



Environmental
Defenders Office

**Submission to the Statutory Review of the native
vegetation provisions (Part 5A and Schedule 5A and
Schedule 5B) of the Local Land Services Act 2013**

19 December 2022

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Environmental Defenders Office is a legal centre dedicated to protecting the environment.

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Executive Summary

It is five years since new laws for biodiversity conservation and native vegetation clearing were introduced in NSW. It is time to ask – are those laws working to protect biodiversity and appropriately regulate land clearing?

In the last five years we have seen a significant increase in rural land clearing since the clearing rules were relaxed; species added to our threatened lists; impacts of drought, bushfire, floods; changes to climate policy; serious concerns raised around relaxed biodiversity offsetting rules; and ongoing koala policy debates. The NSW Audit Office, Natural Resources Commission and a parliamentary inquiry have all already raised serious concerns about the regulation of habitat clearing and the regulatory framework in NSW.

When the laws were made, there was a requirement that they be reviewed after five years to see if they were achieving their objectives. One of the key questions that should be asked is: are the impacts of relaxing land clearing rules and allowing more unregulated clearing under the *Local Land Services Act 2013* (**LLS Act**) actually being offset by increased investment in conservation under the *Biodiversity Conservation Act 2016* (**BC Act**)?

When introduced it was acknowledged that the Land Management and Biodiversity Conservation reform package “may lead to some increased clearing at a property scale, but that checks and balances such as set asides, biodiversity offsets and investment in private land conservation would ensure the impacts of that clearing are managed”.¹ It is not clear how the terms of reference for either the review of Part 5A of the LLS Act or the review of the BC Act intend to examine the legislative framework as a whole and determine whether checks and balances across the framework are sufficient.

Despite the fact that the reforms were based on this critical trade off, the framework is being reviewed by two different agencies in two separate reviews.

The consultation process being run by Local Land Services (**LLS**) relates to the provisions found in Part 5A and Schedules 5A and 5B of the LLS Act only. The Discussion Paper poses 14 questions, largely aimed at elucidating feedback on the implementation of the laws from a landholder perspective. This is very important feedback as landholders are the primary stewards and land managers. However, it is only one side of reviewing whether the provisions are achieving their objectives in accordance with the principles of ecologically sustainable development (**ESD**) (as required by LLS Act, section s 3(e)).

To ensure a comprehensive and balanced review, **EDO recommends** that the review needs to assess a broader range of questions including:

- What systems need to be established to accurately categorise the current 75% unexplained/unallocated clearing?
- What are the cumulative impacts of clearing under allowable activities and codes?
- What evidence is there that clearing is undertaken to the ‘minimum extent necessary’ under allowable activity clearing?

¹ *Statutory Review of the native vegetation provisions (Part 5A and Schedule 5A and Schedule 5B) of the Local Land Services Act 2013 - Discussion Paper*, November 2022, available at https://www.haveyoursay.nsw.gov.au/native-vegetation-legislation?tool=news_feed.p7.

- Is there any auditing of progress on set aside areas to determine if environmental outcomes are being achieved?
- Is self-assessment in the absence of a complete Native Vegetation Regulatory Map consistent with the ESD precautionary principle?
- Is allowing code-based clearing of endangered ecological communities consistent with the ESD principles of biodiversity conservation and intergenerational equity?

The Discussion Paper states that the review will not be a comprehensive provision of the Code or Regulations², but it is clearly impossible to assess the effectiveness of the Part 5 of the LLS Act without looking at these key mechanisms under which extensive clearing is being carried out. The questions for landholders inquire about the useability of the mechanisms, so it is appropriate to also assess the environmental impact.

This submission addresses:

1. **Context of the legislation and review**
 2. **Overarching concerns with the land management and biodiversity conservation framework and statutory review process**
 - Part 5A of the LLS Act facilitates broad-scale land clearing
 - Policy objectives
 - Independent analyses of implementation of the framework
 3. **Key concerns with the approval pathways**
 - Allowable activities
 - Native vegetation Code
 - Native Vegetation Panel
 4. **The Native Vegetation Regulatory Map**
 5. **Monitoring reporting, compliance and enforcement**
 6. **The statutory review process – other issues**
- Appendix 1:** Elements of the current legislation
Appendix 2: Restoring the Balance in NSW Native Vegetation Law - recommendations

We identify relevant sections of our submission which relate directly to Discussion Paper questions, in Parts 3, 4, 5 and 6.

² Discussion Paper, p4 states: “The statutory review is not a comprehensive review of the Land Management (Native Vegetation) Code 2018 (the Code), the Local Land Services Regulation 2014 or the other components of the Land Management and Biodiversity Conservation reforms per se. However, the review can make recommendations on changes to the Code and Local Land Services Regulation if it finds they are needed to meet the objective of this part of the Act.”

1. Context of the legislation and review

On 25 August 2017, a new legal framework for regulating land clearing and impacts on biodiversity commenced in NSW (Land Management and Biodiversity Conservation reforms).³ The new legal framework involved:

- The repeal of the *Native Vegetation Act 2003 (NV Act)*, 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;
- Commencement of the BC Act; and
- Commencement of Part 5A and Schedules 5A and 5B of the LLS Act.

Key elements of the land clearing components of the framework are summarised in **Appendix 1**.

