

Restoring the balance in NSW native vegetation law

Solutions for healthy, resilient and productive landscapes



Environmental
Defenders Office

We recognise the traditional owners and custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander elders past and present and aspire to learn from traditional knowledge and customs so that together we can protect our environment and cultural heritage through law.

Environmental Defenders Office

EDO is the leading public interest environmental law organisation in Australia, with a formidable track record of successful Court outcomes and in driving systemic change through our policy and law reform expertise.

We provide expert, independent analysis of laws and regulations, legal education and support to communities across Australia and the Pacific, and we pursue litigation in the public interest.

Our vision is for a world where nature thrives.



Environmental
Defenders Office



EDO would like to acknowledge the generous support of the James N. Kirby Foundation for this project.



Contents

Executive Summary	2
Recommendations Summary	3
Introduction	5
The legal framework for biodiversity conservation and land management in NSW	5
Independent reviews and analysis of the land clearing framework: confirmation of regulatory failure	7
A changed landscape	9
Restoring the balance: How to fix NSW native vegetation laws	11
Our top 10 regulatory solutions	12
1. Curb excessive clearing: Mandate appropriate assessment pathways	13
2. Clarify where the rules apply: Complete a comprehensive Native Vegetation Regulatory Map	18
3. Efficient and effective assessment: A clear role for the Native Vegetation Panel	20
4. Protecting biodiversity: Set clear limits and incentivise stewardship	22
5. Best practice science-based biodiversity offsetting: Strengthen the rules	24
6. Vegetation in urban areas: Clarify the rules	27
7. Track how the laws are working: Improve monitoring and reporting	30
8. Landscape health: Assess impacts on soil, salinity, and water	33
9. Integrate climate change considerations: Identify impacts and opportunities	34
10. Compliance and enforcement: Ensure the laws are implemented	35
Conclusion	37
List of Recommendations	38

Executive Summary

On 25 August 2017, a new legal framework for regulating land clearing and its impacts on biodiversity commenced in NSW. The new framework has a strong emphasis on deregulation, particularly for land clearing in rural areas. Previous laws that prevented broadscale land clearing unless it was shown to maintain or improve environmental outcomes were repealed in favour of expanded self-assessable codes and a more flexible biodiversity offsets scheme.

On introducing the new laws to the NSW Parliament, the then Minister for the Environment, the Hon. Mark Speakman SC MP, said:

“Overall, the reforms aim to slow down, to arrest and then to reverse the long-term decline of biodiversity and to maintain a healthy, productive and resilient environment now and into the future consistent with the principles of ecologically sustainable development”¹

August 2020 marks three years since the laws commenced and this report asks: Has the new regime met the stated aim?

The evidence says no.

The NSW Audit Office, the Natural Resources Commission and the official vegetation clearing figures published by the NSW Government all confirm a regulatory failure to achieve environmental outcomes and effectively administer the law. While the law has certainly reduced regulatory requirements on landholders, the balance has tipped significantly against ecologically sustainable development, with the laws resulting in a return to broadscale land clearing in NSW.

This report identifies 10 areas of regulatory failure and sets out a law reform pathway with 27 recommendations for reform.

After a three-year experiment in deregulation, it is time to restore the balance to NSW native vegetation laws to ensure healthy, productive and resilient landscapes for generations to come.

¹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 November 2016 (Mr Mark Speakman, Minister for the Environment, Minister for Heritage, and Assistant Minister for Planning), available at <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3357>

Recommendations Summary

This report examines 10 key failings of the Framework relating to the regulation of land clearing and identifies solutions. It makes specific recommendations for urgent law reform to strengthen protections for native vegetation and biodiversity and to improve implementation, monitoring and enforcement in order to curb the return to broadscale land clearing and provide genuine protection for biodiversity and landscape functions.

- 1. Curb excessive clearing: Mandate appropriate assessment pathways**
- 2. Clarify where the rules apply: Complete a comprehensive Native Vegetation Regulatory Map**
- 3. Efficient and effective assessment: A clear role for the Native Vegetation Panel**
- 4. Protecting biodiversity: Set clear limits and incentivise stewardship**
- 5. Best practice science-based biodiversity offsetting: Strengthen the rules**
- 6. Vegetation in urban areas: Clarify the rules**
- 7. Track how the laws are working: Improve monitoring and reporting**
- 8. Landscape health: Assess impacts on soil, salinity, and water**
- 9. Integrate climate change considerations: Identify impacts and opportunities**
- 10. Compliance and enforcement: Ensure the laws are implemented**



Introduction

The legal framework for biodiversity conservation and land management in NSW

On 25 August 2017, a new legal framework for regulating land clearing and impacts on biodiversity commenced in NSW (**the Framework**). The Framework featured a strong emphasis on deregulation, particularly for land clearing in rural areas.² Previous laws that prevented broadscale land clearing unless it was shown to maintain or improve environmental outcomes were repealed in favour of expanded self-assessable codes and a more flexible biodiversity offsets scheme.³ Key elements of the Framework are summarised in **Box 1**.

On introducing the new laws to the NSW Parliament, the then Minister for the Environment, the Hon. Mark Speakman said:

*“Overall, the reforms aim to slow down, to arrest and then to reverse the long-term decline of biodiversity and to maintain a healthy, productive and resilient environment now and into the future consistent with the principles of ecologically sustainable development”.*⁴

However there was significant concern from experts and the community alike regarding the relaxation

of land clearing laws and the impacts deregulation would have on biodiversity, particularly given that clearing of native vegetation is a key threatening process and a significant contributor to greenhouse gas emissions in Australia.⁵ Measures announced by the NSW Government to counter anticipated increases in clearing, such as an increased investment in private land conservation and the Saving Our Species program,⁶ were considered to be inadequate due to their reliance on ongoing funding and inability to deliver outcomes in the short-term.

At the time the new laws were being drafted, the Environmental Defenders Office (**EDO**) raised significant concerns about key elements of the Framework. These concerns led EDO to conclude that the Framework ultimately weakened protections for biodiversity and would lead to an increase in land clearing rates across the state without commensurate protection for biodiversity.⁷ Unfortunately these concerns have been validated by recent independent reviews of the Framework that have confirmed regulatory failure.

2 The new scheme for regulating land clearing and biodiversity in NSW followed the Biodiversity Legislation Review, in which an Independent Panel was tasked with recommending a simpler, streamlined and more effective legislation which improves the conservation of biodiversity and supports sustainable development thereby reducing the compliance and administrative burdens, see <https://www.environment.nsw.gov.au/biodiversitylegislation/review.htm>

3 The new Framework saw the repeal of the *Native Vegetation Act 2003*, the *Threatened Species Conservation Act 1995*, the *Nature Conservation Trust Act 2001* and parts of the *National Parks and Wildlife Act 1974* relating to private land conservation and native animal and plant management.

4 New South Wales, *Parliamentary Debates*, above 1.

5 For example, relaxation of land-clearing regulations in 2013 in Queensland led to a significant increase in the vegetation clearing rate meaning that in 2015 the land use sector in Queensland generated 19 million tonnes of greenhouse gas pollution, see Steffen W. and Dean, A. *Land Clearing and Climate Change: Risks and Opportunities in the Sunshine State* (Climate Council of Australia), 2018, available at <https://www.climatecouncil.org.au/uploads/c1e786d5d0fe4c4bc1b91fc200cbaec8.pdf>

6 As part of the biodiversity conservation and land management reforms, the NSW government committed to an investment of \$240 million over five years to 2020- 21 and \$70 million each following year private land conservation managed by the NSW Biodiversity Conservation Trust and \$100 million for the Saving Our Species Program, see <https://www.environment.nsw.gov.au/news/native-vegetation-act-to-be-repealed-replaced-with-new-and-fairer-system>

7 See EDO submissions to the Biodiversity Legislation Review, available at <https://www.edo.org.au/nsw-biodiversity-legislation/>

Box 1:

An overview of land clearing under the NSW Land Management and Biodiversity Conservation Framework

The Land Management and Biodiversity Conservation Framework regulates land clearing activities on rural and non-rural land via various pathways.

Land clearing on rural land is regulated under Part 5A of the *Local Land Services Act 2013*, via three different pathways:

- **Allowable activities** – Low-impact clearing associated with land management activities is permitted without any authorisation or approval. Allowable activities include the construction of rural infrastructure such as fences, tracks and sheds, public works and telecommunications and electricity infrastructure.⁸
- **Code-based clearing** – Code-based clearing is clearing that is compliant with the *Land Management (Native Vegetation) Code 2018* which covers the following broad categories: invasive native species; pasture expansion; continuing use; equity; and farm plan. Formal assessment or approval is not required; instead, there are requirements for landholders to notify Local Land Services (**LLS**) of intended clearing; and for LLS to issue a voluntary code-compliant certificate or a mandatory code-compliant certificate depending on the type of clearing.
- **Approval** – For higher impact clearing that cannot be undertaken as an allowable activity or under the Code, approval from the Native Vegetation Panel (**NV Panel**) is required. This clearing triggers biodiversity assessment requirements under the *Biodiversity Conservation Act 2016* (**BC Act**).

Land clearing activities in non-rural areas (urban areas) and environment zones that are being carried out for a purpose not requiring development consent are regulated by the *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017* (**Vegetation SEPP**). There are two pathways for approval depending on whether proposed clearing falls above or below the Biodiversity Offsets Scheme Threshold (**BOS Threshold**). Clearing activities falling below the BOS Threshold may require a council permit under council Development Control Plans (**DCPs**). Clearing activities exceeding the BOS Threshold must be assessed and approved by the NV Panel in accordance with the biodiversity assessment requirements in the BC Act. An authority (permit or approval) is not required under the Vegetation SEPP in order to clear vegetation that is dying or dead and not required as habitat for native animals, or that is a risk to human life or property.⁹

Land clearing undertaken for a purpose that needs development consent (e.g. as part of residential development, or mining operations) is assessed and determined as part of the development application process under the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) and may trigger the new biodiversity assessment requirements under the BC Act.

Changes to private land conservation were also introduced as part of the Framework, including a revision of the private land conservation program and the introduction of the Biodiversity Conservation Trust to take over functions of the Office of Environment and Heritage and Nature Conservation Trust. The Government committed \$240 million over 5 years to support private land conservation, with \$70 million each subsequent year dependent on performance reviews.¹⁰

⁸ *Local Land Services Act 2013*, Schedule 5A.

⁹ *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017*, clause 8. However, it is unclear how this interacts with provisions of the *Biodiversity Conservation Act 2016* aimed at protecting plants and threatened species.

¹⁰ See <https://www.environment.nsw.gov.au/news/native-vegetation-act-to-be-repealed-replaced-with-new-and-fairer-system>



Independent reviews and analysis of the new land clearing framework: confirmation of regulatory failure

Three years on from the commencement of the Framework, regulatory failure has been confirmed by the Natural Resources Commission, the NSW Audit Office, a parliamentary inquiry, and by the Government's own published land clearing data.

Land clearing data from the Department of Planning, Industry and Environment and the Natural Resources Commission confirms significant increases in land clearing for agricultural purposes since the reforms were introduced. Data shows that prior to the reforms the average annual area of land approved for clearing was 2,700 ha whereas between June 2018 and May 2019, 37,745 ha was approved for clearing;¹¹ and the actual area of land being cleared for agricultural purposes has also been increasing from 27,100 ha in 2017-18 to 29,400 ha in 2018-19.¹²

A 2019 review by the Audit Office of NSW (**Audit Office**) concluded that the new laws may not be responding adequately to environmental risks whilst permitting landholders to improve agricultural activities, and identified significant delays in compliance and enforcement activity to address unlawful clearing.¹³ The Audit Office concluded:

The clearing of native vegetation on rural land is not effectively regulated and managed because the processes in place to support the regulatory framework are weak. There is no evidence-based assurance that clearing of native vegetation is being carried out in accordance with approvals. Responses to incidents of unlawful clearing are slow, with few tangible outcomes. Enforcement action is rarely taken against landholders who unlawfully clear native vegetation. There are processes in place for approving land clearing but there is limited follow-up to ensure approvals are complied with.

