



## Have your say on the statutory review of the *Biodiversity Conservation Act 2016 (NSW)*

It's been 5 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 5 years we have seen species added to our threatened lists; a significant increase in rural land clearing; 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 multiple parliamentary inquiries have all raised concerns about the regulatory framework in NSW.

This submission guide provides information on engaging in the 5-year statutory review of the *Biodiversity Conservation Act 2016 (NSW)* (**BC Act**).

### What is the statutory review of the BC Act?

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).<sup>1</sup> The new legal framework involved:

- The repeal of the *Native Vegetation Act 2003 (NSW)* (**NV Act**), the *Threatened Species Conservation Act 1995 (NSW)*, the *Nature Conservation Trust Act 2001 (NSW)* and parts of the *National Parks and Wildlife Act 1974 (NSW)* relating to private land conservation and native animal and plant management.
- Commencement of the BC Act.
- Commencement of Part 5A and Schedules 5A and 5B of the *Local Land Services Act 2013 (NSW)* (**LLS Act**).

Section 14.11 of the BC Act requires a statutory review of the Act to be carried out five years after its commencement.

Information about the review is available on the Department of Planning and Environment's [website](#).<sup>2</sup> The review is being led by a panel of independent experts: Dr Ken Henry AC, Mr Mike Mrdak AO, Dr John Keniry AM and Distinguished Professor Michelle Leishman.

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.

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<sup>1</sup> 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>

<sup>2</sup> <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/overview-of-biodiversity-reform/statutory-review-of-the-biodiversity-conservation-act-2016>

Further information is set out in the review [Terms of Reference](#).<sup>3</sup>

To participate in the statutory review you can write a submission or complete an online survey. Further information on how to lodge a submission is outlined below. A [Consultation Paper](#) has been released for public consultation.

A separate review of Part 5A of the LLS Act is also underway – further information is available on the [LLS website](#). A public consultation process for the review of Part 5A of the LLS Act took place at the end of 2022.<sup>4</sup>

**You can [lodge your submission or complete an online survey](#) by Tuesday 11 April 2023**

### Writing a submission

Your submission should try and address any relevant Consultation Paper questions, but you can also raise any other concerns in your submission. For the greatest impact, we recommend that you personalise your submission and include issues that matter the most to you.

EDO's policy and law reform experts have reviewed the Consultation Paper and have identified key issues of concern – see below. You can use these in your submission and/or come up with your own ideas for supporting and strengthening legal framework. EDO has also listed additional resources at the end of this Guide.

If you need more guidance on submission writing, see EDO's [Factsheet on submission writing](#).

### How do I lodge a submission

There are two ways to lodge your submission:

- **Email:** Email your submission to [biodiversity.review@environment.nsw.gov.au](mailto:biodiversity.review@environment.nsw.gov.au)
- **Mail:** To make a postal submission, post your submission to: Biodiversity Conservation Act Review, Department of Planning and Environment, Locked Bag 5022, Parramatta NSW 2124

Alternatively, you can provide your feedback to the statutory review via an [online survey form](#).<sup>5</sup>

### What can I expect after lodging a submission?

Once the consultation period has closed:

- The independent experts will provide a report to the Environment Minister.
- The Minister will table a report on the outcome of the review in both houses of Parliament in August 2023.

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<sup>3</sup> <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Biodiversity/statutory-5-year-review-biodiversity-conservation-act-terms-reference-2202493.pdf>

<sup>4</sup> See <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#:~:text=The%20Minister%20for%20Agriculture%20is%20required%20to%20carry,the%20assistance%20of%20an%20independent%20expert%20advisory%20panel.>

<sup>5</sup> <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/overview-of-biodiversity-reform/statutory-review-of-the-biodiversity-conservation-act-2016/biodiversity-conservation-act-review>

## KEY ISSUES

This Submission Guide addresses the following key issues:

- Statutory Review Process
- Objects and Purpose
- Key elements of the BC Act
- Conserving threatened species and ecological communities
- Private land conservation and investment
- Biodiversity Offsets Scheme
- Biodiversity Certification
- Regulating impacts on, and caring for, native animals and plants
- Compliance and enforcement
- Other important matters

### Statutory Review Process

It does not make sense to conduct the review of Part 5A and Schedules 5A and 5B of the LLS Act separate to the review of the BC Act. Part 5A and Schedules 5A and 5B of the LLS Act were introduced concurrently with the BC Act 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.