The statutory review of NSW native vegetation clearing rules (Part 5A and Schedules 5A and 5B of the LLS Act) is required to be carried out under section 212 of the LLS Act five years after the commencement of those sections of the Act. We note that Local Land Services (**LLS**) is supporting the Minister to carry out the review, with the assistance of an independent expert advisory panel.⁴ Further information is set out in the review [Terms of Reference](#).⁵

The purpose of the review is to determine:

- if the policy objectives of these provisions remain valid, and
- whether the provisions themselves remain appropriate for securing the objectives of this part of the Act.

Therefore, this consultation process being run by LLS relates to the provisions found in Part 5A and Schedules 5A and 5B of the LLS Act only. Other components of the NSW land management and biodiversity conservation framework will be reviewed under the separate review of the BC Act. We understand that community consultation for the statutory review of the BC Act will take place in early 2023. LLS has prepared a [Discussion Paper](#)⁶ from community consultation with 14 discussion questions.

2. Overarching concerns with the land management and biodiversity conservation framework and statutory review process

To provide context for our responses to the Discussion Paper questions below, this part identifies the key overarching issues with the native vegetation framework based on publicly available clearing data and the assessments of the NSW Audit Office, Natural Resources Commission (**NRC**), a NSW parliamentary inquiry, and EDO during the first five years of the scheme. The Discussion Paper briefly notes the Audit Office and NRC Reviews but does not provide detail on the findings (p7).

³ Background on the reform process leading up to the commencement of the new framework can be found on the Department of Planning and Environment website: <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/overview-of-biodiversity-reform/legislation/review>

⁴ Further information is available at: <https://www.lls.nsw.gov.au/help-and-advice/land-management-in-nsw/statutory-review-of-the-native-vegetation-provisions-of-the-local-land-services-act>

⁵ https://www.lls.nsw.gov.au/_data/assets/pdf_file/0005/1422464/TOR.pdf

⁶ *Statutory Review of the native vegetation provisions (Part 5A and Schedule 5A and Schedule 5B) of the Local Land Services Act 2013 - Discussion Paper*, November 2022, available at https://www.haveyoursay.nsw.gov.au/native-vegetation-legislation?tool=news_feed

Part 5A of the LLS Act facilitates broad-scale land clearing

Land clearing data shows that since Part 5A of the LLS Act commenced there has been a significant increase in rates of native vegetation clearing for agriculture. Data shows that land clearing rates for woody vegetation⁷ across NSW have increased from 8500 ha in 2011 to 27,100 ha in 2017, 29,400 in 2018, 23,400 in 2019, and 13,000 in 2020.⁸ Additionally, in 2020, 46,100 ha of non-woody vegetation⁹ was cleared for agriculture on rural land.

This significant increase in land clearing rates triggered the government's own internal review process in October 2018,¹⁰ resulting in a NRC report confirming regulatory failure,¹¹ yet policy settings remain largely unchanged.

A key concern is the amount of clearing that is 'unallocated' or unexplained, and a lack of publicly available data on what clearing is happening where under what authorisation.

Policy objectives

As set out in the Discussion Paper, the objective of Part 5A of the LLS Act is 'to ensure the proper management of natural resources in the social, economic and environmental interests of the State, consistently with the principles of ecologically sustainable development' (LLS Act, s 3(e)).

Notably, the replacement of the NV Act with Part 5A of the LLS Act removed the objective of preventing broadscale land-clearing and the requirement to ensure clearing 'improves or maintains environmental outcomes' – either at the site scale or at the landscape scale. The replacement land management framework established by Part 5A of the LLS Act introduces a system that is less stringent (allowing increased clearing), less evidence-based (with more reliance on self-assessment) and less accountable (with less detailed information available on public registers).

Current policy objectives are not ambitious enough to reflect the current environmental context in NSW. Since Part 5A of the LLS Act commenced:

⁷ For the purpose of NSW data, woody vegetation is defined as vegetation that: produces wood as their primary structural tissue, is typically trees, shrubs or woody vines (lianas), is usually perennial.

See <https://www.environment.nsw.gov.au/topics/animals-and-plants/native-vegetation/landcover-science/statewide-landcover-tree-study>

⁸ See *Results woody vegetation change statewide landcover and tree study 2020* tab 1, available from <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Native-vegetation/results-woody-vegetation-change-statewide-landcover-and-tree-study-2020.xlsx?la=en&hash=3ABF0AF453CB9CF071482933184B51E1AF6804EB>

⁹ Non woody vegetation includes grasses, small shrubs and groundcover – see Department of Planning, Industry and Environment, *Woody and non woody landcover change on rural regulated land Summary report 2019*, available at <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Native-vegetation/woody-non-woody-landcover-change-rural-regulated-land-summary-rpt-2019-210192.pdf>

¹⁰ As noted in the 2019 report of the Natural Resources Commission: "Prior to legislation being passed, a policy review trigger was agreed upon between the then Minister for the Environment and the then Minister for Primary Industries to "initiate a review of the policy framework (including legislative, regulatory and financial settings)" if notified clearing and applications for certification for clearing reached an annualised threshold figure of 20,000 hectares measured in any six month period."