¹¹ Natural Resources Commission, *Final Advice on Land Management and Biodiversity Conservation Reforms*, July 2019, available at <https://www.nrc.nsw.gov.au/land-mngt>

¹² See Department of Planning, Industry and Environment (2019) NSW Woody Vegetation Change 2017-18 spreadsheet, available at <https://www.environment.nsw.gov.au/topics/animals-andplants/native-vegetation/reports-and-resources/reports> and Department of Planning, Industry and Environment (2020) 2018 Landcover Change Reporting, available at <https://www.environment.nsw.gov.au/topics/animals-and-plants/native-vegetation/landcover-monitoring-and-reporting/2018-landcover-change-reporting>

¹³ Audit Office of NSW, *Managing Native Vegetation* (27 June 2019) available at <https://www.audit.nsw.gov.au/our-work/reports/managing-native-vegetation>

NSW Land Management and Biodiversity Conservation reforms

Quarterly report on risk triggers, July 2019 – Cabinet in Confidence

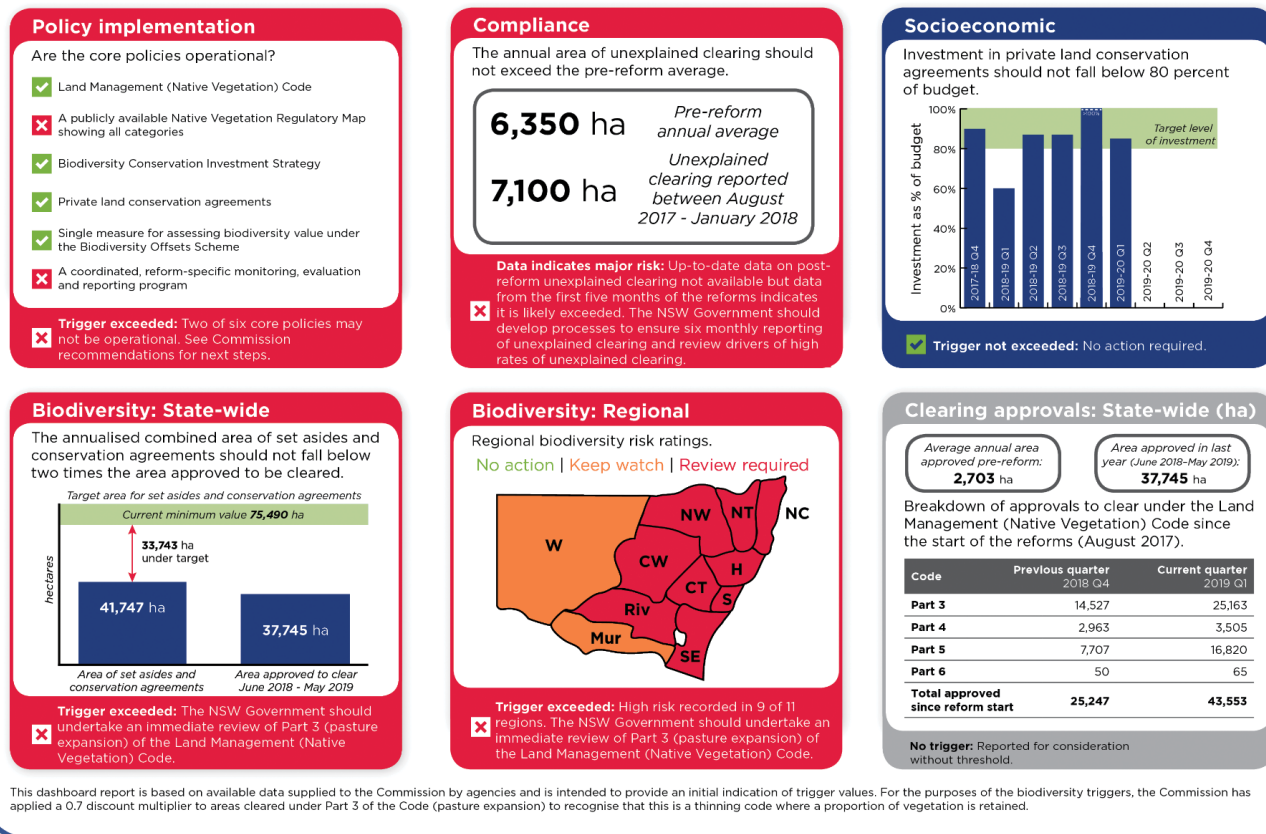


Figure 1: The NRC's 'trigger reporting dashboard' as seen in its report *Final Advice on Land Management and Biodiversity Conservation Reforms*, July 2019.

A review of the Framework, conducted in early 2019 by the Natural Resources Commission (**NRC Report**) but not publicly released until late March 2020, found that:

- Clearing rates have increased almost 13-fold – from an annual average rate of 2,703ha a year under the old laws to 37,745ha under the new laws;
- Biodiversity in 9 out of 11 regions is now at risk;
- Unexplained clearing has increased, with the NRC concluding that “compliance frameworks are inadequate and high rates of clearing pose a major risk”;
- The proposed ‘set aside’ areas and areas managed under conservation agreements that were supposed to offset cleared areas – i.e. the government's whole justification for relaxing rules and introducing self-assessable codes – are woefully inadequate, being 33,743ha below

the minimum required area.¹⁴

A snapshot of the NRC's finding is presented in its ‘trigger reporting dashboard’ – see **Figure 1**.

The NRC Report also confirmed that:¹⁵

- A Native Vegetation Regulatory Map showing all map categories is not publicly available;
- Compliance frameworks are inadequate and high rates of unexplained clearing pose a major risk;
- Widespread use of Part 3 of the Code – which relates to thinning – poses a risk to biodiversity statewide.

A NSW Parliamentary Upper House inquiry into koala populations and habitat in NSW inquired into, amongst other things, the impacts on koalas and koala habitat from the 2016 land management

¹⁴ Natural Resources Commission, *Final Advice on Land Management and Biodiversity Conservation Reforms*, July 2019, available at <https://www.nrc.nsw.gov.au/land-mngt>

¹⁵ Ibid, p 5 – 6.

reforms.¹⁶ The Committee's report found it is clear that frameworks regulating clearing on private land play a vital role in koala habitat protection and therefore in preventing the extinction of the koala in NSW and must be strengthened. The Committee found that without effective intervention, koalas will become extinct in NSW by 2050.

In that context, the Committee made a number of recommendations for strengthening the land management framework under the *Local Land Services Act 2013 (LLS Act)*, namely:

- **Recommendation 33:** *That the NSW Government amend the Local Land Services Act 2013 to reinstate legal thresholds so that its application improves or maintains environmental outcomes and protects native vegetation of high conservation value.*
- **Recommendation 34:** *That the NSW Government review the impact on koala habitat of the application of regulated land and self-assessment frameworks under the Local Land Services Act 2013.*
- **Recommendation 35:** *That the NSW Government adopt all of the recommendations made by the Natural Resources Commission in its 2019 Report on Land Management.*

These reviews make clear that three years after its commencement, the Framework is not operating as intended, with key elements still missing or underutilised, and land clearing rates increasing beyond expectation.

A changed landscape

Concerns regarding the failed implementation of the land management and biodiversity framework and increasing land clearing rates must now also be considered in the context of a changed landscape. The summer bushfire season of 2019-20 was the most devastating on record. Catastrophic bushfires in NSW led to more than 2,400 homes being destroyed and 25 lives lost.¹⁷ The bushfires had a devastating impact on natural landscapes,

ecosystems and native wildlife. Initial assessment by the NSW Government (as at 3 February 2020) indicates the fire ground in NSW covers 5.4 million hectares (7% of the state), including 2.7 million hectares in national parks (37% of the NSW park system). Habitat of more than 293 threatened animals and 680 threatened plants has been impacted.¹⁸ While it is difficult to estimate the exact numbers of native animals killed, some experts predict it could be as many as 800 million in NSW.¹⁹

A 2020 post-fire analysis of key biodiversity indicators²⁰ undertaken by the Department of Planning, Industry and Environment shows a decrease in ecological condition (by 39%), ecological carrying capacity (by 39%) and persistence of ecosystems across the state (by 4%) since an initial analysis in 2013. These statewide reductions are due to the impact of bushfires in the 7% of the state within the fire ground.²¹

The devastating impacts of the 2019-20 bushfires and the decline in ecological condition, ecological carrying capacity and persistence of ecosystems due to the impacts of those fires means that protecting the state's remaining native vegetation is even more crucial. Urgent reform to the land management and biodiversity conservation framework is of critical importance if we want to prevent further decline in ecological condition and to prevent extinction of threatened species and endangered ecological communities.

These impacts on our landscapes and catchments are in addition to the effects of prolonged drought in NSW. In this context, having effective laws to manage our native vegetation sustainably is more important than ever. The importance of retaining native vegetation in the landscape is set out in **Box 2**.

¹⁶ See: <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2536>

¹⁷ Climate Council of Australia, *Summer of Crisis*, March 2020, available at <https://www.climatecouncil.org.au/wp-content/uploads/2020/03/Crisis-Summer-Report-200311.pdf>

¹⁸ See NSW Department of Planning, Industry and Environment, *Understanding the effects of the 2019–20 fires*, available at <https://www.environment.nsw.gov.au/topics/parks-reserves-and-protected-areas/fire/park-recovery-and-rehabilitation/recovering-from-2019-20-fires/understanding-the-impact-of-the-2019-20-fires>

¹⁹ Professor Chris Dickman, Faculty of Science, University of Sydney. See <https://www.sydney.edu.au/news-opinion/news/2020/01/08/australian-bushfires-more-than-one-billion-animals-impacted.html>

²⁰ The Department of Planning, Industry and Environment has established the Biodiversity Indicator Program to assess the status of biodiversity in New South Wales at the commencement of the Biodiversity Conservation Act 2016, and then at recommended intervals, including contributing to the 5-year review of the Act, see <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/biodiversity-indicator-program>

²¹ See Department of Planning, Industry and Environment, *NSW Fire and the Environment 2019–20 Summary Biodiversity and landscape data and analyses to understand the effects of the fire events*, available at <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Parks-reserves-and-protected-areas/Fire/fire-and-the-environment-2019-20-summary-200108.pdf>

Box 2: Native vegetation in NSW: an asset worth protecting

Native vegetation covers 61% of NSW across national parks, public reserves and private land. The extent and condition of native vegetation in NSW is threatened by various land uses such as agriculture, industry and development, with only 15% of native vegetation in NSW considered to be in close to natural condition.²²

Native vegetation has immense intrinsic value and is a key component of our unique ecosystems. It is habitat for native fauna and provides vital ecosystem services, supporting healthy soil and water, enhancing landscapes and improving human health and wellbeing.

Land clearing and associated habitat loss is one of the most significant threats to biodiversity.²³ The NSW Scientific Committee has listed clearing of native vegetation, loss of hollow-bearing trees, and removal of dead wood and trees as key threatening processes.²⁴ Similarly, land clearing is a listed key threatening process under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.²⁵

Land clearing contributes to greenhouse gas emissions. Land-use change, including land clearing, agriculture and forestry, accounted for about 36% of global CO₂ emissions between 1850 and 2000.²⁶ A report released by the Intergovernmental Panel on Climate Change (IPCC) warns that land degradation (including as a result of clearing activities) exacerbates the impacts of climate change.²⁷

Land clearing significantly alters the cycling of water, nutrients, sediments and solutes,²⁸ subsequently compromising landscape functionality. Dryland and irrigation salinity, which can cause significant loss of agricultural productivity, is caused by a loss of deep rooted native vegetation.²⁹ Land clearing can also exacerbate the effects of drought.³⁰

Native vegetation is also of great economic value. It directly supports healthy soil and water functions which are relied upon by many sectors of the Australian economy, including tourism, agriculture and fisheries.³¹

-
- 22 NSW Environment Protection Agency *NSW State of Environment 2018* (2018), Chapter on Native Vegetation, available at <https://www.soe.epa.nsw.gov.au/all-themes/land/native-vegetation>
- 23 NSW Environment Protection Agency, *NSW State of Environment 2018* (2018), Chapter on Biodiversity, available at <https://www.soe.epa.nsw.gov.au/all-themes/biodiversity/threatened-species>. Land clearing is also recognised as a key threat to biodiversity in Commonwealth State of the Environment Reports, see ID Cresswell & HT Murphy (2017) *Australia state of the environment 2016: biodiversity*, 22, 40, available at <https://soe.environment.gov.au/sites/default/files/soe2016-biodiversity-launch-version2-24feb17.pdf>
- 24 Key threatening processes are process that adversely affect threatened species or ecological communities, or could cause species or ecological communities that are not threatened to become threatened, see *Biodiversity Conservation Act 2016*, section 4.32. See: <https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species/nsw-threatened-species-scientific-committee/determinations/final-determinations>
- 25 See *Advice to the Minister for the Environment and Heritage from the Threatened Species Scientific Committee on a public nomination of a Key Threatening Process under the Environment Protection and Biodiversity Conservation Act 1999*, <http://www.environment.gov.au/biodiversity/threatened/key-threatening-processes/land-clearance>
- 26 Brendan Mackey *et al* (2013) 'Untangling the confusion around land carbon science and climate change mitigation policy' *Nature Climate Change* vol 3, p 552.
- 27 See Intergovernmental Panel on Climate Change, *Climate Change and Land* (August 2019), available at <https://www.ipcc.ch/report/srccl/>
- 28 Metcalfe DJ & Bui EN (2017). *Australia State of the Environment 2016: land, independent report to the Australian Government Minister for the Environment and Energy*, Australian Government Department of the Environment and Energy, Canberra, doi:10.4226/94/58b6585f94911, available at <https://soe.environment.gov.au/sites/g/files/net806/ff/soe2016-land-final-web.pdf?v=1492063205>
- 29 Department of Industry and Investment (2009) 'Dryland salinity – causes and impacts' <https://www.dpi.nsw.gov.au/_data/assets/pdf_file/0006/309381/Dryland-salinity-causes-and-impacts.pdf>; Department of Industry and Investment (2009) 'Irrigation salinity – causes and impacts' <https://www.dpi.nsw.gov.au/_data/assets/pdf_file/0018/310365/Irrigation-salinity-causes-and-impacts.pdf>.
- 30 Such as through increased surface temperatures and the loss of an ability to promote the formation of rain-bearing clouds through transpiration and reflect heat back into the atmosphere. See McAlpine *et al*, 'A continent under stress: interactions, feedbacks and risks associated with impact of modified land cover on Australia's climate' (2009) 15 *Global Change Biology* 2206.
- 31 Standing Council on Environment and Water *Australia's Native Vegetation Framework*. (2012) , available at <http://www.environment.gov.au/system/files/resources/76f709dc-ccb3-4645-a18b-063fbbf0a899/files/native-vegetation-framework.pdf>

Restoring the balance: How to fix native vegetation laws in NSW

This report examines 10 key failings of the Framework relating to the regulation of land clearing and identifies solutions. It makes specific recommendations for urgent law reform to strengthen protections for native vegetation and biodiversity and to improve implementation, monitoring and enforcement in order to curb the return to broadscale land clearing and provide genuine protection for biodiversity and landscape functions.

