



## Full Day Hansard Transcript (Legislative Council, 5 August 2011, Proof)

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Extract from NSW Legislative Council Hansard and Papers Friday, 5 August 2011 (Proof).

### THREATENED SPECIES CONSERVATION AMENDMENT (ECOLOGICAL CONSULTANTS ACCREDITATION SCHEME) BILL 2011

Bill introduced, and read a first time and ordered to be printed on motion by the Hon. Cate Faehrmann.

#### Second Reading

**The Hon. CATE FAEHRMANN** [12.40 p.m.]: I move:

That this bill be now read a second time.

In introducing The Greens Threatened Species Conservation Amendment (Ecological Consultants Accreditation Scheme) Bill 2011 I acknowledge the hard work and efforts of the Hon. Ian Cohen and Scott Hickie, his staffer, who carried out extensive consultations with environmentalists and the ecological consultants' community in order to draft this bill. I acknowledge also Holly Kendall in my office who has been working on this bill since then. Members may be aware that the Ecological Consultants Association of New South Wales recently proposed a voluntary industry accreditation scheme in the absence of any statutory scheme to accredit ecological consultants. However, in this voluntary scheme decisions, whether for accreditation, review, discipline and appeals, are made only by members of the association. It would have no statutory basis for public disclosure or a public register for hearing complaints or for penalizing bad practice. A voluntary scheme is more likely to result in a conflict of interest than the proposed mandatory scheme set out in this bill.

Above all the purpose of this bill is to establish an accreditation scheme for ecological consultants who conduct ecological assessments, primarily to inform good decision-making under a number of Acts: the Threatened Species Conservation Act 1995, the Fisheries Act 1994 and the Environmental Planning and Assessment Act 1979. A statutory basis for accreditation of ecological consultants is able to offer a more transparent, accountable process than an internal, voluntary scheme administered by one of several professional associations. For ecological consultants to be accorded professional status, a statutory accreditation scheme is far more preferable in the eyes of the community. Over the years, the community—developers, environmentalists and determining authorities and the environment—has sometimes been let down by defective practices of ecological consultants. They have lacked appropriate mechanisms for lodging complaints to be reviewed impartially and, where necessary, the ecological consultants to be disciplined and/or their future practice conditioned.

The Threatened Species Conservation Amendment (Ecological Consultants Accreditation Scheme) Bill 2011 has an important and necessary purpose. Its purpose is to establish an accreditation scheme for ecological consultants, that is, people who are suitably qualified to undertake ecological assessments and surveys; species impact statements; to advise on land-use proposals; and to make recommendations for vegetation management and habitat protection plans. From its inception the Threatened Species Conservation Act 1995 intended that there be regulation of ecological consultants who assess the ecological value of land. Proposed section 113 will empower the director general of the relevant department to institute an accreditation scheme for suitably qualified and experienced consultants who undertake species impact statements. However, to date this has not been given effect.

Accreditation schemes have been introduced for practitioners identified as suitably qualified to conduct equivalent complex site assessments, such as biobanking assessors pursuant to the Threatened Species Act 1995, and site auditors under the Contaminated Lands Management Act 1997. It is an anomaly to have left accreditation of ecological consultants to this stage. The role of ecological consultants is of increasing importance in New South Wales. Under the Threatened Species Act 1995, the Environmental Planning and Assessment Act 1979 and the Fisheries Management Act 1994, they have an important role in producing ecological studies and advising developers and determining authorities on proposed developments and rezonings that might more broadly threaten ecological biodiversity and the environment. An external body that accredits suitably qualified and experienced individuals as ecological consultants will accord professional

recognition, set and uphold standards and strengthen the integrity of ecological assessments in New South Wales.

As the practice of ecological assessments is currently unregulated, ecological consultants are vulnerable to criticism that their ecological assessments are being influenced by their commercial relationships with developers. Commercial pressure to obtain approval for the developments and the prospect of continuing referral of work by developers may be compromising the ethical conduct of ecological consultants. An accreditation scheme would support the independent and ethical conduct of ecological consultants who generally carry out their work with the highest level of diligence and honesty. However, there are consultants who do not, a matter about which I will speak later. An accreditation scheme would help to address concerns about assessment impartiality and quality by identifying ecological consultants, certify their eligibility to practice and to practice a specialty, as well as establishing a system of peer review if assessment reports are disputed.