¹¹ See: [Analysis: Native vegetation clearing in NSW - Regulatory failure confirmed - Environmental Defenders Office \(edo.org.au\)](https://www.edo.org.au/analysis/native-vegetation-clearing-in-nsw-regulatory-failure-confirmed)

- The 2021 NSW State of the Environment report has confirmed that the number of species considered at risk of extinction continues to rise and permanent clearing of native woody vegetation in NSW has increased about three-fold since 2015 and stands at an average of 35,000 ha cleared each year.¹²
- Severe drought, followed by catastrophic fires and unprecedented floods have greatly impacted the NSW landscape.

The more appropriate policy objective for the LLS Act would be a clear objective to reduce broadscale land clearing and commitment to *improve* biodiversity outcomes. This would also have benefits for climate. This would also align better with new federal ‘nature positive’ objectives.

Current policy objectives do not align with other NSW government policies. For example, the NSW Koala Strategy aims to double koala numbers in NSW by 2050,¹³ yet Part 5A continue to facilitate the clearing of koala habitat (despite some safeguards for ‘core koala habitat’ identified in an approved Koala Plan of Management).

Current policy objectives of the LLS Act also do not align with broader, global objectives to reduced halt and reverse forest loss and land degradation by 2030 (*Glasgow Leaders’ Declaration on Forests and Land Use*) or reverse biodiversity loss by 2030 (*Leaders Pledge for Nature*).

Independent analyses have highlighted significant concerns with the implementation of the framework

Audit Office of NSW

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.¹⁴

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.

¹² See <https://www.soe.epa.nsw.gov.au/all-themes>

¹³ NSW Koala Strategy, available at <https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species/programs-legislation-and-framework/nsw-koala-strategy#:~:text=Under%20the%20NSW%20Koala%20Strategy%2C%20%2423.2%20million%20is%20being%20invested,fires%2C%20drought%2C%20and%20heatwaves.>

¹⁴ 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 Natural Resources Commission

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 “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.¹⁵

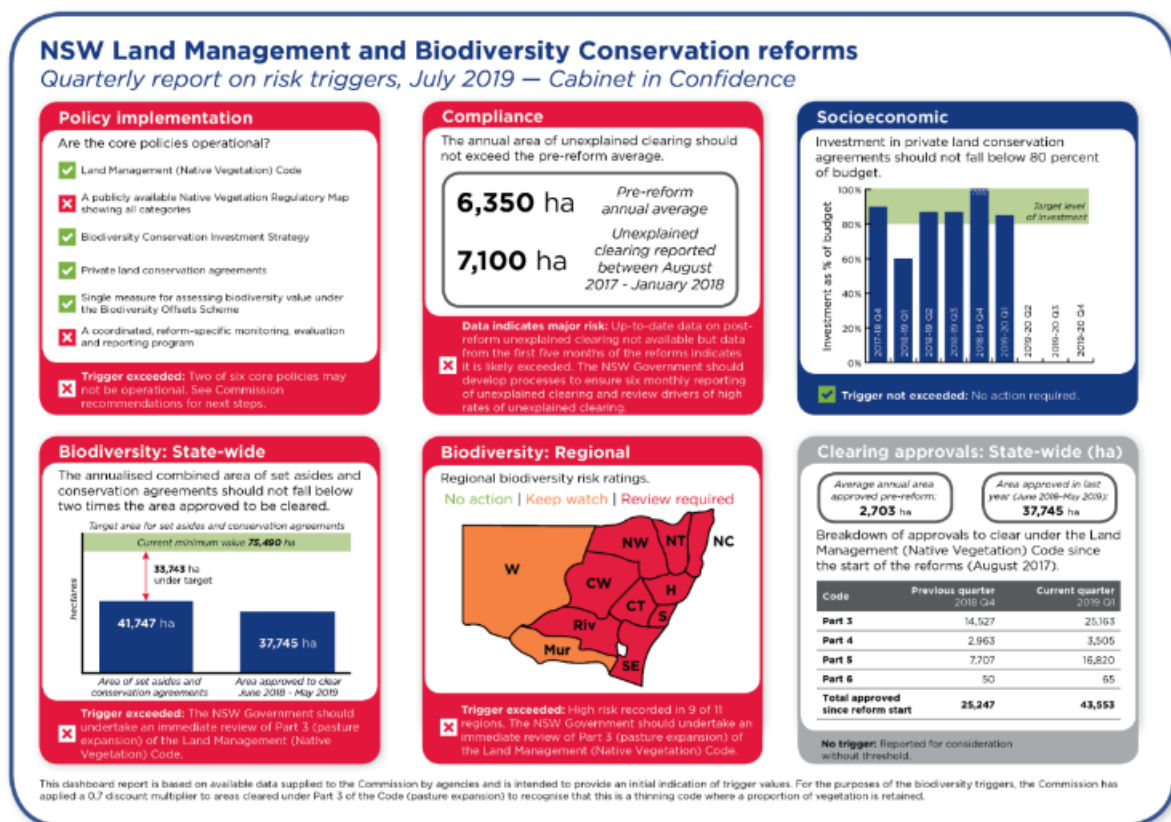


Figure 2: Proposed trigger reporting dashboard and current trigger value

The NRC Report also confirmed that:¹⁶

- 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; and

¹⁵ Natural Resources Commission, *Final Advice on Land Management and Biodiversity Conservation Reforms*, July 2019, available at <https://www.nrc.nsw.gov.au/land-mngt>

¹⁶ Natural Resources Commission, *Final Advice on Land Management and Biodiversity Conservation Reforms*, July 2019 p 5-6.