- 1. Curb excessive clearing: Mandate appropriate assessment pathways**
- 2. Clarify where the rules apply: Complete a comprehensive Native Vegetation Regulatory Map**
- 3. Efficient and effective assessment: A clear role for the Native Vegetation Panel**
- 4. Protecting biodiversity: Set clear limits and incentivise stewardship**
- 5. Best practice science-based biodiversity offsetting: Strengthen the rules**
- 6. Vegetation in urban areas: Clarify the rules**
- 7. Track how the laws are working: Improve monitoring and reporting**
- 8. Landscape health: Assess impacts on soil, salinity, and water**
- 9. Integrate climate change considerations: Identify impacts and opportunities**
- 10. Compliance and enforcement: Ensure the laws are implemented**

These reform solutions will ensure the Framework meets intended objectives, including to reverse the long-term decline in biodiversity and maintain a healthy, productive and resilient environment.³²

With the Government having committed to undertake a review of the new laws, supporting policies, programs and funding within three years of implementation,³³ and in light of concerns raised by the Audit Office, NRC and the Upper House inquiry on specific aspects of the Framework, we make an overarching recommendation that the Government urgently commission an independent review of the entire land management and biodiversity conservation framework, and make the findings of the review publicly available.

Recommendation 1:

The Government urgently commission an independent review of the land management and biodiversity conservation framework, and make the findings of the review publicly available.

³² Our analysis does not consider other aspects of the Framework, such as the process for listing threatened species and key threatening processes. However the report does briefly consider the role of the Biodiversity Conservation Trust insofar as it has a role in identifying and prioritising areas of land for investment of funding earmarked to increase and improve private land conservation.

³³ See New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 November 2016 (Mr Mark Speakman, Minister for the Environment, Minister for Heritage, and Assistant Minister for Planning), available at <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3357>

Our top 10 regulatory solutions

1 Curb excessive clearing: Mandate appropriate assessment pathways

A *Land Management (Native Vegetation) Code 2018 (the Code)* was introduced as part of the new Framework.³⁴ The Code significantly expands the amount of clearing that can be carried out under self-assessment, with little oversight or assessment of environmental impacts. That is, rather than clearing proposals being assessed through a robust environmental assessment and approval process, landholders can simply 'self-determine' that proposed clearing complies with the Code and notify Local Land Services (LLS) of their intention to clear. For some higher-impact clearing a code-compliant certificate is required from the LLS, which simply confirms that the clearing can be carried out under the Code (rather than assessing the impacts of the clearing).

The Audit Office reports that over 200,000ha of native vegetation have been certified for thinning or clearing via certificates under the Code between August 2017 and February 2019.³⁵ More recent figures indicate it is now close to 385,000ha.³⁶ These figures show that the Code is facilitating extremely high levels of land clearing which is likely to be having significant environmental impacts.

These figures reinforce concerns that code-based clearing is an inappropriate regulatory tool for effectively managing land clearing, due to the significant impacts of land clearing on biodiversity and the climate.

Of particular concern are the following features of the Code:

- Clearing under certain parts of the Code amounts to a reintroduction of broadscale land clearing;
- The use of 'set-asides' is not effective or appropriate for ameliorating clearing impacts;
- The scope of category 2 - sensitive regulated land (that is excluded from code-based clearing) is too narrow; and
- There are only limited powers to prevent detrimental outcomes.

Clearing under certain parts of the Code amounts to a reintroduction of broadscale land clearing

Part 2 of the Code permits the clearing of Invasive Native Species (**INS Code**). This Part is intended to allow the removal of INS that have "reached unnatural densities and dominate an area",³⁷ but lacks appropriate controls to ensure clearing is only undertaken in these circumstances. The Audit Office reports that the INS Code is the most commonly used part of the Code and around 170,000ha of clearing was authorised under this Part of the Code between August 2017 and February 2019.³⁸ More recent figures from LLS put the amount authorised under Part 2 of the code at approximately 315,000ha between March 2018 and July 2020.³⁹

While code-based clearing of INS was permitted under previous native vegetation laws, the new INS Code allows more extensive clearing without any clear justification. For example:

- INS can be cleared regardless of whether it is invading an area, or stable and naturally occurring. Restrictions under previous legislation, that only allowed clearing of declared INS in circumstances

³⁴ It is noted that a 2017 version of the Code (the *Land Management (Native Vegetation) Code 2017*) was declared to be invalid by the Land and Environment Court on 9 March 2018. The 2018 Code was immediately made, without any changes from the 2017 Code. See the EDO case note on *NCC vs Minister for Primary Industries and Another*, available at https://www.edonsw.org.au/forestry_clearing_vegetation_trees_cases

³⁵ Audit Office of NSW, above 13.

³⁶ See *Public Information Register - Certificates Under Section 60Y*. The report for the period 09/03/2018 - 02/07/2020 alone shows the total treatment area for certificates issues section 60Y of the Local Land Services Act 2013 to be 383,071 hectares, see https://www.lls.nsw.gov.au/_data/assets/pdf_file/0004/747031/Public-information-register-Certificate-Under-Section-60Y_LMC-2018-02072020.pdf

³⁷ See Local Land Services, *Fact Sheet - The Land Management (Native Vegetation) Code*, available at https://www.lls.nsw.gov.au/data/assets/pdf_file/0008/734516/Land-Management-Native-Vegetation-Code-fact-sheet.pdf

³⁸ Audit Office of NSW, above 13, p 4.

³⁹ See Local Land Services, above no 31, p 2.

where it was regenerating densely or invading plant communities, should be reinstated.⁴⁰ Further guidance on applying the INS Code, including a test on INS density, dominance, numbers or cover, would provide additional clarity and objectivity to the INS Code.⁴¹

- The new INS Code expanded the extent of clearing of INS allowed within a designated treatment area from 80% to 90% with no reasonable explanation, despite the fact that a significant amount of clearing was able to be carried out under the previous policy settings.⁴²
- Up to 20% of clearing undertaken under the INS Code can be clearing of non-invasive species which, in our view, is excessive.⁴³ While we would argue that no level of incidental clearing of non-native species is appropriate, if, in practice, there is incidental clearing of non-invasive species, it should only be to the 'minimum extent necessary' (as was the case under the former INS Code). As this is difficult to define, quantify or technically assess, guidance on what this means in practice would assist landholders.
- Under the previous native vegetation laws, clearing of INS needed to be for the purpose of re-establishing native vegetation or allowing natural regeneration, and could not result in a change of land use from grazing to cropping.⁴⁴ This condition should be re-instated as it is an important safeguard against excessive and inappropriate self-assessed clearing. Any clearing that is for the purpose of changing land use should be subject to more rigorous environmental assessment and approval.

Part 3 of the Code authorises uniform or mosaic thinning for pasture expansion (**Thinning Code**). The Thinning Code authorises landholders to retain a stem density that is less than 75% of the benchmark density, as was previously required under the old

Thinning Code. Thinning is permitted on areas containing endangered ecological communities. The NRC found that widespread use of Part 3 of the Code poses a risk to biodiversity statewide. It noted that this part of the Code was not part of the Independent Biodiversity Legislation Review Panel's recommendations, and recommended that the rules of this part of the Code should be immediately reviewed.⁴⁵ The Audit Office has also raised concerns over how mosaic thinning on vulnerable land can achieve dual objectives of improving farm productivity and managing environmental risks.⁴⁶

Part 5 (**Equity Code**) and Part 6 (**Farm Plan Code**) permit clearing of paddock tree areas⁴⁷ and small patches of vegetation,⁴⁸ which can significantly undermine the connectivity of vegetation across the landscape; and clearing of large areas (up to 625ha) of native vegetation on a single landholding, without requiring erosion or land degradation management conditions.⁴⁹ The potential scale of clearing under Parts 5 and 6 of the Code is so significant that it equates to broadscale clearing. The use of 'set-asides' under these Parts is inappropriate. Any clearing on this scale should be properly assessed by the NV Panel and not allowable under the Code.

Use of set-asides is not effective or appropriate

Most clearing under Parts 5 and 6 of the Code requires landholders to establish 'set-aside' areas of managed vegetation but this mechanism side-steps genuine, commensurate evidence-based offsets. Instead, set-asides are based on simple area-based ratios and do not prevent a net loss of biodiversity.

Currently, there are no requirements that vegetation to be set-aside should be the same (or of ecological

40 As required under the *Clearing of Invasive Native Species Ministerial Order* under cl 38 of the *Native Vegetation Regulation 2013*, signed 14 November 2014, Schedule A, cl 1.1(b), available at <https://www.environment.nsw.gov.au/resources/vegetation/1402761NSOrder.pdf#targetText=a%20the%20plants%20to%20be,composition%20of%20the%20vegetation%20community>.

41 Audit Office of NSW, above 13, p 23.

42 A total of 4,777,847.68 ha was cleared as INS between 2005 – 2017. See EDO Submission to the *Land Management (Native Vegetation) Code* (2017), available at <https://www.edo.org.au/nsw-biodiversity-legislation/>

43 *Land Management (Native Vegetation) Code 2018*, clause 30(4).

44 *Clearing of Invasive Native Species Ministerial Order* under cl 38 of the *Native Vegetation Regulation 2013*, signed 14 November 2014, above n 28. Schedule A, clause 5.3

45 Natural Resources Commission, July 2019, above 14, p6.

46 Audit Office of NSW above 13, p 20.

47 *Land Management (Native Vegetation) Code 2018*, Part 5, Division 1. On any landholding, native vegetation may be cleared from paddock tree areas at a rate of one paddock tree area (an area of Category 2 regulated land that is less than 500 square metres and is completely surrounded by Category 1 – exempt land) for each 50 hectares of landholding in any 12 month period, unless the amount of vegetated land (i.e. Category 2 regulated land) comprises less than 10% of total area of landholding. Under Code Part 6, Division 1 multiple paddock tree areas can be cleared within a year so long as set-asides are established.

48 *Land Management (Native Vegetation) Code 2018* Part 5, Division 3. Between 1-4 ha, depending on what division of the State – for each 250ha in any 12 month period.

49 *Land Management (Native Vegetation) Code 2018* Part 5, Division 4. Up to 625ha (depending on overall size of landholding) can be cumulatively cleared on a single landholding, including vegetation that comprises an endangered ecological community, within the 3 year period immediately following publication of the Code. Under Part 6, Division 2, up to 25% of the Category 2 regulated land on a landholding can be cleared (there is no size limit, only a ratio limit), including vegetation that comprises a vulnerable ecological community.

equivalence) to the vegetation being cleared, and no requirements on what condition the vegetation should be in. Landholders are only required to 'make reasonable efforts to manage the set-aside area in a manner expected to promote vegetation integrity in the set-aside area'.⁵⁰ Without a clear requirement for landholders that set-asides achieve no net loss or better, or detailed guidance about the location, type, extent, quality and diversity of vegetation provided, there is a high risk that set-asides will not actually achieve environmental benefits to compensate for the biodiversity values that are lost. For example, remnant vegetation containing mature trees can be cleared and compensated with shrubs and/or planted seedlings of a completely different species. The provisions that allow a discount or reduction in the area of a set-aside if it contains threatened ecological communities⁵¹ may incentivise landholders to focus conservation efforts on high conservation value land, but would only lead to improved environmental outcomes if the set-asides were genuine, ecologically valid offsets.

Further, while set-aside areas are intended to be managed in perpetuity (i.e. set-asides run with the land so as to apply to future landholders), legal requirements under the LLS Act are that set-asides are recorded on a public register.⁵² This is not as effective as registering set-asides on title.⁵³ Additionally, provisions allow set-aside areas to be cleared in the course of land management activities authorised or required by the Code or a certificate, and for allowable activities under Schedule 5A that improve the native vegetation on the set-aside area as determined under that Code and certificate.⁵⁴

The use of set-asides (including areas of replanted vegetation) to ameliorate impacts under Parts 5 and 6 of the Code is not appropriate for managing environmental harm. Any clearing of this type and scale should be properly assessed by the NV Panel, with adequate offset requirements imposed.

The Audit Office has identified several concerns regarding the operation, biodiversity value and feasibility of set-asides to achieve actual

environmental benefits, including that there are limited requirements and no specific goals for the management of set-asides; no measures have been developed for gauging the success of the Code; there are limited monitoring requirements and no specific requirements to control grazing.⁵⁵

Concerns with the use of set-asides are reinforced by the findings of the NRC Report which found that, in contrast to the stated policy goal of setting aside two to four times the area approved for clearing:

*nine of the eleven regions are setting aside less than the area approved for clearing (between 6 and 69 percent of the area approved to be cleared). These low set aside ratios are driven mainly by the extensive use of Part 3 of the Code (pasture expansion).*⁵⁶

The scope of category 2-sensitive regulated land is too narrow

The scope of category 2-sensitive regulated land is too narrow. Category 2-sensitive regulated land is designed to identify environmentally sensitive areas which are off limits to clearing under the Code.⁵⁷ However, the scope of category 2-sensitive regulated land is too narrow. For example, it only includes critically endangered ecological communities (and not endangered and vulnerable ecological communities), core koala habitat (which, by its legal definition, is limited) and some parts of the coastal zone (but not all of the coastal zone), and does not include other sensitive areas such as travelling stock routes or steep or highly erodible land. For example, with respect to core koala habitat, the recent Upper House inquiry into koala populations and habitat in NSW found that koalas will become extinct in NSW before 2050 without urgent government intervention. The most serious threat to koala populations was found to be the fragmentation and loss of habitat through the clearing of land for agriculture, development, mining and forestry.⁵⁸ The Legislative Council Committee noted that it:

50 *Land Management (Native Vegetation) Code 2018*, clause 18(1)(a).