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”.<sup>6</sup> 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’s submission to the LLS Act review is available [here](#).<sup>7</sup>

### Objects and Purpose

#### **Overview:**

The objects of the BC Act are set out in section 1.3 of the BC Act – see **Appendix 1**.

Since the BC Act commenced in 2017, there has been updated and strengthened international commitment in response to the biodiversity extinction crisis. For example:

- **Kunming-Montreal Global biodiversity framework**

The Kunming-Montreal Global Biodiversity Framework (**GBF**) was adopted during the 15<sup>th</sup> Biodiversity Conference of the Parties (COP 15) in December 2022.<sup>8</sup> The GBF sets out 4 goals (Section G) including that “the integrity, connectivity and resilience of all ecosystems are maintained,

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<sup>6</sup> *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.

<sup>7</sup> <https://www.edo.org.au/wp-content/uploads/2022/12/221219-LLS-Act-Review-EDO-submission.pdf>

<sup>8</sup> <https://www.cbd.int/gbf/>

enhanced, or restored, substantially increasing the area of natural ecosystems by 2050” and “human induced extinction of known threatened species is halted” (Goal A). It also sets out 23 targets (Section H) including targets of conserving 30 per cent of terrestrial and inland water areas, and of marine and coastal areas, by 2030 (Target 3).

- **Glasgow Leaders’ Declaration on Forests and Land Use**

During the 26th UN Climate Change Conference of the Parties (COP26) in Glasgow from 31 October – 12 November 2021 over 100 countries, including Australia, pledged to halt and reverse deforestation and land degradation by 2030 through the *Glasgow Leaders’ Declaration on Forests and Land Use* (**Glasgow Declaration**).<sup>9</sup> The Glasgow Declaration includes six key commitments, including to conserve forests and accelerate their restoration; and to reverse forest loss and degradation while ensuring robust policies and systems are in place to accelerate the transition to an economy that is resilient and advances forest, sustainable land use, biodiversity and climate goals.

- **Leaders’ Pledge for Nature**

In September 2022, Prime Minister Albanese, announced that Australia would sign on to the *Leaders’ Pledge for Nature* to reverse biodiversity loss by 2030.<sup>10</sup> Under the pledge, political leaders have committed to undertake urgent action, as part of the UN Decade of Action to achieve Sustainable Development, to put nature and biodiversity on a path to recovery by 2030. This includes commitments to “*address the direct and indirect drivers of biodiversity loss and halt human induced extinction of species, to ensure species populations recover, and to significantly increase the protection of the planet’s land and oceans through representative, well-connected and effectively managed systems of Protected Areas and Other Effective Area-Based Conservation Measures, and to restore a significant share of degraded ecosystems*”.<sup>11</sup>

- **Threatened Species Action Plan: Towards Zero Extinctions**

In October 2022, the Federal government released its *Threatened Species Action Plan: Towards Zero Extinctions*. The Action Plan includes objectives of preventing new extinctions of plants and animals (Objective 3) and protecting and conserving at least 30 per cent of Australia’s land mass is protected and conserved (Objective 4).

### **Key issues:**

- The objects of the BC Act lack ambition and will not reverse current trends of declining biodiversity. They are not in line with national and international policy ambitions to halt and reverse biodiversity loss.

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<sup>9</sup> See <https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/>

<sup>10</sup> See The Guardian, *Australia signs global nature pledge committing to reverse biodiversity loss by 2030*, 21 September 2022, available at <https://www.theguardian.com/australia-news/2022/sep/21/australia-signs-global-nature-pledge-committing-to-reverse-biodiversity-loss-by-2030>

<sup>11</sup> See <https://www.leaderspledgefornature.org/>. ‘Other effective area-based conservation measures’ (OECMs) are areas that achieve long term and effective in-situ conservation of biodiversity, outside of protected areas, and can include areas on private land, such as areas protected under a formal, long-term or in-perpetuity conservation agreement. The International Union for the Conservation of Nature (IUCN) has published guidance on defining and identifying OECMs, see <https://portals.iucn.org/library/sites/library/files/documents/PATRS-003-En.pdf>

- The BC Act should match international and national ambition, including to halt extinctions and protect and conserve land.
- In particular, in order to overcome baseline decline and prevent further extinctions, the objects must be requirement *improvement* in the condition of biodiversity (e.g. maintain and improve, conserve and enhance, or no net loss or better).
- The objects of the BC Act should be better operationalised within the Act. This could be achieved by:
  - A new provision that outlines how the objects will be achieved; and/or
  - Specific provisions that require decision-makers to make decisions consistent with the objects of the Act; and/or
  - Specific standards and goals embedded in the Act (for example, the standards underpinning the Biodiversity Offsets Scheme).