- Widespread use of Part 3 of the Code – which relates to thinning – poses a risk to biodiversity state-wide.

NSW Parliamentary Inquiry

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 reforms.¹⁷ The Committee's report found that 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 could go 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.*

Environmental Defenders Office

In August 2020, EDO released its report [Restoring the balance in NSW native vegetation law - Solutions for healthy, resilient and productive landscapes](#).¹⁸ The report identifies 10 areas of regulatory failure and sets out a law reform pathway with 27 recommendations for reform – see **Appendix 2**.

¹⁷ See: <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2536>

¹⁸ EDO, *Restoring the balance in NSW native vegetation law - Solutions for healthy, resilient and productive landscapes*, August 2020, available at <https://www.edo.org.au/publication/report-nsw-native-vegetation-law/>

3. Key concerns with approval pathways under the LLS Act

This section identifies a number of key concerns with the current approval pathways:

- **Allowable activities** (Discussion Paper questions 5, 6, 7)
- **Native Vegetation Code** (Discussion Paper questions 5, 8)
- **Native Vegetation Panel** (Discussion Paper questions 5, 9)

Allowable activities

Discussion Paper Questions

Question 5 - *Do each of the approval pathways for native vegetation clearing provide landholders with adequate options while managing environmental risks? Please give reasons and/or examples to support your answer.*

Question 6 - *Is it clear what native vegetation clearing activities are “allowable” i.e. don’t need notification or approval?*

Question 7 - *What, if any, other native vegetation clearing activities should be “allowable?” How could the requirements for allowable activities be improved?*

In relation to allowable activities, the Discussion Paper (p16) states: “This pathway aims to provide greater flexibility and decision-making autonomy. It allows landholders to carry out routine, agricultural land management activities that are a low risk of impacting biodiversity, without needing to notify or obtain approval from Local Land Services.”

While it is reasonable for genuine routine low risk activities to be exempted from full assessment, the lack of any notification requirement means that there is a significant lack of transparency regarding the clearing that is being undertaken under the allowable activities exemption.

There is no evidence or analysis that clearing under this exemption is done ‘to the minimum extent necessary.’ This is supposed to be a key safeguard to prevent the exemption being misused, but it is not clear whether this is ever checked as there are no notification requirements.

Other safeguards (for example, the provision that firewood collection, construction timber, public works and gravel pit allowable activities, must not be used where the native vegetation comprises, or is likely to comprise, a threatened species (including their habitat) or ecological community¹⁹) depend on the landholder having the requisite ecological knowledge of threatened species and communities.

There is no assessment of the cumulative impact of continual incremental clearing under this pathway.

For these reasons, it is difficult to see how ‘environmental risk’ is being effectively managed under this pathway.

Lack of notification requirements and inadequate reporting makes it difficult to determine what percentage of ‘unallocated clearing’²⁰ is carried out under allowable activity rules.

¹⁹ See clauses 14-15, 20-21, Schedule 5A, Local Land Services Act.

²⁰ Unallocated clearing can include:

The drafting of the current exemption is broad and unchecked. EDO **recommends** that the review consider ways to increase the transparency of clearing under this category to ensure that it is being used correctly. Only genuinely low impact clearing should be allowed as an allowable activity under the LLS Act. EDO has previously recommended that there could be a very easy brief record-keeping template form that could be used by landholders to record this category of clearing and be used for compliance purposes.

We **do not support** further expansion of this category in the absence of evidence that reasonable activities are being unduly curtailed under the current settings.

Land Management (Native Vegetation) Code (Native Vegetation Code)

Discussion Questions

Question 5 - Do each of the approval pathways for native vegetation clearing provide landholders with adequate options while managing environmental risks? Please give reasons and/or examples to support your answer.

Question 8 - How effective are the requirements for establishing, managing, monitoring and reporting for set asides? Please give reasons for your answer

As noted, the Discussion Paper indicates that the review will not include a comprehensive review of the Code. However, in the absence of applications to the Native Vegetation Panel (discussed below), it must be assumed that the vast majority of the increased clearing is being done under the Code or allowable activity exemption.

As noted, since the Code was introduced there has been a significant increase in land clearing in NSW, and no commensurate applications for full assessment and approval. Significant clearing is therefore likely occurring under the Code. While the Discussion Paper notes “Invasive native species management is not broadscale clearing” (p17), EDO has serious concerns about the sheer scale of clearing permitted under the INS, Equity and Farm Plan sections of the Code.²¹

It is therefore imperative that the review undertake an objective analysis of this mechanism.

To assist the review, we identify the following key concerns with the operation of the Native Vegetation Code.

- lawful clearing or reduction of landcover on rural regulated land that does not require an approval, notification and/or keeping of records (e.g. allowable activities)
- vegetation loss for which the Department of Planning and Environment (the Department) does not have access to information or records that authorise, explain or allocate the clearing to a particular land management activity
- areas that have been cleared unlawfully or are not fully compliant with approvals.