51 *Land Management (Native Vegetation) Code 2018*, clause 81(5) and (6) 88(6) and (7).

52 *Local Land Services Act 2013*, s 60ZC and *Local Land Services Regulation 2014*, clause 130.

53 We note that Property Vegetation Plans under the former *Native Vegetation Plan 2003* were required to be registered on title. Best-practice offsetting would require genuine offsets to be registered on title.

54 *Local Land Services Act 2013*, s 60ZC(5).

55 Audit Office of NSW, above no 13, pp 20-22.

56 NRC Report, above 14, p 6.

57 *Local Land Services Regulation 2014*, clause 124(1)(a).

58 New South Wales Parliament Legislative Council. Portfolio Committee No. 7 – Planning and Environment. Koala populations and habitat in New South Wales (June 2020), available at <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2536/Koala%20populations%20and%20habitat%20in%20New%20South%20Wales%20-%20Report%203.pdf>

...was concerned to hear that the protections for koalas under the Land Management Framework were not functioning effectively... many of these protections seemed to be failing because of the poor interaction between the Local Land Services Act 2013 and SEPP 44. The crux of the issue seems to be that it is only land identified as core koala habitat under a koala plan of management where clearing is not permitted. With so many local councils still lacking comprehensive koala plans of management – the majority through no fault of their own – this protection has little practical effect.⁵⁹

Code-based clearing must not be allowed in any environmentally sensitive areas. Instead, proposed clearing in these areas should be subject to proper assessment and approval. To achieve this, Category 2 - sensitive regulated land should be expanded.

Limited powers to prevent detrimental outcomes

There are limited powers for the LLS to refuse clearing under the Code. Clause 16 of the Code provides that:

Local Land Services may refuse to issue a voluntary code compliant certificate or a mandatory code compliant certificate, or may withdraw the authority to clear by revoking a notification, if:

- a. the area of land on which clearing of native vegetation is proposed was subject to a notification, voluntary code compliant certificate or mandatory code compliant certificate at any time in the 5 years prior to the notification or the consideration of the application for a voluntary or mandatory code compliant certificate, and
- b. in the opinion of Local Land Services, the cumulative impact of all clearing, including the proposed clearing, is more than would be permitted under any single Part of this Code, would undermine the effectiveness of any condition of this Code or would result in excessive or broadscale clearing.

These provisions do not prevent cumulative impacts

across the landscape or unacceptable impacts on threatened species. To strengthen these provisions, the requirement to refuse applications that fall within the scope of clause 16 must be mandatory and the standard of 'excessive or broadscale clearing' should be an objective standard, supported by evidence-based criteria and guidelines.

Other provisions that attempt to limit clearing are confusing. For example, clearing under some parts of the Code can continue to be carried out until there is only 11% of Category 2 regulated land left. The Code also states that voluntary and mandatory certificates cannot be issued over existing treatment areas but remains silent regarding the number of treatment areas permitted within a single landholding overall.

The Audit Office has raised similar concerns regarding the limited ability for LLS to refuse an application for a certificate even if LLS is concerned about the level of impact of the clearing and how well it will be managed⁶⁰ and has recommended that a review of the Code address the inability of LLS to reject a notification or application for a certificate on the basis it would likely result in poor environmental outcomes.⁶¹

Despite concerns regarding the scale of clearing occurring under the Code, the Government in 2019 made changes to the Code to facilitate further land clearing, including clearing of critically endangered ecological communities,⁶² and has foreshadowed further Code changes in the north-west of the State.⁶³ These changes are expected to facilitate still more clearing under the Code.

In light of the significant amounts of land clearing being facilitated by the Code, it is imperative that an independent and comprehensive review of the Code is undertaken, and measures are put in place to limit code-based clearing to genuinely low-impact activities. In response to the Audit Office's report, the Government committed to undertake a review of the Code by June 2020,⁶⁴ however it is unclear if that review has been undertaken or if the findings of the review will be made public.

⁶⁰ Audit Office of NSW, above 13, p. 16-17.

⁶¹ Audit Office of NSW, above 13, Recommendation 2.

⁶² *Land Management (Native Vegetation) Code Amendment (Monaro and Werriwa Grassy Woodland Critically Endangered Ecological Communities) 2019*.

⁶³ The Guardian, *Secret review into soaring NSW land clearing set to spark cabinet tensions*, 13 September 2019, <https://www.theguardian.com/australia-news/2019/sep/13/secret-review-into-soaring-land-clearing-rates-handed-to-nsw-government>

⁶⁴ Audit Office of NSW, above no 13, p 43, in response to Audit Office Recommendation 2

⁵⁹ Ibid [7.128].

Solutions to curb excessive clearing and mandate appropriate assessment pathways

Recommendation 2:

Limit the amount of clearing that can be carried out under the INS Code, including by:

- Only allowing declared INS that is regenerating densely or invading native plant communities to be cleared.
- Providing further guidance on applying the INS Code, including a test on INS density, dominance, numbers or cover.
- Reducing the extent of clearing of INS allowed within a treatment area.
- Restricting incidental clearing of non-invasive species to the 'minimum extent necessary' and providing guidance to landholders on what this means.
- Requiring clearing of INS to be for the purpose of re-establishing native vegetation or allowing natural regeneration (and not allowing code-based clearing of INS that would result in a change of land use (e.g. from grazing to cropping)).

Recommendation 3:

Remove Part 5 Equity and Part 6 Farm Plan of the Code in their entirety, and instead require clearing of this scale to be assessed efficiently by the Native Vegetation Panel.

Recommendation 4:

Strengthen the power of the LLS to refuse to issue code-compliant certificates by:

- Making the requirement to refuse applications that fall within the scope of clause 16 mandatory;
- Ensuring 'excessive or broadscale clearing' is an objective standard, supported by evidence-based criteria and guidelines.

Recommendation 5:

Expand Category 2 - sensitive regulated land to include a broader range of sensitive and high conservation value areas, including:

- All *endangered* ecological communities, not just critically endangered ecological communities. These are unique communities of species at *very high risk of extinction in the near future* and are not suitable for code clearing;
- All *vulnerable* ecological communities. These are at *high risk of extinction in the medium term*;
- The entire coastal zone⁶⁵ (not just coastal wetlands and littoral rainforests area);
- All small holdings;⁶⁶
- Travelling stock reserves (**TSRs**). TSRs have high conservation value as they play a key role in ecological landscape connectivity and biodiversity conservation;
- A broader definition of koala habitat, to ensure all koala habitat is off limits to code-based clearing, and having regard to the introduction of *State Environmental Planning Policy (Koala Habitat Protection) 2019*.
- Nominated Areas of Outstanding Biodiversity Value (**AOBVs**), not just declared AOBVs;
- All set-aside areas; and
- Steep or highly erodible land.

⁶⁵ As defined in the *Coastal Management Act 2016*, section 5.

⁶⁶ As defined in the *Local Land Services Act*, Schedule 5A, clause 4.

2 Clarify where the rules apply: Complete a comprehensive Native Vegetation Regulatory Map

The Native Vegetation Regulatory Map (**NVR Map**) is fundamentally important as it underpins the entire regulatory regime – it determines where the rules apply. However after three years, this critical map has not been finalised, with a number of land categories remaining unpublished.

The NVR Map is intended to categorise land across NSW to identify where and how the Framework applies, as follows:

- **Category 1 (exempt land)** - Rural land where clearing can occur without the need for an approval.
- **Category 2 (regulated land)** - Rural land where clearing can occur under Part 5A of the LLS Act as an allowable activity, code-based clearing or with approval from the NV Panel. This category also includes two sub-categories - vulnerable regulated land and sensitive regulated land.
- **Category 3 (excluded land)** – Non-rural land such as urban areas and environment zones, where Part 5A of the LLS Act does not apply. Instead clearing may be regulated by other laws such as the EP&A Act or the Vegetation SEPP.

Currently, the published Transitional NVR Map only shows excluded land (Category 3) and the sensitive and vulnerable areas of regulated land (Category 2) (and not the remainder of Category 2 regulated land). However the mapping for the vast majority of the state, which is supposed to be categorised

as either Category 2 (regulated land) or Category 1 (unregulated land) has not yet been released. For these areas, landholders are required to ‘self-categorise’ unmapped land in accordance with transitional arrangements.⁶⁷ An incomplete map makes an already confusing regulatory scheme even more difficult to navigate for landholders and members of the public alike, and transitional provisions are open to misuse.

In November 2019, an ‘annual’ update to the Transitional NVR Map was finalised, but did not include these missing components.⁶⁸ Additionally, recently listed Critically Endangered Ecological Communities (CEECs) were not added to the Transitional NVR Map, despite CEECs falling within the scope of Category 2 – sensitive regulated land.⁶⁹ These areas are instead identified in a Community Advisory Layer which is intended to be a guide only.

The Audit Office found that a lack of a complete NVR Map can make categorising land more difficult for LLS staff, particularly for areas of groundcover such as shrubs and grassland,⁷⁰ and the NRC found that an incomplete map creates a risk in terms of ensuring LLS staff can provide consistent and accurate advice.⁷¹ The Audit Office recommended “(i)mplementing a staged release of draft maps Category 1 - Exempt and Category 2 - Regulated land to landholders and the public, allowing sufficient time for landholder review and input”, and “(e)nsuring adequate resources are in place, during the release of the last two map categories, to process category explanation reports and NVR map reviews, and to update the NVR map”.⁷² In response, the Environment, Energy and Science Division of the Department of Planning, Industry and Environment (EES) has indicated it has developed a strategy for the staged release of the remaining map categories, which will be released once approved

67 Local Land Services Act 2013, section 60F.

68 See: <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/native-vegetation-regulatory-map>

69 Monaro Tableland Cool Temperate Grassy Woodland in the South Eastern Highlands Bioregion and Werriwa Tablelands Cool Temperate Grassy Woodland in the South Eastern Highlands and South East Corner Bioregions (Monaro and Werriwa CEECs) were gazetted as CEECs on 28 June 2019, see https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Regulation_2019_2019-283.pdf. While a new advisory layer of Monaro and Werriwa CEECs is available on the NVR Map Viewer (<https://www.lmbc.nsw.gov.au/Maps/index.html?viewer=NVRMap>), the Government has indicated that this layer is advisory only and does not imply any particular land category.

70 Audit Office of NSW, above 13, p 14.

71 Natural Resources Commission, above 14, p 13.

72 Audit Office of NSW, above 13, Recommendations 5 and 6, p 7.



by Government.⁷³ However, there has been no indication from Government itself about when the remaining map categories can be expected to be published.

Given that the NVR Map is intended to underpin the entire Framework, it must be published in full to create the regulatory certainty that is currently lacking.

Solutions to clarify where the rules apply: complete a comprehensive Native Vegetation Regulatory Map

Recommendation 6:

Immediately release the comprehensive NVR Map with all map categories including Category 1 (exempt land) and Category 2 (regulated land) accurately identified.

Recommendation 7:

Put in place mechanisms to ensure that any newly listed CEECs are mapped as category 2 – sensitive regulated land without delay.

⁷³ Audit Office of NSW, above 13, p 44.



3 Efficient and effective assessment: A clear role for the Native Vegetation Panel

Land clearing that cannot be carried out as an allowable activity or under the Code requires assessment and approval by the NV Panel established under Part 5A of the LLS Act, and requires a more robust environmental assessment. Applications to the NV Panel must include a biodiversity development assessment report (**BDAR**) which is prepared by an accredited assessor using the Biodiversity Assessment Method (**BAM**) under the provisions of the BC Act. The BDAR identifies the biodiversity values of the area to be cleared and the type and number of biodiversity credits that will be required to offset those values. The NV Panel must assess applications according to requirements in the LLS Act and must refuse any applications that are likely to have serious and irreversible impacts on biodiversity values.

There is very little publicly available information about the NV Panel.⁷⁴ The LLS Act requires the NV Panel members to hold certain qualifications⁷⁵ and to follow certain procedural requirements;⁷⁶ however because of the lack of publicly available information, it is not known whether those requirements have been met.

Approvals issued by the NV Panel should be

⁷⁴ Limited information about the NV Panel can be found at <https://www.nvp.nsw.gov.au/>. The NV Panel also determines applications under Part 4 of *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017*.

⁷⁵ Section 60ZE(2) of the *Local Land Services Act 2013* provides that: The Panel is to consist of the following 3 members appointed by the Minister—(a) a Chairperson of the Panel, being a person with expertise in planning, public administration or social assessment, (b) a person with expertise in economics, agricultural economics or agricultural land production systems, (c) a person with expertise in ecology or the protection and conservation of biodiversity.