### **Consultation Paper - Focus Questions**

1. How effective are the objects of the Act to restore, conserve and enhance biodiversity today and into the future?
2. Is the current purpose to conserve biodiversity consistent with the principles of Ecologically Sustainable Development appropriate?
3. How could the Act best support national and international biodiversity aspirations including climate change adaptation, nature positive and restoration goals?
4. How could the Act better integrate Aboriginal knowledge and support the aspirations of Aboriginal people in biodiversity conservation?

## **Key elements of the BC Act**

### **Overview:**

The BC Act includes the following key components:

- **Part 2 – Protection of plants and animals:** includes offences relating to harming or damaging plants and animals and a framework for issuing biodiversity conservation licences.
- **Part 3 – Areas of outstanding biodiversity value:** establishes a new process for declaring areas of outstanding biodiversity value that meet established criteria.
- **Part 4 – Threatened species and threatened ecological communities:** sets out the process for listing threatened plants and animals; establishes the biodiversity conservation program (Saving our Species) for threatened species and threatened ecological communities; and establishes the Threatened Species Scientific Committee.
- **Part 5 - Investment strategy and private land conservation agreements:** establishes the private land conservation framework, and the requirements to develop a Biodiversity Conservation Investment Strategy.

- **Part 6 – Biodiversity offsets scheme:** establishes the biodiversity offsets scheme, including provisions for establishing a method to assess biodiversity; the creation of, and dealings with, biodiversity credits, scheme for accreditation and the Biodiversity Conservation Fund.
- **Part 7 - Biodiversity assessment and approvals** under the *Environmental Planning and Assessment Act 1979* (NSW): sets out biodiversity assessment requirements development and activities in the planning system.
- **Part 8 - Biodiversity certification of land:** establishes the framework for biodiversity certification.
- **Part 9 - Public consultation and public registers:** sets out requirements for consultation and the publication of registers under the BC Act.
- **Part 10 – Biodiversity Conservation Trust:** establishes the Biodiversity Conservation Trust.
- **Part 11 – Regulatory compliance mechanisms:** sets out the range of compliance mechanisms including stop work orders, interim protection orders, remediation orders, biodiversity offsets enforcement order and directions relating to protected animals and threatened species of animals.
- **Part 12 – Investigation powers:** sets out the investigative powers including authorised officers, powers to require information and records and powers under the BC Act.
- **Part 13 – Criminal and civil proceedings:** sets out liabilities for offences and types of proceedings that may be taken and orders that may be made.

#### Key issues:

- **The BC Act does not effectively respond to climate change.** Despite object b) of the BC Act being “to support biodiversity conservation in the context of a changing climate”, the BC Act framework fails to effectively build in effective mechanisms to achieve this.
- In this regard, the BC Act could be strengthened by, for example:
  - requiring the Biodiversity Conservation Program to respond to the impacts of climate change on threatened species and ecological communities.
  - requiring the Biodiversity Conservation Investment Strategy to respond to the impacts of climate change.
  - requiring the Minister to consider climate change in developing the Biodiversity Assessment Method

#### **Consultation Paper - Focus Questions**

5. How current and comprehensive are the existing elements of the Act for biodiversity conservation?
6. Is there other architecture that should be included to achieve the objects of the Act?

#### **Conserving threatened species and ecological communities**

The BC Act is the primary piece of legislation in NSW aimed at protecting and conserving threatened species and ecological communities. Key elements of the framework aimed at conserving threatened species and ecological communities include:

- Offences for harming native plants and animals

- Threatened species and ecological communities listing processes
- Key threatening processes
- Biodiversity Conservation Program
- Areas of Outstanding Biodiversity Value
- Serious and irreversible impacts mechanism
- Indigenous Knowledge

Each of these is discussed in more detail below.

- **Offences for harming native plants and animals**

**Overview:**

The BC Act includes a range of offences for harming native plants and animals. These are set out in Part 2, Division 2 of the BC Act. Various defences are available under Part 2, Division 3, including undertaking acts authorised under other legislation (e.g. development approval), or holding a conservation licence.

**Key issues:**

- The range of offences and penalties under the BC Act are supported. However, some offences should be made strict liability offences to reflect the serious nature of the offence and the risk of undermining the objectives of the BC Act.