See [https://www.environment.nsw.gov.au/topics/animals-and-plants/native-vegetation/landcover-science/2020-landcover-change-reporting/unallocated-clearing#:~:text=Unallocated%20\(previously%20'unexplained'\),been%20recorded%20or%20is%20unlawful](https://www.environment.nsw.gov.au/topics/animals-and-plants/native-vegetation/landcover-science/2020-landcover-change-reporting/unallocated-clearing#:~:text=Unallocated%20(previously%20'unexplained'),been%20recorded%20or%20is%20unlawful)

²¹ The Discussion Paper (p18) notes: For the period August 2017 to December 2020 21,364 hectares of authorised native vegetation clearing was carried out on rural regulated land. 60% (13,109 hectares) of this clearing was to manage invasive native species. Clearing under Equity (5,825 hectares) and Pasture Expansion (2,121 hectares) are the second and third most implemented parts of the Code, respectively.

- **The Native Vegetation Code is an inappropriate regulatory tool for managing impacts on biodiversity in rural areas.** It permits broadscale clearing without any robust environmental assessment or approval requirements (although notification or certification may be required). There is limited ability for LLS to refuse certification and prevent unacceptable and cumulative impacts on threatened species.²² The most recent figures (31 October 2022) indicate that total hectares approved for clearing under the Codes is more than 780,000 ha,²³ (but not all approved clearing has been carried out).
- **Purported environmental safeguards in the Native Vegetation Code are inadequate,** for the reasons set out below, meaning that the Native Vegetation Code does not adequately manage the environmental risk associated with substantial amounts of clearing undertaken with limited environmental assessment and oversight.
- **The scope of category 2 sensitive land is too narrow.** Code-based clearing cannot be undertaken on category 2 sensitive land.²⁴ While this provides some protection for environmentally sensitive areas, the scope of category 2 sensitive land is limited. For example, currently only ‘core koala habitat’ is categorised as category 2 sensitive land. In practice, ‘core koala habitat’ is limited in scope; any other koala habitat outside of this definition may be able to be cleared under the Native Vegetation Code.
- **Only critically endangered ecological communities are off-limits to code based clearing.**²⁵ Other categories of threatened ecological communities (e.g. vulnerable and endangered) may be able to be cleared under the Native Vegetation Code. For a species to be listed as vulnerable or endangered, it means that the law has recognised the entity to be at risk of decline and potential extinction. According to best practice regulatory theory, self-assessable pathways such as the Code are appropriate for genuinely low risk activities only– therefore not appropriate for high risk species. The biodiversity implications of this internal risk contradiction must be comprehensively reviewed and addressed to be consistent with the principles of ESD.
- **Set asides are arbitrary and have little ecological basis.** The use of an arbitrary set ratio for determining set asides requirements under the Native Vegetation Code is not ecologically sound. The Discussion paper notes “in most cases set asides are established at a ratio of 1:2” (p17). The Native Vegetation Code does not specify that the vegetation to be set aside should be the same (or of ecological equivalence) and what condition the vegetation should be in.²⁶
- **Protections for threatened species are not stringent enough:** The Native Vegetation Code states that clearing is not authorised under the Code if the person who carries out the clearing harms an animal that is a threatened species, and that person knew that the

²² The Auditor-General 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 managed. See Audit Office of NSW, *Managing Native Vegetation*, 27 June 2019, p16.

²³ See *Public Information Register - Certificates Under Section 60Y*. The report for the period 09/03/2018 - 31/10/2022 shows the total treatment area for certificates issues section 60Y of the Local Land Services Act 2013 to be 782701.67 hectares, https://www.lls.nsw.gov.au/data/assets/pdf_file/0004/747031/Public-Information-Register-Certificates-Under-Section-60Y-LMC2018-31102022.pdf

²⁴ *Local Land Services Regulation 2014*, clause 124(1)(a)

²⁵ *Land Management (Native Vegetation) Code 2018*, clause 7.

²⁶ These types of deficiencies have been identified by the Auditor-General, Audit Office of NSW, *Managing Native Vegetation*, 27 June 2019, p, 21.

clearing was likely to harm the animal.²⁷ Framed in this way, ignorance can provide an excuse; a person could claim they did not know clearing was likely to harm the animal. This safeguard could be strengthened by requiring that a landholder ‘ought reasonably to know’ that the clearing would harm a threatened animal species, such as the koala.

- **Maximum clearing caps have expired:** The Native Vegetation Code includes maximum limits on the amount of clearing that can be undertaken under Part 5 – Equity Code in the initial three-year period immediately following publication of the Code.²⁸ This was included as a safeguard to prevent excessive clearing. However, the cap on maximum clearing was not revised once the initial three-year period expired, meaning there is currently no cap on clearing under the equity code.

EDO recommends that for the reasons listed above, it is imperative for the review process to include an analysis of the Code and make recommendations for reform.

EDO has previously made recommendations in relation to the INS Code, the Equity Code, the Farm Code, the definition of sensitive regulated land, and LLS code-compliance certificates, and mapping – see **Recommendations 2-7 in Appendix 2.**

Native Vegetation Panel

Discussion Questions

Question 5 - *Do each of the approval pathways for native vegetation clearing provide landholders with adequate options while managing environmental risks? Please give reasons and/or examples to support your answer.*

Question 9 – *What are the barriers to using the Native Vegetation Panel approval pathways and how could this pathway be improved?*

The Native Vegetation Panel (NVP) is not operating as intended. The NVP is established under the LLS Act. The primary function of the NVP is to assess and determine clearing applications for clearing on rural land that cannot be carried out as an allowable activity or under the Native Vegetation Code.²⁹ Since the commencement of Part 5A of the LLS Act, only one application had lodged and determined by the NVP.

