Environment).
 22 Division 4 of the Bill.
 23 NSW *Parliamentary Debates*, 20/5/2010 (F Sartor MP, Minister for Climate Change and the Environment).

24 DECCW, *Biodiversity Certification*: <http://www.environment.nsw.gov.au/biocertification/index.htm> accessed 27/5/2010.
 25 Section 126L of the Bill.
 26 Section 126ZH of the Bill.
 27 Section 126ZJ of the Bill.
 28 Section 126I of the Bill.
 29 Section 126I of the Bill.
 30 Section 126I of the Bill.
 31 Section 126I of the Bill.
 32 Section 126ZA of the Bill.
 33 Section 126ZP of the Bill.
 34 Section 126ZL of the Bill.
 35 Section 126ZK of the Bill.
 36 NSW *Parliamentary Debates*, 20/5/2010 (F Sartor MP, Minister for Climate Change and the Environment).
 37 NSW *Parliamentary Debates*, 20/5/2010 (F Sartor MP, Minister for Climate Change and the Environment).

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