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Biodiversity conservation and natural resources management in NSW: complexity, coordination and common sense

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Abstract

Most environmental lawyers, like ecologists, wish to see broad scale landscape change, better management of land and improved protection of remnant vegetation and threatened species. Incorporating scientific knowledge into effective strategic planning is one step. Implementing strategic planning is another, necessitating the flow of priorities into statutory planning and regulation. The translation of broad landscape scale conservation objectives on to the ground requires not only improved understanding but also active use of the legal system. The law relating to the regulation of land use and vegetation clearing, threatened species conservation and catchment management is complex, inter-dependent and dynamic. While planning was once the exclusive domain of local government, now state government natural resource agencies and catchment management bodies routinely use it to determine priorities for both regulation and investment. In this paper we explore the potential of the current system for conservation. We consider the potential of the land use planning system and argue that its role has been constrained by its history. While there is significant reform in coastal and growth areas, rural areas continue to be neglected by this system. This gap would appear to be being filled in NSW by catchment management, which has a key planning role and is grappling with the management of existing uses; and native vegetation legislation which focuses on new development.

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Introduction

Most environmental lawyers, like ecologists, wish to see broad scale landscape change, better management of land and improved protection of remnant vegetation and threatened species. Incorporating scientific knowledge into effective strategic planning is one step. Implementing strategic planning is another, necessitating the flow of priorities into statutory planning and regulation. The translation of broad landscape scale conservation objectives on to the ground requires not only improved understanding but also active use of the legal system. The law relating to the regulation of land use and vegetation clearing, threatened species conservation and catchment management is complex, inter-dependent and dynamic. While planning was once the exclusive domain of local government, now state government natural resource agencies and catchment management bodies routinely use it to determine priorities for both regulation and investment.

In this paper we explore the potential of the current system for conservation. We consider the potential of the land use planning system and argue that its role has been constrained by its history. While there is significant reform in coastal and growth areas, rural areas continue to be neglected by this system. This gap would appear to be being filled in NSW by catchment management, which has a key planning role and is grappling with the management of existing uses; and native vegetation legislation which focuses on new development.

The Potential of the land use planning system

Land use planning is potentially the most powerful function of local government (Jones, 1993; Harrison, 1988; Manning, 1973). Provisions under the *Environmental Planning and Assessment Act 1979* (EPAA) provide wide scope for innovative conservation planning (Kelly, 1995; Farrier *et al*, 1998). In addition to command and control regulation of development, s 26 enables environmental planning instruments to:

*   protect, improve or utilise, to the best advantage, the environment;

- protect or preserve trees or vegetation; and
- protect and conserve native animals and plants, including listed threatened species, populations and ecological communities, and their habitats, under the *Threatened Species Conservation Act 1995* (TSCA) and the *Fisheries Management Act 1994* (FMA).

This has the potential for creative initiatives such as conservation funding schemes, offset mechanisms and educational programs. But the system has failed to produce such fresh conservation approaches, especially in rural areas.   As will be seen, this reflects in part the British origins of the planning system and a primary focus on urban management in both practice and education. The regulatory nature of the EPAA was reinforced in the mid-1990s by the introduction of the threatened species laws (i.e. TSCA and FMA), with added special environmental assessment as a result of the 'seven (previously eight) part test' and the possibility of a species impact statement (SIS) (Kelly and Mooney, 2006; Kelly, 1996). It is clear however that the land-use planning system has the potential for much greater influence than is presently exercised.

Use of planning law for conservation purposes is widely recognised as beneficial. Greening Australia (1995, 66), for instance, cites planning as an "obvious tool" to "help secure valuable vegetation". The *National Local Government Biodiversity Strategy* (Berwick and Thorman, 1999) lists various actions under planning schemes as affording significant conservation opportunity. But there are significant hurdles that undermine such expectations. Jay (1999, 47) contends that planners are "well placed" to develop biodiversity conservation strategies. While planners are well placed they are not necessarily well educated for the task of incorporating ecological concepts or knowledge into planning regimes (Cardew, 1999).