During the reform process, it was suggested that this pathway would provide landholders with access to biodiversity offsets options for getting approval for significant clearing – similar to developers in the urban context. This was intended to ‘level the playing field’ in terms of urban and rural clearing applications. However, data suggests there is extremely limited appetite for this option, and for the one application approved, the Panel used their discretion to reduce the biodiversity offset credit requirement to zero (Discussion paper p20, footnote 40).

The assumption therefore is that essentially *all* land clearing that has taken place on rural land since the Framework commenced has been undertaken as an allowable activity or under the

²⁷ *Land Management (Native Vegetation) Code 2018*, clause 9.

²⁸ *Land Management (Native Vegetation) Code 2018*, clause 82.

²⁹ *Local Land Services Act 2013*, s 60ZF(6).

Code. This casts significant doubt as to whether the NV Panel and the overall Framework and approval pathways are operating as intended, consistent with the stated objectives.

Given significantly increased land clearing rates, the failure of the NV Panel to operate as intended is concerning given the alternative approval pathways (allowable activities provisions and the Code) are less rigorous in terms of environmental assessment requirements. It also suggests that the scope of allowable activities provisions and the Code are too broad or open to misuse. The result has been a de-regulation of native vegetation clearing which is inconsistent with the principles of ecologically sustainable development.

EDO recommends the review consider and report on why the NV Panel is not functioning as intended (see Recommendation 9 in **Appendix 2**). This should be the mandatory pathway for any significant clearing proposal so that environmental impacts can be addressed.

4. The Native Vegetation Regulatory Map

Discussion Paper Questions

Question 2 - *How easy to understand are the land categories and the native vegetation clearing arrangements that apply under each category? What, if any, changes are needed?*

Question 3 - *How useful is the Native Vegetation Regulatory Map as a tool for categorising private rural land? What, if any, other tools could help landholders make decisions about their land?*

Question 4 - *How comfortable and capable are landholders in self-assessing their land according to the land categories? What, if any, improvements to the Transitional Arrangements should be made? Please give reasons for your answer.*

The Native Vegetation Regulatory Map (**NVR Map**) is a fundamental component of the framework – it is the critical mechanism for categorising land in order to determine if and where the rules apply. During the reform process it was suggested that the Native Vegetation Regulatory Map was the key foundation underpinning the implementation of the new scheme.

After five years, the crucially important NVR Map still has not been finalised.

Currently, transitional arrangements are in place. The published Transitional NVR Map only shows excluded land and the sensitive and vulnerable areas of regulated land (Category 2). The Discussion Paper indicates that the sensitive and vulnerable areas equate to 6% of the state (Table 2, p12). 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) is incomplete. For these areas, landholders are required to ‘self-categorise’ unmapped land in accordance with transitional arrangements.³⁰

The Discussion Paper (p13) states: “Where seeking to clear in areas where map categories have not been published, a landholder can currently self-assess the categorisation of their land. Landholders do not have to notify Local Land Services about their self-assessment but can seek guidance from Local Land Services, which has draft mapping for all map categories.”

³⁰ *Local Land Services Act 2013*, section 60F.

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. The lack of notification requirements means it is difficult to gauge the accuracy of self-determinations about whether the rules apply.

The Government has released a draft NVR Map for landholders in eleven local government areas in sections of the Riverina, Murray and South East regions.³¹ This is a long overdue first step. Given that the NVR Map is intended to underpin the entire Framework, it must be finalised in full as soon as possible to create the regulatory certainty that is currently lacking.

EDO **recommends** that there needs to be a comprehensive release of the NVR Map with all map categories displayed (see recommendation 6 in Appendix 2).

We also **recommend** that to be consistent with the principles of ecologically sustainable development, clearing under the Code should be appropriately limited by expanding Category 2 – sensitive regulated land – ie, to exclude Code-based clearing from 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 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, encompassing koala habitat not yet mapped in a Koala Plan of Management to ensure all koala habitat is off limits to code-based clearing;
- Nominated Areas of Outstanding Biodiversity Value (**AOBVs**), not just declared AOBVs;
- All set-aside areas; and
- Steep or highly erodible land.

5. **Monitoring, reporting, compliance and enforcement**

Discussion Paper Questions

Question 10 - *Is the public register for reporting on native vegetation certificates and notifications accessible, and is the information useful and easy to understand? What if any improvements to reporting should be made? Please give reasons for your answer.*

Question 11 - *How adequate are the penalties for offences for illegal clearing and breaches of set aside obligations? Please give reasons and/or examples for your answer.*

Question 12 - *To what extent does the public have confidence in compliance and enforcement of native vegetation regulation? How could public confidence be improved?*

³¹ See <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/native-vegetation-regulatory-map/view-your-map>

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. The Discussion Paper (p21) notes:

Local Land Services is required to maintain and publish on its website a Public Register which includes notifications and certificates of clearing under the Code. The Department of Planning and Environment also reports annually on levels of woody and non-woody vegetation loss on rural land that is regulated under Part 5A of the Local Land Services Act. However, neither of these reporting mechanisms monitors the extent or condition of native vegetation on private land that incorporates both native vegetation loss as well as native vegetation regeneration, regrowth or replanting.

