

## Natural and Built Environment Bill Reform Series: Biodiversity

### Codification may inhibit the achievement of better biological outcomes

The Natural and Built Environment Bill (**NBE Bill**) will codify the 'effects management framework', which has previously appeared in policy statements and plans, and the offsetting principles established through case law. The codification will also go further than current case law with respect to the offsetting principles, making compulsory a number of existing and new considerations. In addition, activities with a 'more than trivial adverse effect' on the attributes of a 'significant biodiversity area' or a 'highly vulnerable biodiversity area' will be prohibited unless they fall within certain narrow exceptions, or gain an exemption.

#### In summary:

- The NBE Bill stipulates an effects management framework that must be applied to significant biodiversity areas and specified cultural areas and, where directed by the National Planning Framework (**NPF**), other resources.
- The effects management framework requires in the first instance the avoidance of adverse effects where practicable, followed by the minimisation, remediation, and offsetting of adverse effects where practicable. If residual adverse effects remain after the consecutive application of those requirements, the activity cannot proceed unless redress is provided by enhancing the relevant aspect of the environment. Exemptions to the effects management framework may be provided for in the NPF where certain criteria are met.
- Where the effects management framework applies offsetting must be undertaken in accordance with the offsetting and redress principles detailed in the NBE Bill schedules. These schedules relate specifically to significant biodiversity areas and specified cultural areas, so presumably the NPF will be required to detail principles of any other resources it directs that the framework applies to.
- There are limitations on when offsetting and redress can apply, for instance they cannot apply where the indigenous biodiversity affected is of a certain level of vulnerability or irreplaceability.
- Within the principles, the overall result of no net loss and preferably a net gain is carried through from existing offsetting caselaw – although now as a compulsory requirement. Some of the new compulsory requirements include that gain must be achieved within the consent period, and the offset must be undertaken where it will result in the best ecological outcome (preferably close to the location of development or within the same ecological district).
- In addition to application of the effects management framework, activities that would have a more than trivial adverse effect on the attributes that make an area a significant biodiversity area or a 'highly vulnerable biodiversity area' must not be allowed. There is the potential for this requirement to come up at the consenting stage if the significant biodiversity area or highly vulnerable biodiversity area was not identified in the NPF or plan. Exemptions to the 'no more than trivial adverse effects' requirement may be provided for in the NPF, although they are unlikely to include economic considerations.
- Plans must identify each location in the region that is a "place of national importance". Rules must not allow for activities that would have a "more than trivial" adverse effect on these places of national importance. Additionally, before any activity can commence the council must determine whether the area includes an area of significant biodiversity.

While the codification of certain requirements (and the consistency that offers) is an anticipated outcome of the proposed legislation, the high threshold required to

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meet these requirements may in fact have the effect of stifling better biological outcomes that could be achieved through offsetting mechanisms.

General themes from submissions include:

- Support for the timeframe for first NPF to be extended from 6 months to 12 months to ensure it is meaningful with a focus on outcomes-based effects rather than staged.
- Submitters advocate for outcomes in the Bill to be weighted dependent upon location and circumstance to be able to capture the individual aspects of regions and districts. Submitters are also worried about the lack of guidance for implementation of the outcomes and key concepts such as offsetting, remediation and minimisation.
- Concern that the use of the term 'trivial' in the NBE Bill suggests a higher threshold than currently accepted through years of litigation and will result in expensive re-litigation.

**Want to know more?**

Please contact a member of our [Environments, Planning and Natural Resources Team](#) if you would like to know more.