The failings of the land use planning system

The failure of planning relates in part to its history. Despite the broad legislative mandate in the EPAA, Australian planning systems are inhibited by their British origins as a response to urban conflict concerning public health, safety and amenity. The approach taken involved heavy reliance on the restrictive tools of zoning and development standards that still prevail in NSW today. This begs the question of their appropriateness in conservation planning. Beyond the urban landscape, land-use regulation is unpopular. For example, when the State Government introduced former *State Environmental Planning Policy 46* - Protection and Management of Native Vegetation (the forerunner to the current native vegetation legislation), rural landholders in vast areas of NSW had their first real experience of legal controls over land clearance.   Seen as an intrusion on their "property rights", this was anathema to rural landholders (Lee, Baird and Lloyd, 1988). Yet it is important to bear in mind that the demand that State governments should not interfere with property rights is based not on any fundamental law but on a long tradition of limited government intervention, particularly in rural areas, stemming from Australia's historical reliance on rural production for its economic prosperity. Property rights relating to land use and development are a reflection of legislation as it exists at any particular point in time.

In Britain most rural areas were marked as uncoloured "white lands" on official plans, with no detailed mechanisms other than a broad policy statement pronouncing that "existing uses of land are intended to remain largely undisturbed" (Green, 1971, 45).   By the time modern environmentalism prompted the NSW State Government to re-order

zoning controls over non-urban land (Planning and Environment Commission, 1977; Kelly and Farrier, 1996), many local ecosystems had been damaged or substantially destroyed. In the Sydney metropolitan area, the first statutory plan was the regional County of Cumberland Planning Scheme, in 1951. This contained an "antidote for promiscuous urbanisation" in the form of a 'Green Belt Area' zone (Freestone, 1992, 72). The ring of parkland was eventually disbanded. Recent events show that things have not changed since. Similar green belts, with a greater emphasis on conservation, encompassed in the proposed Sydney north-west and south-west housing sectors as part of the grand metropolitan plan have similarly been abandoned (Colman, 2005).

A further problem relates to the ethos of developmentalism in the planning system. As Gleeson observes (1998, 5-6; see also Stein, 1998), the original community-based objective of planning is now being "brushed aside in favour of a new … chief purpose … to facilitate development". Under environmental planning legislation, decision-makers have a very broad discretion, weighing up potential damage to the environment on the one hand against the socio-economic benefits of development proposals on the other.

There is nothing to say that consents that will have a significant or irreversible effect on the environment must be denied. Indeed, where land has been zoned to allow development of a particular kind (eg residential), the starting-point is that some form of development consistent with the zoning will be permitted. While situations can be envisaged where it may be difficult to develop a site in an environmentally acceptable manner and also provide a commercially viable project, they will be rare (see *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237). Moreover, while the 'down-zoning' for conservation purposes of areas zoned to allow development at a time when inadequate attention was given to assessing their ecological significance is legally possible, it is practically difficult because of the heightened expectations of private landholders. In areas where development has already been legitimately commenced, planning law privileges existing uses by protecting them from new regulatory initiatives.

Biodiversity certification and offsets
Recent reforms with a direct impact on the planning system were introduced by the *Threatened Species Legislation Amendment Act* 2004. These changes mean that the potential for, and the benefit of, taking threatened species into account at the strategic planning stage is enhanced. This Act gives power to the Minister to confer biodiversity certification on a local environmental plan (LEP). These reforms provide the opportunity for a comprehensive strategic approach to the management of threatened species on private land (Department of Environment and Conservation (DEC), 2005). It is proposed that regional conservation plans will be prepared which will feed into regional strategies and then environmental planning instruments (EPIs), especially LEPs prepared by local councils. The regional conservation plan will identify 'green light', 'amber light' and 'red-light' areas based on the level of their biodiversity values (see DEC 2004, 2005). The purpose of this is to direct development to those areas likely to have least adverse effect on biodiversity (green light), to ensure protection and targeted restoration in those areas with highest biodiversity (red light) and balance development and conservation in other areas by measuring biodiversity loss and offsetting its effects (amber light).
As a matter of policy it is proposed that the focus of the reform effort will be on coastal and growth areas although there is nothing in the legislation to limit its broader application. The practical effect of biodiversity certification is that a development or

activity under the EPI will be deemed to be not likely to significantly affect threatened species, therefore bypassing the need for a species impact statement and Ministerial concurrence. The caveat on this of course is the quality of the information, which underpins the system. This approach implies a robust knowledge of the local and life history of threatened species. In reality we know very little. The task is made ever more complex as the certain but not fully understood impact of climate change affects the physiology, geographic distributions and phenology of species (Hughes 2003).   While much can be revealed during the assessment of individual projects, there is very clearly a need for reform at the strategic level.