Further in relation to allowable activities the Discussion Paper (p21) notes:

Local Land Services is also required to publicly report every year on the estimated rate of allowable activity clearing and clearing authorised under the Code. However, Local Land Services are currently unable to accurately report on estimated rates as the Local Land Services Act does not require landholders to report on allowable activities.

As noted in this submission, there is a lack of publicly available information and transparency on what type of clearing is happening where. Reporting estimates or aggregated totals does not provide a comprehensive picture on impacted species and communities.

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 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. 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.³² This is essentially due to the fact that most clearing is now undertaken under the Native Vegetation Code, or via the allowable activities exemption. The LLS Act only requires reporting on aggregated information for code-based clearing that requires notification or certification,³³ or an annual estimate of allowable activities.³⁴ The lack of similar detailed information for notification and certification applications under the Code means monitoring and reporting is less transparent.

³² Public registers on land clearing maintained by the LLS are available at <https://www.lls.nsw.gov.au/sustainable-land-management/public-registers>

³³ Section 60ZO of the LLS Act 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).

³⁴ *Local Land Service Act 2013*, section 60ZN.

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.³⁵

The Natural Resources Commission has recommended that the roles and responsibilities for monitoring and enforcing the Native Vegetation Code (between LLS and EES) needs to be reviewed; and 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.³⁶

Compliance and enforcement: ensure the laws are implemented

As with all regulatory regimes, appropriate compliance 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.³⁷

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 and investigate potentially unlawful clearing.

The Natural Resources Commission 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.³⁸

While any person is able to commence civil enforcement proceeding in the NSW Land and Environment Court 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 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.

The Discussion Paper sets out the maximum penalties for illegal clearing and failure to comply with set aside obligations (p22), but does not provide any information on any compliance and enforcement activities that have been undertaken in the last five years. There is no information provided about what penalties have actually been imposed. A lack of public information on effective compliance and enforcement, and the imposing of sufficient penalties to establish deterrence, reduces confidence in the implementation of the scheme.

³⁵ Audit Office of NSW, *Managing Native Vegetation*, 27 June 2019.

³⁶ Natural Resources Commission, *Final Advice on Land Management and Biodiversity Conservation Reforms*, July 2019, p 6.

³⁷ Audit Office of NSW, *Managing Native Vegetation*, 27 June 2019.

³⁸ Natural Resources Commission, *Final Advice on Land Management and Biodiversity Conservation Reforms*, July 2019, p 33.

6. The statutory review process

Discussion Paper Questions

Question 13 - Overall, how relevant are Part 5A and Schedule 5A and Schedule 5B of the Local Land Services Act in achieving the social, economic and environmental interests of the State? The other questions in this Discussion Paper consider the individual provisions of the Local Land Services Act in more detail and may provide you extra context when answering this question.

Question 14 - What if any other issues should be considered as part of the statutory review of Part 5A and Schedule 5A and Schedule 5B of the Local Land Services Act? Please give reasons why they should be considered in your answer.

It does not make sense to conduct the review of the Part 5A and Schedules 5A and 5B of the LLS Act separate to the review of the BC Act. As noted in the Discussion Paper, Part 5A and Schedules 5A and 5B were introduced as part of broader Land Management and Biodiversity Conservation reforms. Section 212(2) of the LLS Act explicitly states that the review of Part 5A of the LLS Act is to be undertaken in conjunction with the review of the BC Act.

As noted, when introduced it was acknowledged that the Land Management and Biodiversity Conservation reform package “may lead to some increased clearing at a property scale, but that checks and balances such as set asides, biodiversity offsets and investment in private land conservation would ensure the impacts of that clearing are managed”.³⁹ It is not clear how the terms of reference for either the review of Part 5A of the LLS Act or the review of the BC Act intend to examine the legislative framework as a whole and determine whether checks and balances across the framework are sufficient.

EDO recommends that there must be greater coordination between the two reviews with robust analysis of critical questions about the implementation of the Framework as a whole including:

- Are the impacts of relaxing land clearing rules and allowing more unregulated clearing under LLS Act actually being offset by increased investment in conservation under the BC Act?
- Where has the \$240 million (with \$70m annually) been spent, and what biodiversity outcomes have been delivered?

To assist both review panels, we attach our recommendations from our Report: *Restoring the Balance in NSW Native Vegetation Laws*, in **Appendix 2**. The recommendations make a number of key linkages across the inter-related framework.

³⁹ *Statutory Review of the native vegetation provisions (Part 5A and Schedule 5A and Schedule 5B) of the Local Land Services Act 2013 - Discussion Paper*, November 2022, p7.

Appendix 1: An overview of the land management and biodiversity conservation framework

Land clearing on rural land is regulated under Part 5A and Schedules 5A and 5B of the LLS Act.

Under section 60A of the LLS Act rural land is defined as any area of the state except:

- urban areas of the State to which *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017* applies;
- national park estate and other conservation areas; and
- State forestry land.

Land that falls outside the scope of the LLS Act is identified as *excluded land*.