Given the pivotal role that ecological consultants play in decision-making and public consultation processes under the Environmental Planning and Assessment Act 1979, the Threatened Species Act 1995 and the Fisheries Management Act 1994, it is a matter of concern that there is no formal requirement for any level of training, knowledge or skill to undertake ecological assessment and for ethical conduct, in particular, with respect to animal welfare. Ensuring the skills and expertise of people responsible for assessing the impacts of growth and development is critical for the effectiveness of environmental protection. Ecological consultants should be regulated in a manner similar to doctors, lawyers and accountants.

This bill provides that only natural persons are eligible for accreditation as ecological consultants. It makes provisions for eligibility to be accredited as an ecological consultant, including specialist accreditation. It also makes provisions for continuing requirements including continuing professional education for ecological consultants. It also provides for the responsibilities of accredited ecological consultants to maintain the current skills and knowledge conforming to industry best practice in ecological assessments under the relevant Acts.

There is a need for specialist accreditation because of the diversity of fauna and flora, landscapes and projects and special skills, for example, in conservation genetics, and in which ecological consultants are required to make assessments. The creation of a class of specialist accreditation will help develop skills in ecological consultants and create a system that allows proponents to easily find ecological consultants with the specialist skills required. Specialist accreditation may include accreditation in the areas of estuary and river systems, koala habitat, bell frog specialisation or invasive species expertise. It may extend to cover specified ecosystems or biodiversity processes or threats. Increasing specialisation in ecological consultants will improve environmental outcomes.

The bill will require the establishment of an accreditation panel. The panel will have five members which will include the chief executive of the Office of Environment and Heritage or his or her representative, and four or more other members appointed by the chief executive who are recognised for their expertise in biodiversity values. The panel will advise on the criteria for accreditation and eligibility of applicants for accreditation, including specialist accreditation, and it will undertake peer review of assessments that are referred to the panel. Accreditation as an ecological consultant is granted for three years and may be renewed on application. This is longer than doctors and lawyers who are required to renew their registration or practising certificate every year. In comparison, a period of three years registration before renewal is not overly onerous, but it is short enough to require that ecological consultants' skills and knowledge continue to be updated. It also allows continuous oversight of the industry. This will allow further refinement of the regulations, if necessary.

The chief executive will be required to keep a register of all accredited ecological consultants that is publicly accessible on the website of the Office of Environment and Heritage. This register will be an important public resource that will allow proponents of a development to check that ecological consultants are accredited before engaging them. The register will also include the names of any ecological consultants whose accreditation has been suspended or revoked as well as the company name of their clients. This is intended to encourage corporate responsibility by corporations who hire ecological consultants. It will also deter corporations from leaning on ecological consultants to meet commercial rather than ecological objectives. If that happens they will be named and shamed in the public domain.

Another function of the panel is to review an ecological assessment carried out by an accredited

ecological consultant. The request to review may be made by an accredited ecological consultant or consent authority or any individual who is supported either by an ecological consultant or by a consent authority. Having a formal procedure the peer review will set out standards for accredited ecological consultants and enable councils and community groups to refer concerns to the accreditation panel. As a result of the peer review the panel would have powers to impose conditions on the accreditation of the ecological consultant, suspend or revoke the accreditation. The panel will have the discretion to reject requests for reviews that it considers are frivolous or vexatious. The panel will be required to disclose any interest held in relation to employment, a partner's employment or specified interest in a corporation that a member may have that is to be recorded and publicly accessible for a fee. This disclosure ensures transparency in the recommendations of the panel.

The chief executive will have the power to revoke or suspend accreditation on the basis of recommendations from the accreditation panel if the ecologist is no longer eligible for accreditation, has failed to meet a requirement of the act or conditions of accreditation, or has failed to pay required fees. The chief executive will be required to notify the ecologist in writing and provide him or her with an opportunity to make submissions on the decision which the chief executive will be required to consider before making a final decision.

Applicants who are denied accreditation or have their accreditation revoked or suspended or have conditions attached to their accreditation will have a right to have the decision reviewed by the Administrative Decisions Tribunal. Grounds for revocation or suspension would be specified in regulation, but the bill does include a responsibility for ecological consultants to avoid conflicts of interest. These disciplinary powers would not be available under a voluntary scheme. Experience shows that this statutory scheme is necessary to ensure that standards are enforced and ecological assessments that have extensive impacts on the local environment are carried out with the highest level of diligence.