Allied to this reform of the strategic approach to biodiversity conservation are proposals to introduce offsets and biodiversity banking. While still at the development stage the concept of biodiversity banking is potentially both significant and controversial. It would appear that banking is intended only to operate in coastal and growth areas subject to considerable development pressure. In broad terms, the concept involves the creation of a credit system for biodiversity. Using a defined methodology, biodiversity loss as a consequence of development will be quantified and an equivalent offset required. A 'bank' will purchase, procure or create biodiversity offsets in advance of individual development proposals, and these can then be sold to developers. The arguments for the scheme are that it will allow effective and manageable large-scale protection of land of high conservation value, reduce incremental loss of biodiversity and reduce transaction costs for developers and government (see DEC 2006). On the other hand, it is argued that it is impossible to adequately quantify biodiversity in order to create a credible system for transactions, that it is a fundamental shift towards the privatisation of nature and that it will result in the net loss of biodiversity because of issues around defining offsets, securing them and managing them over time (Fox and Nino-Murcia 2005, Wilcove and Lee 2003).   Whether improving the security of some parcels of land of high conservation value will compensate for the net loss of area supporting vegetation and species remains to be demonstrated.

Planning and management in rural areas
While there has been some important reform of the planning system in order to improve its capacity to anticipate the effect of development and protect threatened species, the focus has been on coastal and growth areas. In rural areas, which do not have urban development pressures the issues are different. The objectives are to improve the management of existing uses, rehabilitate defined areas and protect native vegetation, all of which will have a bearing on the protection and recovery of threatened species.

Recent responses do not rely on the planning system under the EPAA. Catchment management and vegetation conservation legislation are moving in to fill the gap. NSW has a fairly long history of catchment management and its structure, form and function has evolved considerably over the last 17 years. It has always been concerned with the management of existing uses and the traditional approach has been inducement rather than regulation. Most recently in NSW, Catchment Management Authorities (CMAs) have been formed under the provisions of the *Catchment Management Authorities Act* 2003. They are constituted as statutory authorities with an independent board and a wide range of functions. The principle functions are to prepare a catchment action plan and to give effect to it through an annual implementation program, to provide loans, grants and subsidies to landholders for catchment activities, to contract works, to assist landholders and to provide education and training. In addition, CMAs were

recently given powers to regulate clearing under the *Native Vegetation Act* 2003, in particular by making decisions on whether property vegetation plans should be approved. This represents a significant expansion of the traditional functions of catchment management. In summary then it can be said that CMAs have three important functions: planning, investment and regulation.

The legislation describes in broad terms the content of a catchment action plan (CAP), which includes the results to be achieved by the implementation of the plan and the priorities for funding for the purposes of annual implementation programs. In preparing a plan the CMA must have regard to plans made under the EPAA and other natural resource plans, consult widely and, finally, gain approval from the Minister and the Natural Resource Commission (NRC). There is considerable scope for CMAs to respond to local circumstances and environmental priorities. However there is nothing that defines the relationship between catchment and other plans or requires them to be consistent with each other.   In addition, catchment action plans (CAPs) must take into account State-wide natural resource management standards and promote the achievement of State-wide natural resource management targets .

In practice, CMAs have built upon previous catchment plans called 'Blueprints' and used working groups and wide stakeholder and community consultation to develop draft CAPs. The approach used by the Southern Rivers CMA, for instance, was to identify issues of greatest concern and then determine the range of benefits that would flow from investment to assist in defining priority investment areas (SRCMA 2005). In reality, the priorities are also influenced to a significant extent by Commonwealth programs such as NHT (see SRCMA 2004). The key then is to understand that the primary role of the CAPs is to guide investment in the catchments. This is an absolutely critical role because it is pivotal in determining the flow of both Commonwealth and State natural resource funding to projects on the ground. The real detail of activity is contained in the Investment Strategies, which sit underneath the CAP and elaborate the broader priorities. The Strategies contain the detail of programs, budget and targets. In broad terms then it can be seen that the CAPs control the flow of resources into native vegetation conservation and recovery of threatened species as well as other natural resource areas. Investment can take several forms, including capital funding for works, small grants for landholders or on-going incentive payments for management activities.