Under Part 5A of the LLS Act, rural land is categorised as either:

- *Category 1 – exempt land*; or
- *Category 2 – regulated land*, including the following sub-categories:
 - *Category 2 – vulnerable regulated*
 - *Category 2 – sensitive regulated*.

Land clearing on rural land is regulated under various pathways

Clearing on clearing category 1 – exempt land is unregulated (i.e. there are no rules regulating clearing on category 1 exempt land).

Clearing on category 2 regulated land is regulated via three different pathways:

- **Allowable activities** – Low-impact clearing associated with land management activities are 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.⁴⁰
- **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 level of clearing triggers biodiversity assessment requirements under the BC Act.

*Additional restrictions apply to land categorised as category 2 – vulnerable regulated or category 2 – sensitive regulated. For example, there are different allowable activity rules for category 2 – vulnerable regulated or category 2 – sensitive regulated; and code-based clearing cannot be undertaken on category 2 – sensitive regulated.*⁴¹

⁴⁰ *Local Land Services Act 2013*, Schedule 5A.

⁴¹ *Local Land Services Act 2013*, Schedule 5A, Part 4.

Regulation of clearing on *exempt land*

Clearing on *exempt land* is regulated by other rules:

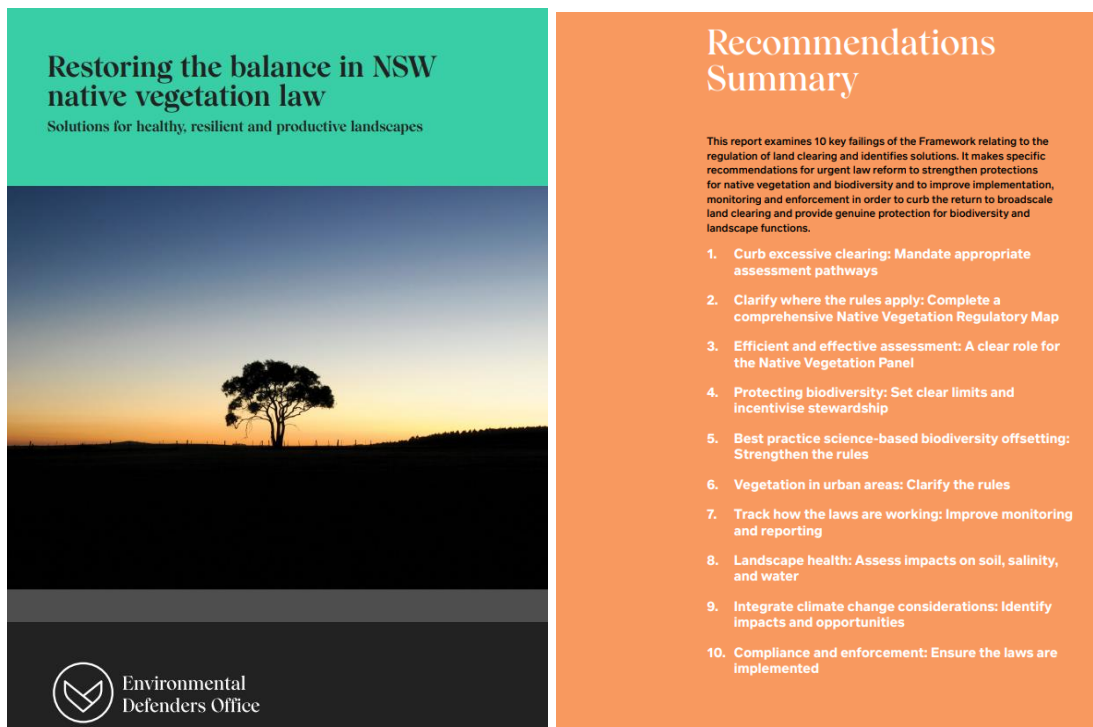
- **Land clearing activities in non-rural areas (urban areas) and environment zones** that are being carried for a purpose not requiring development consent are regulated by Tree clearing on excluded land is regulated under Chapter 2 - Vegetation in non-rural areas of *State Environmental Planning Policy (Biodiversity and Conservation) 2021*.
- **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

Changes to private land conservation were also introduced as part of the biodiversity conservation and land management 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.⁴²

⁴² See <https://www.environment.nsw.gov.au/news/native-vegetation-act-to-be-repealed-replaced-with-new-and-fairer-system>

Appendix 2: Restoring the balance in NSW native Vegetation law recommendations.



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 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.

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 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, 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.

Recommendation 6: Immediately release the comprehensive NVR Map with all map categories including Category 1 (exempt land) and Category 2 (regulated land) displayed.

Recommendation 7: Put in place mechanisms to ensure that any newly listed CEECs are mapped as category 2 sensitive regulated land without delay.

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.

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, 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 Native Vegetation Regulatory 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 Biodiversity Offsets Scheme and Act;
- Requiring genuine attempts to avoid and minimise impacts on threatened species be demonstrated before the Biodiversity Offsets Scheme 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 offsets;
- Removing the option to discount offset requirements based on non-ecological considerations;
- BCT must be able 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,
- Formulas used to determine credit pricing must 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.

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.

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 more detailed information about priority area determinations and private land conservation investment decisions.

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.

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.