It is important that ecological consultants not participate in projects in which they have a conflict of interest. However, they must also not be perceived to have any conflict of interest. In placing a responsibility on ecological consultants to avoid conflicts, the bill aims to ensure that ecological consultants do not carry out assessments for people or corporations that they or their families are connected to or hold a pecuniary interest in. Given the commercial relationship between ecological consultants and developers, all appearance of conflict of interest must be minimised.

In essence this bill sets up an accreditation scheme that draws on the expertise of the ecological consultants' community, their understanding of the industry, the range of and complexity of field work and the culture of this profession. Their expertise in biodiversity values will mean that they are well aware of the environmental outcomes of the standards they set, the recommendations that they make and the impacts that these will have on the livelihoods of ecological consultants. This industry focus will be complemented by strong enforcement mechanisms and ministerial oversight. The recommendations of the panel are made to the chief executive of the Office of Environment and Heritage and the Minister for the Environment.

The bill will also introduce two offences. The first relates to the carrying out of an environmental assessment without accreditation and the second relates to the making of false representations as to accreditation. These offences will be a deterrent to those who seek to avoid accreditation and create a framework in which consultants are required to meet the requirements set by the accreditation panel to maintain their livelihood. In particular, these enforcement mechanisms differentiate this accreditation scheme from any possible industry scheme. It gives the regulation of the industry teeth to ensure that only accredited ecological consultants are conducting assessments.

In preparing this bill, the Hon. Ian Cohen made inquiries to the Minister for the Environment as to the cost of operating comparable accreditation schemes. The scheme for auditing site auditors under the Contaminated Lands Management Act 1997 cost \$272,740 to administer in 2008. The proposed ecological consultant's accreditation panel is anticipated to have a comparable cost. Under the Contaminated Lands Management Act the accreditation panel for site auditors consists of an officer of the Office of Environment and Heritage, a representative of community environmental groups appointed on the nomination of the Nature Conservation Council of New South Wales, a representative of industry and a representative of academia with tertiary qualifications in a discipline relevant to contaminated sites. The application process under this bill would be very similar. Under the Contaminated Lands Management Act applicants are required to provide specific information to allow the Office of the Environment and Heritage to determine whether the applicant is eligible for accreditation, applicants are required to pay an application fee,

and accreditation can be granted for anywhere up to three years. The ecological consultant application mirrors this.

Under the Contaminated Lands Site Auditors Scheme, failure to comply with conditions of accreditation is a ground for suspension, revocation or non-renewal. Auditors must renew accreditation. The Office of Environment and Heritage monitors the activities and reviews the work of site auditors on an ongoing basis to ensure that the standard of their performance is acceptable. The Office of Environment and Heritage undertakes routine monitoring, including reviewing site audit reports and site audit statements, examination of records held at auditors' offices, discussion with auditors on audits in progress and internal consultation. The Office of Environment and Heritage can also undertake a special review of an auditor's performance where it considers that there has been a breach of legislation, where the auditor is believed to have failed to adhere to guidelines, where there are perceptions of conflict of interest, or where the Office of Environment and Heritage has received complaints about an auditor's work. The Ecological Consultants Accreditation Scheme would be less onerous in that referrals are made only by an ecological consultant or consent authority or a member of the community supported by either an ecological consultant or consent authority.

Under the Contaminated Lands Site Auditors Scheme, the Office of Environment and Heritage is empowered to take disciplinary action that may include placing conditions on the auditor's accreditation, issuing directions to the auditor, suspending or revoking the auditor's accreditation or not renewing the auditor's accreditation or renewing it for a shorter period than previously. The Ecological Consultants Accreditation Scheme provides similar powers. A cost of \$272,740 is a minimal impost on the State to ensure the integrity of ecological assessments and the independent professional conduct of ecological consultants.

The first illustration of the need for this bill is the Cobaki Lakes proposal for development. The proposed development is on the Cobaki Lake floodplain in far north-east New South Wales. This region is at the centre of a biodiversity hotspot that together with far south-east Queensland has the second highest diversity of plants and vertebrate animal species on the continent. It has the highest diversity of marsupial and microbat species, equal highest diversity of frog species and the second highest bird species diversity of any of Australia's bioregions. The area is of national significance for over-wintering migratory and nomadic birds and fruit bats.