⁷⁶ *Local Land Services Act 2003*, Schedule 5B.

published in the register maintained by the LLS,⁷⁷ however, to date publicly released data (up to 24 August 2018) suggests that the NV Panel has not processed any applications.⁷⁸ The NV Panel homepage shows just one application (Ingleburn) which was lodged in June 2020 and is currently under assessment.⁷⁹ The assumption therefore is that *all* land clearing that has taken place on rural land since the Framework commenced has been undertaken as an allowable activity or under the Code. This raises questions as to whether the NV Panel and the overall Framework are operating as intended. For example:

- Are landholders misusing the system by undertaking multiple clearing activities under the Code to avoid the more rigorous assessment process required by the NV Panel?
- Are cumulative impacts of clearing across the landscape being properly identified and managed?

With evidence that land clearing rates have significantly increased, the failure of the NV Panel to operate as intended is concerning. The alternative approval pathways (allowable activities provisions and the Code) are less rigorous in terms of environmental assessment requirements, and the lack of NV Panel assessments suggests that the scope of allowable activities provisions and the Code are too broad or open to misuse.

Solutions for an efficient and effective assessment: A clear role for the Native Vegetation Panel

Recommendation 8:

Immediately publicly release more information about the NV Panel.

Recommendation 9:

As part of an overarching review of the Framework, consider and report on why the NV Panel is not functioning as intended.

‘With evidence that land clearing rates have significantly increased, the failure of the NV Panel to operate as intended is concerning’

⁷⁷ *Local Land Services Act 2003*, section 60ZO.

⁷⁸ See *Public Information Register - Approvals and Refusal of Applications For Approval Under Division 6*, https://www.lls.nsw.gov.au/__data/assets/pdf_file/0005/747032/Public-Information-Register-Approvals-and-Refusal-of-Applications-For-Approval-Under-Division-6-24082018.pdf

⁷⁹ See <https://www.nvp.nsw.gov.au/ingleburn>

4 Protecting biodiversity: Set clear limits and incentivise stewardship

Serious and irreversible impacts

The Framework creates ‘red flags’ that require decision-makers to refuse certain land clearing that, in their opinion, is likely to have serious and irreversible impacts (**S&II**) on biodiversity. Effectively regulating to prevent unacceptable impacts is an essential foundation for any functional natural resource management legislation. The Framework currently fails to do this in a number of ways.

The **S&II test** applies to land clearing that requires approval by the NV Panel under the LLS Act⁸⁰ and local development that requires development consent under the EP&A Act.⁸¹ However, in the case of major projects (State Significant Development and State Significant Infrastructure), the Minister must only *consider* S&II, and retains discretion to approve major projects regardless of any S&II.⁸²

As noted above, to date no clearing under the LLS Act has been determined by the NV Panel. This means any safeguard against S&II provided for within the NV Panel decision-making process is rendered nugatory. As recommended above, the operation of the NV Panel must be reviewed and strengthened so that it operates as intended.

The S&II test adopted in the Framework is not consistent with the principles of ecologically sustainable development from which it is drawn.

The precautionary principle states ‘serious **or** irreversible’ impacts (rather than ‘serious **and** irreversible impacts’), which creates a higher bar than intended by the precautionary principle. The mechanism should adopt the wording of the precautionary principle – ‘serious **or** irreversible’.

Additionally the S&II test fails to incorporate appropriate consideration of cumulative impacts. For example, while an individual proposal may not be deemed to have a S&II on biodiversity, multiple proposals across the landscape may lead to S&II. Finally, the S&II test is subjective as it is ‘in the opinion’ of the decision-maker. Although guidelines are in place to assist decision-makers,⁸³ the mechanism would be further strengthened by removing ‘in the opinion’ and creating an objective test.

Areas of Outstanding Biodiversity Value (AOBVs)

One mechanism that offers some limits to unfettered clearing - and is intended to galvanise stewardship funding where clearing is not permitted - is the declaration of Areas of Outstanding Biodiversity Value (**AOBVs**) under the BC Act. This critical mechanism has not been utilised.⁸⁴

AOBVs are intended to identify the most valuable sites for biodiversity conservation in NSW outside of the national reserve system.⁸⁵ AOBVs are intended to be a ‘priority for government investment’ and are considered an ‘automatic priority’ under the *Biodiversity Conservation Investment Strategy 2018*.⁸⁶ Despite the fact that an AOBV declaration has potential to protect the most important areas of biodiversity in NSW, no new AOBVs have been declared or registered since the BC Act came

83 Department of Planning, Industry & Environment, *Guidance to assist a decision-maker to determine a serious and irreversible impact* (2019), available at <https://www.environment.nsw.gov.au/research-and-publications/publications-search/guidance-to-assist-a-decision-maker-to-determine-a-serious-and-irreversible-impact-2019>

84 See *EDO Briefing Note, Areas of Outstanding Biodiversity Value under the Biodiversity Conservation Act 2016*, available at https://www.edonsw.org.au/aobv_briefing_note

85 Section 3.2 of the *Biodiversity Conservation Act 2016* provides that the Environment Minister may declare any area in NSW to be an AOBV if they are of the opinion that:

- (a) The area is important at a State, national or global scale, and
- (b) The area makes a significant contribution to the persistence of:
 - i. multiple species, or at least one threatened species or ecological community;
 - ii. irreplaceable biological distinctiveness;
 - iii. ecological processes or ecological integrity; or
 - iv. outstanding ecological value for education or scientific research.

86 See <https://www.environment.nsw.gov.au/conservationprograms/biodiversity-conservation-investment-strategy.htm>

80 See section 60ZF(6) of the *Local Land Services Act 2013*.

81 See section 7.16(2) of the *Biodiversity Conservation Act 2016*.

82 See section 7.16(3) of the *Biodiversity Conservation Act 2016*.

into effect in August 2017,⁸⁷ and no process for community members to nominate AOBVs has been established.

We recommend establishing a clear and transparent process for any person to nominate an area as an AOBV. The process should be transparent, science-based and consistent with the current nominations process for threatened species. It should clarify how members of the public and other agencies and experts such as the LLS, Biodiversity Conservation Trust, Biodiversity Conservation Advisory Panel and the NSW Threatened Species Scientific Committee (**Scientific Committee**) should engage with the AOBVs nominations process. Further, in order to ensure AOBVs are providing the protection intended, there should be a requirement that any land recommended as an AOBV to the Minister by the Environment Agency Head must be mapped as Category 2 – sensitive regulated land in the NVR Map within two weeks of receiving the recommendation from the Environment Agency Head.⁸⁸

Solutions for protecting biodiversity: Set clear limits and provide incentives for stewardship

Recommendation 10:

Strengthen the concept of ‘serious and irreversible impacts on biodiversity values’, including by:

- Reframing the S&I test as serious **or** irreversible to bring it into alignment with the principles of ecologically sustainable development from which it is derived.
- Requiring proposals for major projects (which

include significant land clearing) to be refused where the project will or will be likely to have serious or irreversible impacts on biodiversity.

- Requiring the S&I test be applied as an objective standard.

Recommendation 11:

Establish a clear and transparent process for any person to nominate an AOBV that:

- Makes explicit that any person can nominate an area for consideration as an AOBV.
- Establishes a process for recommending and nominating AOBVs, including an online form and guidelines,⁸⁹ that specify information requirements to address the criteria for AOBVs established by the BC Act and Regulation, and clearly outlines what data, evidence and mapping is required to support a nomination.
- Sets clear timeframes for consideration and Ministerial declaration.
- Outlines the process for the Scientific Committee, Biodiversity Conservation Trust and Biodiversity Conservation Advisory Panel to provide advice to the Environment Agency Head on an AOBV nomination and resulting recommendation, and to the Minister on an AOBV declaration.
- Clarifies the role of the LLS in discussing with landholders and recommending potential AOBVs, including providing landholders with information about financial incentives and assistance.
- Ensures that any land recommended as an AOBV to the Minister by the Environment Agency Head is mapped as Category 2 – sensitive regulated land in the NVR Map within two weeks of receiving the recommendation from the Environment Agency Head.

⁸⁷ It is noted that ‘critical habitats’ identified under the now repealed *Threatened Species Conservation Act 1995* have been carried across to the new *Biodiversity Conservation Act 2016* as AOBVs. There are currently only four habitats identified in this way: the habitat for the Gould’s Petrel, Little Penguin population in Sydney’s North Harbour, Mitchell’s rainforest snail in Stotts Island Nature Reserve and the Wollemi Pine – none on private rural land.

⁸⁸ *Local Land Services Regulation 2014*, clause 108(2)(g) provides that land that is recommended as an AOBV to the Minister by the OEH is categorised as Category 2 – sensitive regulated land.

⁸⁹ The *Biodiversity Conservation Regulation 2017* provides for guidelines to be made that can specify the information requirements. A useful precedent can be found in relation to the threatened species listing process that has background information and guidelines.

5 Best practice science-based biodiversity offsetting: Strengthen the rules

Biodiversity offsetting should be seen as a last resort, only permitted after genuine attempts to avoid and minimise impacts on species and ecological communities have been implemented. Where offsets are permitted it should be done according to a clear and objective environmental standard of ‘no net loss or better’. The Biodiversity Offsetting Scheme (**BOS**) and Biodiversity Assessment Method (**BAM**) established by the Framework do not meet best-practice.⁹⁰ Five key concerns are summarised below.

Like-for-like offsetting requirements and variation rules provide too much flexibility

One of the cornerstones of best-practice offsetting is that offsetting is like-for-like (that is, impacts are sought to be countered by ecologically equivalent offsets). However, the BOS offset rules provide a significant degree of flexibility, including in relation to spatial location of offsets and the ability to trade off vegetation within the same class rather than the same plant community. For example, under flexible rules proponents could destroy koala populations and habitat around Gunnedah and offset them with koala populations on the south coast of NSW.⁹¹ Variation rules provide further flexibility, including that in some cases offsets need not even be the same species, so long as the offset species has the

same or a higher threat status under the BC Act.⁹² Where like-for-like credits are not available, this is an indication that the proposal’s impact is significant (and potentially serious and irreversible), particularly for species or ecological communities already at risk of extinction. Offsetting is not appropriate in such circumstances as it fails a ‘no net loss or better’ test.

Biodiversity conservation measures are allowed in lieu of genuine direct offsets

In some instances the BOS allows alternative ‘biodiversity conservation measures’ (such as research and targeted surveys) to be credited in lieu of genuine direct offsets.⁹³ While there are some restrictions around when biodiversity conservation measures can be used, this is another example of undermining like-for-like standards for biodiversity offsetting. It is essentially trading off a permanent impact for an activity that may or may not yield a direct environmental outcome in the future.

Payments can be made to the Biodiversity Conservation Fund in lieu of securing offsets

The BOS allows payments to be made to the Biodiversity Conservation Fund managed by the Biodiversity Conservation Trust (**BCT**) in lieu of securing actual direct offsets.⁹⁴ This puts the onus on the BCT to find a credit without stopping to check if a relevant credit can be found. It also allows the BCT to use funds for “other biodiversity conservation measures or actions” as an alternative to retirement of credits for genuine like-for-like offsets. Again, this fails a no net loss test, and is a further weakening of the offset rules.

Mine rehabilitation is allowed in lieu of genuine offsets

Ancillary rules can set out standards for the ecological rehabilitation of sites impacted by the

⁹⁰ Detailed analysis is set out in our submissions on the draft BOS and draft BAM, and feedback on the implementation of the BOS during its first two years of operation See: <https://www.edo.org.au/nsw-biodiversity-legislation/>

⁹¹ *Biodiversity Conservation Regulation 2017*, clause 6.3.

⁹² *Biodiversity Conservation Regulation 2017*, clause 6.4.

⁹³ See *Ancillary rules: Biodiversity conservation actions Published under clause 6.5 of the Biodiversity Conservation Regulation 2017*, available at <https://www.environment.nsw.gov.au/resources/bcact/ancillary-rules-biodiversity-actions-170496.pdf>

⁹⁴ See Part 6, Division 6 of the *Biodiversity Conservation Act 2016*.

carrying out of mining and the credit value of any such rehabilitation.⁹⁵ Allowing mine rehabilitation to generate credits under the BAM is highly problematic. Providing any offset credits for mine rehabilitation work creates a perverse incentive to allow or recommend poor rehabilitation outcomes during the approval stage, and for mining companies to undertake poor rehabilitation in the first instance and only undertake an adequate standard of rehabilitation where there will be a financial reward through the offsetting system. This approach constitutes double counting. Further, under previous rules,⁹⁶ credits for mine rehabilitation were significantly discounted to recognise the high level of uncertainty in achieving positive biodiversity outcomes through mine rehabilitation, but even this safeguard has been removed.

Credit requirements can be discounted based on non-ecological considerations

Offsetting credit requirements for approvals under the LLS Act or development under the EP&A Act can be reduced based on non-ecological considerations, including the social and economic impacts of the proposed clearing or development.⁹⁷ In the case of major projects, the Minister has discretion regarding whether to require the proponent to retire biodiversity credits to offset biodiversity impacts.⁹⁸ This discretion is another avenue whereby the ecological validity and integrity of an offset can be undermined under current NSW laws.