In addition to their role in directing investment in biodiversity conservation and natural resource management, the CMAs have also been given regulatory functions under the *Native Vegetation Act* 2003 (NVA). The Act provides that in certain areas of the State, clearing of remnant native vegetation and regrowth designated for protection is prohibited unless it is carried out with development consent or in accordance with the provisions of a property vegetation plan (PVP). (There are exceptions relating to, for instance, routine agricultural management activities and activities authorised under other legislation). One important feature of the new clearing controls is the significant constraint they impose on the discretion of CMAs in deciding whether or not to give the go-ahead to a clearing proposal. Under the NVA consent or approval can only be given where proposed clearing will "improve or maintain environmental outcomes". This includes not only water quality and land degradation outcomes, but also biodiversity. Conservation is given a very clear priority over socio-economic considerations.
How can clearing improve or maintain environmental outcomes? This is to be assessed by using the *Environmental Outcomes Assessment Methodology* (*Native Vegetation Regulation 2005*, Reg 26 as amended in Gazette 21 July 2006). One result of this is

that in ecological communities listed as threatened, and landscapes and vegetation types assessed as being overcleared (over 70% cleared), further clearing is absolutely prohibited unless the vegetation is classified as being of low condition. Outside of these areas, clearing can be approved if the landholder commits to implementing a PVP which *offsets* the environmental damage likely to be caused by the clearing. An offset is defined broadly as "any natural resource management action or work".

As these arrangements under the NVA have been granted biodiversity certification, there is no longer any requirement that decision-makers carry out what has recently become the seven-part test of environmental significance in relation to impact on threatened species, nor any requirement to prepare a species impact statement where this is assessed as being significant. However, unlike in coastal and growth areas, there is no proposal to create a banking system. Offsets will therefore remain largely on-site.

Conclusion

Even though the new initiatives relating to banking in urban areas and offsets in rural areas have developed separately there is a common theme. This represents a significant step forward in terms of developing smarter regulation. Rather than simply requiring environmental damage to be *mitigated* as far as possible, the developer must give something in return for being allowed to develop, *compensating* for damage by providing some sort of equivalent elsewhere. The theory is that the environmental costs of development are internalised, rather than being passed on to the community.

In addition, this policy instrument has the potential to go beyond negative constraints on land use in offset areas (eg restrictions on grazing) and to secure active management (eg weed and pest control) as part of what is essentially a bargain between government and private landholder, albeit one that is not entirely voluntary because it is made against a very restrictive regulatory backdrop. The task of monitoring compliance, particularly where active management is required, is going to be a challenging one. The risk of alienating those who are expected to manage the land for conservation in perpetuity by bringing legal proceedings against them is likely to be a vital consideration for those exercising enforcement discretion.

Despite these common reform themes relating to offsets and banking the interrelationship between the planning system and the natural resource management system remains to be clarified. Land use plans set the parameters for land-use decision making for new uses and rely almost exclusively on command regulation. Catchment management has a role in the on-going management of existing uses and the restoration of past damage, relying on investment to induce change. Significantly, the native vegetation reforms mean that the CMAs now also have a regulatory function and a role in decision making about new land uses albeit only those on non-urban land that involve the destruction of native vegetation. The coordination of the priorities and objectives developed in a local context for strategic land use plans and catchment plans is imperative. Already different standards are emerging in decision making about development on urban land to which the EPAA would apply and rural land to which the NVA is relevant. For the latter, the test is to 'improve or maintain environmental outcomes' whereas under s 79C of the EPAA which continues to apply to development in urban areas there is no attempt to give priority to conservation. Decision makers are left with the task of balancing environmental, social and economic objectives.

There is clearly plenty of room for innovation in the regulation and management of land for conservation purposes. It is generally accepted that the most beneficial approach is one that uses a suite of different policy approaches (Young *et al* 1996). These include good planning, sound regulation, incentive programs, offsetting unavoidable impacts, market mechanisms and education (Doremus 2003, Thompson 2002). Ironically, it has been demonstrated that market type mechanisms have been most effective when they are underpinned by sound regulation, which is adequately enforced (Fox and Nino-Murcia 2005).

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