On 11 May this year the Northern Region Planning Panel at Tweed Heads was to determine the Cobaki Lakes development application based on supporting documents, including a fauna assessment and an ecological report together with management plans to maintain biodiversity values. The ecological assessment provided by the proponent has been fiercely criticised by David Milledge of Landmark Ecological Services Pty Limited—a fauna ecologist with more than 40 years experience in field survey and research in south-east Australia. Mr Milledge was commissioned to prepare an expert submission by a concerned community group, Northern Rivers Guardians. David Milledge noted that the fauna assessment prepared by an ecological consultant for the developer recorded 12 threatened species within the site.

Milledge drew attention to a number of major defects in the developer's ecological assessment, including: incorrect assessment of koala habitat under State environmental planning policy 4 that concluded there was no designated koala habitat on site overall despite the fact that the ecological report refers to vegetated areas on the site dominated by stands of koala tree species, such as swamp mahogany—the very areas that would be adversely impacted by the proposed development—and the failure to refer to the presence of the rufous bettong and long-nosed potoroo on this site recorded in a past study in 2006 conducted by a consultant for the developer. A further failure is the omission of past records of koalas on the site.

David Milledge also reviewed the concept plan and found it so defective he called it "a plan for extinction". In submissions to the regional planning panel, Mr Milledge stated that the proposed concept plan failed to provide corridors of sufficient width to function as habitat to support resident individuals of threatened species, the proposed corridor lands are surrounded by high-density urban development, the corridor lands are severed by internal pathways and cycleways, are compromised by constructed ponds that will serve as a breeding habitat for cane toads and have no dedicated fauna underpasses to cater for major road crossings. These omissions constitute a failure to apply basic principles of ecological landscape design. Such serious failures of the ecological assessments demonstrate the need for a statutory peer review process.

The bill provides that following a peer review with adverse findings the accreditation panel may recommend to the chief executive, as chairperson, that the ecological consultant's accreditation be

conditioned, suspended or revoked. This bill will deter accredited ecological consultants from making avoidable errors and misleading their clients and determining authorities. It should not be up to concerned members of the community to raise the alarm without a process for redressing defective practice by ecological consultants. A second example occurred in the Liverpool local government area. The Office of Environment and Heritage criticised the ecological assessment undertaken to support a proposal to amend the draft Liverpool Local Environmental Plan 2008. The proposal was for rezoning an area known as Cooper's Paddock, which is zoned for private recreation, into parcels to be zoned for general industrial use and public recreation. The proposed rezoning would have significantly reduced this environmental refuge by reduction and destruction of the vegetation and habitat on Cooper's Paddock.

The Office of Environment and Heritage stated that the ecological assessment prepared to support the planning proposal failed to use appropriate survey techniques to establish the condition of the vegetation on site, made inappropriate assumptions about the vegetation condition and the likely loss of vegetation from the site to justify the lack of a comprehensive fauna survey, failed to reference data that was publicly available in the *Atlas of NSW Wildlife* prior to drafting of the reports demonstrating the presence on site of the vulnerable species the black-chinned honeyeater, varied sittella and little lorikeet, and that the presence of these species means that this land is an "environmentally sensitive natural area" serving as both a vegetated buffer area and a significant fauna habitat.

The review listed failures in the methods of surveying flora and fauna used by the ecological consultant. For example, the survey was conducted over too small an area and the survey design resulted in failures to collect data on specific areas of the site described as "exotic understorey characteristics" or "understorey absent managed exotic grassland". In response to these deficiencies, council has required the applicant to commission a peer review; that is, with safeguards of the statutory accreditation scheme provided for in this bill. A third example, and there are countless more, revealed the flawed practices of some ecological consultants who undertake ecological assessment for major projects such as coalmines that destroy the existing environment. The proposed expansion of the Boggabri coalmine will result in the destruction of 1,384 hectares of remnant forest in the Leard State Forest.

*[The Deputy-President (The Hon. Jennifer Gardiner) left the chair at 1.01 p.m. The House resumed at 2.00 p.m.]*

Pursuant to sessional orders business interrupted at 2.00 p.m. for questions.