Credit pricing

Turning biodiversity into a tradeable commodity without a comprehensive system of red flags simply puts a price on extinction. The justification for creating a market for biodiversity credits is that as species and ecosystems become scarcer, it will become more expensive to purchase offset credits

and therefore provide limits on the amount of clearing undertaken. However, the process of credit pricing under the Framework is fundamentally undermined by the failure to require true like-for-like offsets and the existence of the variation rules. These rules mean that it is possible to comply with offset requirements without actually protecting the populations or ecological communities at risk, thereby avoiding increased credit prices for rare species or ecosystems. The underlying formulation of the credit price also fails to adequately recognise scarcity. Further, the ability for a proponent to meet their offset obligation by simply paying money to the BCT creates a lag between the ability to clear vegetation and habitat and the identification that there are no equivalent species or ecosystem offset areas available, i.e. like-for-like areas no longer exist. The presence of the BCT as a major purchaser of credits also risks further distorting the market, with anecdotal reports that landholders willing to create stewardship sites and sell offset credits are not able to obtain sufficient financial benefit from the process because their cost of management exceeds the estimates generated by the offset payment calculator.⁹⁹

The variation rules that apply to the BCT should be identical to those that operate in the biodiversity credit market itself. In particular, there should be no allowance for the BCT to source offsets from other geographical regions or for impacts on entities excluded from the variation rules for other market participants or by using other conservation measures approved by the Minister.¹⁰⁰

‘Turning biodiversity into a tradeable commodity without a comprehensive system of red flags simply puts a price on extinction’

⁹⁵ See clause 6.5(2) of the *Biodiversity Conservation Regulation 2017*.

⁹⁶ Under the former *Framework for Biodiversity Assessment* mine rehabilitation activities generated just 25% of credits, see *Framework for Biodiversity Assessment* (p 50) <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/BioBanking/framework-biodiversity-assessment-140675.pdf>

⁹⁷ See section 60ZG(4) of the LLS Act and section 7.13(4) of the *Biodiversity Conservation Act 2016*.

⁹⁸ See section 7.14(3) of the *Biodiversity Conservation Act 2016*.

⁹⁹ The Offsets Payment Calculator is an interactive tool designed to determine how much a developer must pay into the Biodiversity Conservation Fund to satisfy an offset obligation, if they opt to do so instead of obtaining and retiring credits. The public tool provides an estimate of this price in advance of any formal negotiations with the BCT.

¹⁰⁰ See page 11 of the methodology note, section 4.1.4, hierarchy options 2, 4 and 5

Solutions for best practice science-based biodiversity offsetting: Strengthen the rules

Recommendation 12:

Strengthen the Biodiversity Offsets Scheme, including by:

- Imposing a clear and objective 'no net loss or better' environmental standard under the BOS and BC Act;
- Requiring genuine attempts to avoid and minimise impacts on threatened species be demonstrated before the BOS can be applied;
- Tightening like-for-like offsetting requirements and variation rules;
- Significantly limiting indirect offset options such as biodiversity conservation measures and mine rehabilitation;
- Setting stricter parameters around the payment of money to the BCT in lieu of direct offsets;
- Removing the option to discount offset requirements based on non-ecological considerations;
- Empowering the BCT to refuse to accept an offset liability for a proponent where, in their opinion, it would not be possible for them to obtain like-for-like offsets under tightened rules; and
- Ensuring that formulas used to determine credit pricing incorporate increasing scarcity and do so in a non-linear fashion to ensure that it becomes increasingly expensive to purchase credits for increasingly scarce species and ecosystems.



6 Vegetation in urban areas: Clarify the rules

A new *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017* (**Vegetation SEPP**) was introduced as part of the Framework to regulate tree clearing in non-rural areas of the State, including urban areas and environment zones,¹⁰¹ in circumstances where development consent is not required. The rules are confusing and unclear and consequently there are a number of issues regarding the implementation of the Vegetation SEPP and its interaction with the EP&A Act, as outlined below.

Clearing that requires a council permit

For clearing that falls below the Biodiversity Offset Scheme threshold (**BOS Threshold**)¹⁰² landholders are required to obtain a council permit, but only if the vegetation is covered by the council's Development Control Plan (**DCP**). Yet there is no legal obligation on councils to update DCPs in response to the Framework and, at this stage, many councils haven't done so. Further, the Vegetation SEPP doesn't specify any minimum environmental standards which must be reflected in a DCP, leaving it up to a council to decide how they assess applications for clearing. The Vegetation SEPP is also silent as to the types of trees that will be subject to permits and other protections, evaluation criteria for determining permits, and public consultation requirements.

The result is that vegetation clearing in non-rural areas may be unevenly and inconsistently regulated, both within a local government area and across the state, and as a result the aims of the Vegetation

SEPP, including protecting the biodiversity values of trees and other vegetation in non-rural areas, are unlikely to be achieved. Some clearing may be falling through the regulatory cracks (e.g. in cases where a council has not updated its DCP). This is of particular concern in e-zones.

Clearing that requires approval from the NV Panel

Clearing that exceeds the BOS Threshold will require approval from the NV Panel established under the LLS Act (see comments above regarding the NV Panel). The BOS Threshold also has a role to play in determining biodiversity assessment requirements for development applications under the EP&A Act.

The BOS Threshold provides that the BOS will be triggered if:

- the amount of native vegetation being cleared exceeds an area threshold (prescribed in clause 7.2 of the *Biodiversity Conservation Regulation 2017* (**BC Regulation**)), or
- the impacts occur on an area mapped on the Biodiversity Values Map (**BV Map**) published by the Minister for the Environment.

The BV Map¹⁰³ is used for identifying when the BOS should apply, however the implementation and application of the map could be improved. For example:

- Clause 7.3 of the BC Regulation provides that the Environment Agency Head is to prepare and publish the BV Map, which *may* include certain land, including coastal wetlands and littoral rainforests, core koala habitat, Ramsar wetlands, old growth forests, rainforests or a declared area of outstanding biodiversity value. This leaves the content of the BV Map to the discretion of the Environment Agency Head. The requirement should be that the BV Map *must* include the areas prescribed in the BC Regulation and may include additional areas which, in the opinion of the Environment Agency Head, are of sufficient biodiversity value to be included in the Map.
- The BV Map is difficult to navigate. For

¹⁰¹ See clause 5 of the *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017* which specifies the non-rural areas to which the SEPP applies.

¹⁰² See section 7.4 of the *Biodiversity Conservation Act 2016* and clauses 7.1 – 7.3 of the *Biodiversity Conservation Regulation 2017*.

¹⁰³ See <https://www.imbc.nsw.gov.au/Maps/index.html?viewer=BOSETMap>

example, when first viewed, it shows only a single layer of land with biodiversity values (and separately those added in the last 90 days¹⁰⁴). While earlier versions of the BV Map did not allow users to determine types of biodiversity values at a location, this function was added in February 2019,¹⁰⁵ however it is not instinctive for users (the *Biodiversity Values Map and Threshold tool user guide*¹⁰⁶ explains how this function operates). Also, it is difficult to use the BV Map to determine whether the area threshold has been exceeded. This is because the BV Map is underpinned by Spot 5 imagery which does not allow you to zoom in to a property scale, making it difficult to draw a polygon around the area to be cleared or identify individual trees.

- In the same vein as discussed above (in the context of discussing Category 2 – sensitive regulated land for the purpose of the Code), the scope of some of the categories of values that may be included in the BV Map are problematic, for example, the definition of core koala habitat is too narrow.

Clearing being carried out for the purpose of development that requires development consent

It is our understanding that if tree clearing is being carried out as part of a development that requires development consent under the EP&A Act, then it is assessed and determined through the relevant EP&A Act development assessment process. However, this particular interaction between the Vegetation SEPP and EP&A Act is not clear. EDO is aware of examples where proponents are relying on the Vegetation SEPP in circumstances where vegetation clearing

has been carried out for the purpose of development. Concerns regarding the interaction between the Vegetation SEPP and EP&A Act also arise in relation to enforcement (see below).

Enforcement

There is a clear prohibition in the Vegetation SEPP on clearing vegetation that requires a permit or approval unless such an authorisation has been obtained and complied with.¹⁰⁷ However, the Vegetation SEPP itself does not contain any enforcement provisions; these are contained in the EP&A Act. It is the view of the NSW Government that clearing in the absence of a permit or approval (where such an authorisation is required under the Vegetation SEPP) is “prohibited development” for the purpose of the EP&A Act and that the Vegetation SEPP can be enforced via the provisions in the EP&A Act, including the issuing of penalty notices.¹⁰⁸ However this is not explicitly expressed in the Vegetation SEPP or the EP&A Act. Further legislative clarity should be provided regarding the relationship between the Vegetation SEPP and EP&A Act, particularly in relation to enforcement of breaches of the Vegetation SEPP.

Assessment of cumulative impacts

The Vegetation SEPP does not contain a clear mechanism to account for ‘stacking’ of multiple clearing actions over time, nor does it specify any mechanism for systematic review of tree removal permits to reduce and monitor the cumulative impacts of clearing across urban areas or e-zones. For clearing below the BOS Threshold that requires a permit, councils can request that applicants provide more information about previous clearing in the surrounding area but there is no requirement to do so.¹⁰⁹ For clearing above the BOS Threshold, the NV Panel must consider any future clearing that has been authorised or notified but there is no obligation to consider previous clearing actions.¹¹⁰ Without a specific mechanism for reviewing

104 Clause 7.3(5) of the *Biodiversity Conservation Regulation 2017* provides that if an area of land is included in the Map, proposed development to be carried out in that area of land does not exceed the biodiversity offsets scheme threshold if it is the subject of an application for planning approval when the area is so included or within 90 days after it is so included.

105 See explanation of previous updates to the BV Map, available at <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/biodiversity-offsets-scheme/entry-requirements/biodiversity-values-map>

106 See Department of Planning, Industry and Environment *Biodiversity Values Map and Threshold tool user guide - A step-by-step guide to using the Biodiversity Values Map and Threshold tool*, p 12, available at <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Biodiversity/biodiversity-values-map-threshold-tool-user-guide-190705.pdf>. Additionally, landholders and councils can request a Biodiversity Values Map Explanation Report for a description of the biodiversity values applicable to a landholding, but this option does not appear to be available for third parties, see <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/biodiversity-offsets-scheme/entry-requirements/biodiversity-values-map>

107 *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017*, clause 7

108 See <https://www.planning.nsw.gov.au/-/media/Files/DPE/Factsheets-and-faqs/faqs-for-councils-vegetation-sepp-2018-07.pdf>

109 *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017*, clause 11(2).

110 *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017*, clause 14(5)(c).



cumulative impacts of clearing permitted under the Vegetation SEPP, impacts of clearing actions on biodiversity and amenity at a landscape scale are difficult to evaluate.

Monitoring and reporting under the Vegetation SEPP

The Vegetation SEPP does not specify any requirements to notify the public of applications to clear or to seek comments from the public, nor does it require councils or the NV Panel to maintain a public register of clearing permits or NV Panel approvals under the Vegetation SEPP (see further comments and recommendation on monitoring and reporting below).

Solutions for vegetation in urban areas: Clarify the rules

Recommendation 13:

Establish minimum environmental standards to be included in Development Control Plans in relation to tree clearing.

Recommendation 14:

Require all councils to update DCPs to give effect to the Vegetation SEPP within a set timeframe.

Recommendation 15:

Improve the implementation and application of the BV Map, including by:

- Prescribing that certain values *must* be included in the BV Map;
- Making the functionality and tools of the BV Map easier for users; and,
- Reviewing the scope of certain values that should be included in the BV Map (e.g. koala habitat, coastal zone).

Recommendation 16:

Provide greater clarity within legislation regarding the relationship between the Vegetation SEPP and EP&A Act, particularly in relation to the clearing of vegetation that requires development consent and the enforcement of breaches of the Vegetation SEPP.

7 Tracking how the laws are working: Improve monitoring and reporting

Monitoring of and reporting on land clearing is important for understanding how much clearing is occurring across the state and what impacts clearing is having on biodiversity. A public register is a useful tool for ensuring transparency and accountability. Public registers can be used to monitor any potential 'stacking' of clearing actions and cumulative impacts of clearing actions on individual landholdings, or at a regional or landscape scale.

Monitoring and reporting under LLS Act

Compared to the previous regime under the *Native Vegetation Act 2003 (NV Act)*, there is a significant reduction in information included in public registers under the new Framework.¹¹¹ This is essentially due to the fact that most clearing is now undertaken as code-based clearing, or via allowable activities provisions. The LLS Act only requires reporting on aggregated information for code-based clearing that requires notification or certification,¹¹² or an annual estimate of allowable activities.¹¹³ While more detailed information is required regarding approvals

by the NV Panel under the LLS Act (including, for example, property name, address, application date) the public register indicates that no such approvals have been given (noting the register has not been updated since August 2018). The lack of similar detailed information for notification and certification applications under the Code means monitoring and reporting is less transparent. Detailed information would allow the community to understand better where land clearing activities are being undertaken lawfully, and where illegal clearing may be occurring.

A lack of effective monitoring was highlighted by the Audit Office, which found that the LLS undertakes only limited monitoring of whether landholders are meeting the requirements of the Code, including whether set-asides are being established and managed appropriately.¹¹⁴

The NRC Report agreed with the Audit Office's conclusion, and recommended:

- *the roles and responsibilities for monitoring and enforcing the Code (between LLS and EES) need to be reviewed*
- *monitoring of compliance with certifications and notifications to clear, including the establishment and management of set asides, under the Code needs to be strengthened, including increasing transparency.*¹¹⁵

Monitoring and reporting under Vegetation SEPP

As noted above, there are no requirements to report on clearing being undertaken under the Vegetation SEPP. This means that clearing permits issued by councils and approvals issued by the NV Panel are considered and determined behind closed doors. The Vegetation SEPP does not include any requirement to notify the public of applications to clear, nor does it require councils or the NV Panel to maintain a public register of clearing permits or approvals.

Without mandatory reporting requirements there is no way for the public to keep track of what vegetation is approved for clearing under the Vegetation SEPP.

111 Public registers on land clearing maintained by the LLS are available at <https://www.lls.nsw.gov.au/sustainable-land-management/public-registers>

112 Local Land Services Act, section 60ZO provides that Local Land Services is to maintain and make publicly available registers of the following: (a) aggregate information about notices given under section 60X (Notice to Local Land Services of clearing), (b) aggregate information about certificates under section 60Y (Certification by Local Land Services prior to clearing—general), (c) aggregate information about certificates under Schedule 5A to which section 60Y applies, (d) approvals (and any modification of approvals) granted under Division 6, (e) applications for approval (or for modifications of approvals) that have been refused and the reasons for the refusal. Aggregate information about notices or certificates is to be compiled on a regional basis and is not to identify the particular landholder who gave the notice or to whom the certificate was issued (or the address of the landholding concerned).

113 *Local Land Service Act 2013*, section 60ZN.

114 Audit Office of NSW, above 13.

115 NRC Report, above 14, p 6.

As discussed above, a public register is a useful tool for ensuring transparency and accountability and can also be used to monitor any potential 'stacking' of clearing permits (where a landholder applies for multiple clearing permits below the BOS Threshold instead of a single clearing approval for clearing that is above the BOS Threshold), and any cumulative impacts of clearing actions on individual landholdings at a regional or landscape scale.

Councils are required to keep a public register of development applications and consents. A public register of clearing permits issued by councils could be kept in a similar way. With respect to approvals by the NV Panel, the LLS is already required to keep a public register of approvals determined by the NV Panel under the LLS Act (see above). This requirement should extend to approvals determined by the NV Panel under the Vegetation SEPP.

The Vegetation SEPP was not within the scope of the recent audit on land management conducted by the Audit Office, so no insight on the implementation of the Vegetation SEPP can be gleaned from the Audit Office's findings.

Monitoring and reporting on Biodiversity Conservation Trust

The BCT is tasked with managing the state's private land conservation program including the allocation of funds committed to improve private land conservation across the state. Investment in private land conservation was seen as a key component of the Framework, intended to 'counter' the relaxation of land clearing laws. While EDO strongly supports funding incentives for environmental stewardship and payments for landholders to manage land for conservation, we are concerned that, under the Framework, conservation and restoration isn't guaranteed in law, but is instead dependent on funding decisions.

Inadequate monitoring and reporting requirements hinder the ability to examine how effectively the BCT is managing the allocation of funding and private conservation in general. For example, there are limited requirements for the BCT to report on processes for entering into private land conservation agreements and it is unclear what vegetation types are being prioritised and protected by the Trust. There is no requirement for the BCT to

demonstrate to the public how priority investment areas for biodiversity conservation have been identified according to the criteria established by the Biodiversity Conservation Investment Strategy (BCIS).¹¹⁶ There is also no requirement to demonstrate how a decision to invest in certain private land over others meets the priority areas identified by the BCIS and satisfies the five investment principles outlined by the BCIS.¹¹⁷

Transparency and accountability around the decision to determine certain areas as priority investment areas and the decision to invest in particular landholdings is critical. The BCT decides how public funds are spent and the public should have access to readily available information about the BCT's decisions. This includes detailed information about the type, extent, condition and integrity of vegetation that the BCT is investing in. This would promote public confidence in the BCT to ensure best possible conservation outcomes. It is very difficult to assess whether the BCT is actually achieving meaningful conservation on private land without further information.

In considering the operation of BCT, the Audit Office found that:

- The BCT has processes in place for identifying and prioritising areas of land for investment but the funding provided to each region is not always consistent with these priorities. For example, one region of the state has received the largest proportion of funding, but the areas selected for conservation have the lowest biodiversity values; and
- The published information on the selection of conservation tenders does not accurately reflect the BCT's current approach to meeting its investment priorities, especially in relation to the funding allocation between regions and tenders for koala habitats.

¹¹⁶ Established by the *Biodiversity Conservation Investment Strategy* pp 12 – 15 under the BC Act s 5.3(1)(a). The four criteria are: 1. Areas of high environmental value should be prioritised; 2. Areas that improve ecological connectivity and resilience to climate change should be prioritised; 3. Areas that contribute towards achieving a comprehensive, adequate and representative (CAR) protected area system should be prioritised; and 4. Areas where high environmental value assets are under the greatest pressure should be prioritised.

¹¹⁷ See *Biodiversity Conservation Investment Strategy* pp 17 – 20 under the BC Act s 5.3(1)(b). The five principles are that investment in private land should: 1. seek to maximise conservation benefits; 2. seek to promote long-term outcomes – both for landholders and the environment; 3. complement other government and non-government programs; 4. support sustainable farming enterprises, promote regional economic benefits and avoid land use conflicts; and 5. be cost-effective, transparent, efficient and make the best use of available mechanisms to deliver investment.

The Audit Office recommended that by September 2019, the BCT should ensure the published selection processes for conservation tenders, fixed rate offers and land purchases accurately reflects the selection methodologies and that the methodology used for tender selection aligns with the BCT's investment priorities. In response to the recommendations of the Audit Office, the BCT undertook to publish more detailed information. To ensure transparency, these requirements should be made mandatory in law.

Solutions for tracking how the laws are working: Improve monitoring and reporting

Recommendation 17:

Require copies of all notifications and certificates to be published on the public register, including details of the property where the notified or certified clearing is occurring.

Recommendation 18:

Implement the recommendations of the NRC, namely:

- Review the roles and responsibilities for monitoring and enforcing the Code (between LLS and EES); and
- Strengthen monitoring of compliance with certifications and notification, including the establishment and management of set asides.

Recommendation 19:

Require councils to maintain a public register of clearing permits issued under the Vegetation SEPP.

Recommendation 20:

In addition to existing requirements under the LLS Act, require the public register maintained by the LLS to include applications to the NV Panel under the Vegetation SEPP.

Recommendation 21:

Introduce mandatory legal requirements for the BCT to publish detailed information about priority area determinations and private land conservation investment decisions.

8 Landscape health: Assess impacts on soil, salinity and water

The former NV Act recognised the importance of protecting not just biodiversity values, but also ecosystem values, including soil and water quality.¹¹⁸ The former Environmental Outcomes Assessment Methodology (EOAM) that underpinned the NV Act included not only a module for biodiversity assessment, but also modules for assessments of water quality, salinity and soil quality.

The new Framework is much more limited in its application. ‘Biodiversity values’ is currently defined as:

- (a) vegetation integrity—being the degree to which the composition, structure and function of vegetation at a particular site and the surrounding landscape has been altered from a near natural state,
- (b) habitat suitability—being the degree to which the habitat needs of threatened species are present at a particular site, and
- (c) biodiversity values, or biodiversity-related values, prescribed by the regulations.¹¹⁹

While a ‘consultation note’ in the Biodiversity Conservation Bill suggested that values that might be prescribed in the regulations included soil health (to enable assessment of the degree to which proposed development impacts on soil salinity or soil degradation),¹²⁰ such ecosystem services have

not been prescribed by the BC Regulation to date.¹²¹

The failure to maintain mandatory soil, salinity and water assessments for clearing is not consistent with ensuring landscape health and productivity for future generations to achieve intergenerational equity. This is despite one of the purposes of the BC Act being to “maintain the diversity and quality of ecosystems and enhance their capacity to adapt to change and provide for the needs of future generations”.¹²²

Solutions for landscape health: Assess impacts on soil, salinity and water

Recommendation 22:

Prescribe additional biodiversity-related values in the BC Regulation, including soil quality, salinity and water quality.

Recommendation 23:

Update the BAM to include components for the assessment of soil quality, salinity and water quality.

¹¹⁸ One of the aims of the former *Native Vegetation Act 2003* was “to protect native vegetation of high conservation value having regard to its contribution to such matters as water quality, biodiversity, or the prevention of salinity or land degradation” (*Native Vegetation Act 2003*, section 3(c)).

¹¹⁹ *Biodiversity Conservation Act 2016*, section 1.5(2).

¹²⁰ Draft Biodiversity Conservation Bill 2016, available at <https://biodiversity-ss.s3.amazonaws.com/Uploads/1462186512/Biodiversity-Conservation-Bill-2016.pdf>

¹²¹ Clause 1.4 of the *Biodiversity Conservation Regulation 2017* provides that the following are prescribed as additional biodiversity values for the purposes of the Act:

- a) threatened species abundance—being the occurrence and abundance of threatened species or threatened ecological communities, or their habitat, at a particular site,
- b) vegetation abundance—being the occurrence and abundance of vegetation at a particular site,
- c) habitat connectivity—being the degree to which a particular site connects different areas of habitat of threatened species to facilitate the movement of those species across their range,
- d) threatened species movement—being the degree to which a particular site contributes to the movement of threatened species to maintain their lifecycle,
- e) flight path integrity—being the degree to which the flight paths of protected animals over a particular site are free from interference,
- f) water sustainability—being the degree to which water quality, water bodies and hydrological processes sustain threatened species and threatened ecological communities at a particular site.

¹²² *Biodiversity Conservation Act 2016*, section 1.3(b).

9 Integrate climate change considerations: Identify impacts and opportunities

The development of the Framework provided an opportunity to bring NSW land management and biodiversity conservation laws up-to-date with current climate science and best-practice climate mitigation and adaptation, yet the Framework fails to adequately embed climate change considerations into decision-making processes. Climate change is predicted to have an irreversible and devastating effect on Australia's biodiversity including reductions in the geographic range of species, changes to the timing of species' lifecycle events, changes in the location of species' habitats, increased risk of extinction for species that are already vulnerable, and changes in the structure and composition of ecosystems and communities.¹²³ Changes to rainfall and temperature patterns, and the intensity of droughts, storms and fires as a result of climate change are also threats to native vegetation.¹²⁴

Native vegetation has an important role to play in maintaining landscape resilience to impacts of climate change. Additionally, native vegetation serves the crucial function of carbon storage. An increase in land clearing due to changes in land management regimes is expected to increase greenhouse gas emissions in the Land Use, Land Change and Forestry sector.¹²⁵ Despite

the significant implications of this, there is no assessment required under the current Framework. The assessment of carbon could be prescribed as a biodiversity-related value under the BC Regulation and a component for assessing carbon could be included in the BAM.

The failure of the Framework to assess and consider emissions also means there is a failure to properly incentivise carbon sequestration opportunities. Greater consideration should be given to achieving co-benefits – ie, benefits for both carbon sequestration and for biodiversity conservation – through investment in stewardship and conservation management on private land.

Solutions for clearing and climate change: Identify impacts and opportunities

Recommendation 24:

Update the BC Regulation and the BAM to require the assessment of carbon storage and emissions impacts arising from clearing applications assessed under the BAM.

Recommendation 25:

Explore and incentivise opportunities for achieving co-benefits – ie, benefits for both carbon sequestration and for biodiversity conservation – through investment in stewardship and conservation management on private land.

¹²³ EDO, *Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis*, June 2009, p 9.

¹²⁴ COAG Standing Council on Environment and Water, *Australia's Native Vegetation Framework*, 2012, Australian Government, Department of Sustainability, Environment, Water, Population and Communities.

¹²⁵ Bulinski, J., R. Enright, and N. Tomsett. *Tree clearing in Australia: Its Contribution to Climate Change*, 2016, CO2 Australia Limited.

10 Compliance and enforcement: Ensure the laws are implemented

As with all regulatory regimes, appropriate monitoring and enforcement is vital to ensuring the aims and objectives of the laws are being met. The Audit Office reported that clearing of vegetation on rural land is not effectively regulated and managed because the processes in place to support the regulatory framework are weak and there is no evidence-based assurance that clearing of native vegetation is being carried out in accordance with approvals.¹²⁶

The Audit Office found that there are lengthy delays in assessing compliance because identifying breaches requires satellite imagery to be compared against clearing authorisations and exemptions in order to identify potentially unlawful clearing. There is an inherent lag time in this process, which can be up to two years. This is clearly unacceptable given the serious environmental harm that can result from unlawful clearing. Additionally, despite there being resources, policies and guidance to support compliance and enforcement activities, there is little evidence of effective enforcement activity being undertaken in response to unlawful land clearing.

The Audit Office noted that around 1,000 instances of unexplained land clearing are identified each year, with around 300 investigations commenced. However, this does not necessarily translate into compliance action. The Audit Office noted that each year only two or three prosecutions for unlawful clearing take place. In addition, three to five remediation orders and around 10 penalty notices are issued each year. The vast majority of compliance action appears to be by way of advisory and warning letters. This approach may have been

justified in the early days of a new regulatory regime as landholders adjusted to the new legislation, but with concerns about poor implementation in the three years since the Framework commenced, and substantial increases in rates of clearing, stronger enforcement action is needed to ensure the Framework is operating as intended and that clearing of native vegetation on rural land and associated impacts are being effectively managed. Despite this, the Audit Office did not make any specific recommendations for improving compliance and enforcement of the land management framework.

Similarly, the NRC Report found that compliance frameworks need to be strengthened. The NRC advised that as a priority, the NSW Government should develop processes to report up to date data on unexplained clearing every six months and also review the drivers behind high rates of unexplained clearing and implement measures to address any issues.¹²⁷

Also of concern is the Government's *Policy for resolving investigations under the now repealed Native Vegetation Act 2003*.¹²⁸ The policy provides, amongst other things, that:

- No new investigations of possible breaches of the NV Act will commence after 31 August 2019;
- For outstanding investigations, the Department of Planning, Industry and Environment will seek to secure improved environmental outcomes through engagement with landholders, with formal compliance and enforcement action used only as a last resort; and
- No compliance action will be taken if the land management activity under investigation would, if taken today in the same manner, have been consistent with the Code.

While the policy was purportedly introduced to address some of the concerns raised by the Audit Office, it followed lobbying by farming interests facing prosecution,¹²⁹ and was reported as an

¹²⁷ Natural Resources Commission, above 14, p33.

¹²⁸ See <https://www.environment.nsw.gov.au/research-and-publications/publications-search/policy-for-resolving-investigations-under-the-now-repealed-native-vegetation-act-2003>

¹²⁹ Anne Davies, The Guardian, (21 October 2019) *Talk about bullies!': how 2GB's Ben Fordham campaigned for farmers charged with illegal land clearing*, <https://www.theguardian.com/environment/2019/oct/21/talk-about-bullies-how-2gbs-ben-fordham-campaigned-for-farmers-charged-with-illegal-land-clearing>

¹²⁶ Audit Office of NSW, above 13.

'amnesty' on compliance and enforcement of alleged unlawful clearing under the former *Native Vegetation Act 2003*.¹³⁰

Whatever the driver behind the policy, the decision to not pursue compliance and enforcement action for alleged breaches of former laws, particularly in circumstances where the person undertaking such action may have benefited from the alleged activity, undermines the rule of law, sets a dangerous precedent of retrospectively sanctioning unlawful activity, and has serious environmental consequences.

If the Government fails to take appropriate enforcement action, any person is able to commence civil enforcement proceeding in the LEC.¹³¹ While this is a important safety net, it is easier for the regulator to enforce the law. It is the regulator that has the power to enter premises for the purpose of investigating whether the law has been breached and gathering evidence to support criminal or civil legal action. It can be extremely difficult for a member of the public to determine whether observed clearing is lawful because, as outlined above, the NVR Map is still not complete and the public registers that record authorised clearing do not, for the most part, identify the relevant property. This lack of information makes civil enforcement by the public extremely difficult.

Solutions for compliance and enforcement: Ensure the laws are implemented

Recommendation 26:

Strengthen processes for investigating and taking appropriate enforcement action on unexplained clearing.

Recommendation 27:

Improve transparency measures, such as public reporting, to make it easier for the public to understand where clearing has been authorised, and where it may be unexplained.

'It can be extremely difficult for a member of the public to determine whether observed clearing is lawful'

¹³⁰ Peter Hannam, Sydney Morning Herald (1 August 2019) "Disgusted": NSW government drops land-clearing action against farmers', <https://www.smh.com.au/environment/sustainability/disgusted-nsw-government-drops-land-clearing-action-against-farmers-20190801-p52cxq.html>

¹³¹ *Biodiversity Conservation Act 2016*, s13.14.



Conclusion

In light of the significant increase in land clearing rates, confirmed regulatory failures in implementation and ongoing concerns about the policy settings underpinning the Framework, it is clear that the NSW land management and biodiversity framework is not able to deliver the outcomes needed to reverse the long-term decline in biodiversity and maintain a healthy productive and resilient environment.

Native vegetation is of immense value to NSW and has a vital role in regulating our living environment. It is a key component of our unique biodiversity, habitat for many native fauna and helps to regulate soil, water and weather conditions. Avoiding clearing of high-carbon native vegetation is an important contribution to mitigating climate change. Our laws need clear limits to avoid serious or irreversible impacts, to avoid a continued net loss of biodiversity, as well as clear incentives for conservation stewardship and restoration on private land.

The recommendations for significant amendments made in this report are urgently needed to restore the balance and address the regulatory failings that have resulted from an over-zealous deregulation agenda. After three years it is clear that the NSW regime is failing to ensure ecologically sustainable land management. It is time to review and revise the law to ensure healthy, resilient and productive catchments, landscapes and ecosystems for generations to come.



Recommendations

Recommendation 1:

The Government urgently commission an independent review of the entire land management and biodiversity conservation framework, and make the findings of the review publicly available.

Recommendation 2:

Limit the amount of clearing that can be carried out under the Invasive Native Species (INS) Code, including by:

- Only allowing declared INS that is regenerating densely or invading native plant communities to be cleared.
 - Providing further guidance on applying the INS Code, including a test on INS density, dominance, numbers or cover.
 - Reducing the extent of clearing of INS allowed within a treatment area.
 - Restricting incidental clearing of non-invasive species to the ‘minimum extent necessary’ and providing guidance to landholders on what this means.
 - Requiring clearing of INS to be for the purpose of re-establishing native vegetation or allowing natural regeneration (and not allowing code-based clearing of INS that would result in a change of land use (e.g. from grazing to cropping)).
-

Recommendation 3:

Remove Part 5 Equity and Part 6 Farm Plan of the Native Vegetation Code in their entirety, and instead require clearing of this scale to be assessed efficiently by the Native Vegetation Panel.

‘A broader definition of koala habitat, to ensure all koala habitat is off limits to code-based clearing’

Recommendation 4:

Strengthen the power of the Local Land Services (LLS) to refuse to issue code-compliant certificates by:

- Making the requirement to refuse applications that fall within the scope of clause 16 mandatory;
- Ensuring ‘excessive or broadscale clearing’ is an objective standard, supported by evidence-based criteria and guidelines.

Recommendation 5:

Expand Category 2 - sensitive regulated land to include a broader range of sensitive and high conservation value areas, including:

- All *endangered* ecological communities, not just critically endangered ecological communities. These are unique communities of species at *very high risk of extinction in the near future* and are not suitable for code-based clearing;
- All *vulnerable* ecological communities. These are at *high risk* of extinction in the medium term;
- The entire coastal zone (not just coastal wetlands and littoral rainforests area);
- All small holdings;
- Travelling stock reserves (**TSRs**). TSRs have high conservation value as they play a key role in ecological landscape connectivity and biodiversity conservation;
- A broader definition of koala habitat, to ensure all koala habitat is off limits to code-based clearing, consistent with the aims of the *State Environmental Planning Policy (Koala Habitat Protection) 2019*.
- Nominated Areas of Outstanding Biodiversity Value (**AOBVs**), not just declared AOBVs;
- All set-aside areas; and
- Steep or highly erodible land.

Recommendation 6:

Immediately release the comprehensive Native Vegetation Regulatory Map (NVR Map) with all map categories including Category 1 (exempt land) and Category 2 (regulated land) accurately identified.

Recommendation 7:

Put in place mechanisms to ensure that any newly listed Critically Endangered Ecological Communities are mapped as category 2 – sensitive regulated land without delay.

Recommendation 8:

Immediately publicly release more information about the Native Vegetation Panel.

Recommendation 9:

As part of an overarching review of the Framework, consider and report on why the Native Vegetation Panel is not functioning as intended.

Recommendation 10:

Strengthen the concept of ‘serious and irreversible impacts on biodiversity values’ (S&I Test), including by:

- Reframing the S&I test as serious or irreversible to bring it into alignment with the principles of ecologically sustainable development from which it is derived.
 - Requiring proposals for major projects (which include significant land clearing) to be refused where the project will or will be likely to have serious or irreversible impacts on biodiversity.
 - Requiring the S&I test be applied as an objective standard.
-



Recommendation 11:

Establish a clear and transparent process for any person to nominate an Area of Outstanding Biodiversity Value (AOBV) that:

- Makes explicit that any person can nominate an area for consideration as an AOBV.
- Establishes a process for recommending and nominating AOBVs, including an online form and guidelines, that specify information requirements to address the criteria for AOBVs established by the Act and Regulation, and clearly outlines what data, evidence and mapping is required to support a nomination.
- Sets clear timeframes for consideration and Ministerial declaration.
- Outlines the process for the Scientific Committee, Biodiversity Conservation Trust and Biodiversity Conservation Advisory Panel to provide advice to the Environment Agency Head on an AOBV nomination and resulting recommendation, and to the Minister on an AOBV declaration.
- Clarifies the role of the LLS in discussing with landholders and recommending potential AOBVs, including providing landholders with information about financial incentives and assistance.
- Ensures that any land recommended as an AOBV to the Minister by the Environment Agency Head is mapped as Category 2 – sensitive regulated land in the NVR Map within two weeks of receiving the recommendation from the Environment Agency Head.

Recommendation 12:

Strengthen the Biodiversity Offsets Scheme, including by:

- Imposing a clear and objective ‘no net loss or better’ environmental standard under the BOS and BC Act;
- Requiring genuine attempts to avoid and minimise impacts on threatened species be demonstrated before the BOS can be applied;
- Tightening like-for-like offsetting requirements and variation rules;
- Significantly limiting indirect offset options such as biodiversity conservation measures and mine rehabilitation;
- Setting stricter parameters around the payment of money to the BCT in lieu of direct offsets;
- Removing the option to discount offset requirements based on non-ecological considerations;
- Empowering the BCT to refuse to accept an offset liability for a proponent where, in their opinion, it would not be possible for them to obtain like-for-like offsets under tightened rules; and
- Ensuring that formulas used to determine credit pricing incorporate increasing scarcity and do so in a non-linear fashion to ensure that it becomes increasingly expensive to purchase credits for increasingly scarce species and ecosystems.

**‘Imposing
a clear and
objective
‘no net loss
or better’
environmental
standard
under the
Biodiversity
Offsets
Scheme and
Act’**

Recommendation 13:

Establish minimum environmental standards to be included in Development Control Plans (DCPs) in relation to tree clearing.

Recommendation 14:

Require all councils to update DCPs to give effect to the Vegetation SEPP within a set timeframe.

Recommendation 15:

Improve the implementation and application of the Biodiversity Values Map (BV Map), including by:

- Prescribing that certain values *must* be included in the BV Map;
 - Making the functionality and tools of the BV Map easier for users; and,
 - Reviewing the scope of certain values that should be included in the BV Map (e.g. koala habitat, coastal zone).
-

Recommendation 16:

Provide greater clarity in legislation regarding the relationship between the Vegetation SEPP and EP&A Act, particularly in relation to the clearing of vegetation that requires development consent and the enforcement of breaches of the Vegetation SEPP.

Recommendation 17:

Require copies of all notifications and certificates to be published on the public register, including details of the property where the notified or certified clearing is occurring.



Recommendation 18:

Implement the recommendations of the Natural Resources Commission, namely:

- Review the roles and responsibilities for monitoring and enforcing the Code (between LLS and EES); and
- Strengthen monitoring of compliance with certifications and notification, including the establishment and management of set asides.

Recommendation 19:

Require councils to maintain a public register of clearing permits issued under the Vegetation SEPP.

Recommendation 20:

In addition to existing requirements under the LLS Act, require the public register maintained by the LLS to include applications to the NV Panel under the Vegetation SEPP.

Recommendation 21:

Introduce mandatory legal requirements for the BCT to publish detailed information about priority area determinations and private land conservation investment decisions.

Recommendation 22:

Prescribe additional biodiversity-related values in the Biodiversity Conservation Regulation, including soil quality, salinity, and water quality.

Recommendation 23:

Update the Biodiversity Assessment Method (BAM) to include components for the assessment of soil quality, salinity, and water quality.

‘Strengthen processes for investigating and taking appropriate enforcement action on unexplained clearing’

Recommendation 24:

Update the BC Regulation and the BAM to require the assessment of carbon storage and emissions impacts arising from clearing applications assessed under the BAM.

Recommendation 25:

Explore and incentivise opportunities for achieving co-benefits – ie, benefits for both carbon sequestration and for biodiversity conservation – through investment in stewardship and conservation management on private land.

Recommendation 26:

Strengthen processes for investigating and taking appropriate enforcement action on unexplained clearing.

Recommendation 27:

Improve transparency measures, such as public reporting, to make it easier for the public to understand where clearing has been authorised, and where it may be unexplained.



Design by Slade Smith

Printed by EcoPrint

Photo credits

Cover: Lone tree, istock, credit: Thad

P4: Birds in tree: Janelle Lugge iStock

P7: Koala, istock, credit: fogaas

P12: Felled trees, istock, credit: f.field_of_vision

P19: Koala Freder iStock

P20: Burnt paddock after bushfire, istock, credit: Stephen Allen 75

P26: Bulldozer, istock, credit: Michele Jackson

P29: Suburbs, istock, credit: jandrie lombard

P37: Bare paddock with bush beyond, istock, credit: Mark R Higgins

P41: Sheep in a bare paddock, istock, credit: James Bowyer

P45: Possums, istock, credit: Andy Krakovski

Back cover: Alpaca during drought and bushfire smoke, istock, credit: Marta Urbanska

© EDO August 2020



Environmental
Defenders Office

L5 263 Clarence St, Sydney 2000
(02) 9262 6989 / 1800 626 239

www.edo.org.au  facebook.com/edo  @EDO



100% RECYCLED PAPER ● PAPER MADE CARBON NEUTRAL ● PROCESS CHLORINE FREE ● ISO 14001 EMS ● FSC CERTIFIED ● RESPONSIBLE FORESTRY