- **Threatened species and ecological communities listing processes**

**Overview:**

Part 4 of the BC Act provides the framework for nominating and declaring species and ecological communities as threatened.

**Key issues:**

- **Option to list specific populations** - The option to list specific populations under the former *Threatened Species Conservation Act 1995* (NSW) (**TSC Act**) was repealed and not reintroduced under the BC Act. The ability to recognise distinct local populations is essential for conserving and retaining genetic diversity<sup>12</sup> - a fundamental component of biological diversity.
- **Application of provisional listing provisions** - Importantly, NSW is the only jurisdiction in Australia with provisional listings provisions. These provisions provide an important safeguard for species that need to be listed on an emergency basis. These provisions could be strengthened by explicitly providing for the use of provisional listing provisions following a major event that has significantly impacted on the conservation status of a species (e.g. bushfire).<sup>13</sup>

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<sup>12</sup> The recognition that individual populations may constitute biologically distinct taxa is consistent with the concept of Evolutionary Significant Units (ESUs) under the United States of America Endangered Species Act of 1973. Under the Act a sub-species, race or population may be listed as an endangered ESU even if the species is otherwise secure overall.

<sup>13</sup> For further information, see EDO, *Defending the Unburnt, Wildlife can't wait: Ensuring timely protection of our threatened biodiversity*, November 2022, <<https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Wildlife-cant-wait.pdf>>

- **Key threatening processes**

**Overview:**

Part 4, Division 5 of the BC Act sets out a process for listing threatening processes that can adversely affect threatened species or ecological communities, or could cause species or ecological communities that are not threatened to become threatened. These are known as key threatening processes (**KTPs**).

For listed KTPs:

- One of the key objectives of the Biodiversity Conservation Program (discussed below) is to minimise the impacts of key threatening processes on biodiversity and ecological integrity. The Biodiversity Conservation Program may include strategies to minimise the impacts of key threatening processes.
- One of the factors that must be considered as part of the ‘Test of Significance’<sup>14</sup> is whether the proposed development or activity is or is part of a key threatening process or is likely to increase the impact of a key threatening process. The test of significance is used to determine whether a proposed development or activity likely to significantly affect threatened species or ecological communities and whether a Biodiversity Development Assessment Report is required and the Biodiversity Offsets Scheme is triggered.

**Key issues:**

- The broader regulatory framework could be strengthened to ensure KTPs are better taken into consideration in decision making. For example, require planning authorities to consider and not make decisions that would increase the impact of key threatening processes when making strategic plans or granting development approval.

- **Biodiversity Conservation Program:**

**Overview:**

Part 4, Division 6 of the BC Act requires the Environment Agency Head<sup>15</sup> to establish a Biodiversity Conservation Program that will maximise the long-term security of threatened species and threatened ecological communities in nature; and minimise the impacts of key threatening processes on biodiversity and ecological integrity.

The Biodiversity Conservation Program is currently delivered through the NSW Government’s Saving our Species (**SoS**) program - that is, SoS is the Government’s Biodiversity Conservation Program for the purpose of Part 4, Division 6 of the BC Act.<sup>16</sup>

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<sup>14</sup> See <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/about-the-biodiversity-offsets-scheme/when-does-bos-apply/test-of-significance>

<sup>15</sup> Environment Agency Head refers to the head of the Environment and Heritage division of the NSW Department of Planning and Environment.

<sup>16</sup> See <https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species/programs-legislation-and-framework/biodiversity-conservation-program>



The SoS program aims to manage and conserve threatened species based on their differing conservation needs, including through on-ground conservation projects working directly with landholders and the community.

### **Key issues:**

- **Land use rules undermine Biodiversity Conservation Program:** The SoS program plays an important role in managing impacts on threatened species and conserving and restoring important habitat, however it operates separately to the legal frameworks regulating activities on land. The result is that conservation efforts under the SoS program may be undermined by inadequate regulatory frameworks that continue to allow activities that greatly impact on threatened species and their habitat.
  
  - **Strengthening interaction between Biodiversity Conservation Program and rules regulating land use:** More could be done to improve the interaction of the SoS program and the legal frameworks regulating activities on land such as urban development and land clearing. For example, the BC Act should:
    - impose duties on developers and development decision makers to act consistently with SoS conservation priorities;
    - require environmental assessments to state whether approving the development will contribute to key threatening processes listed under the BC Act, and if so, how this will be minimised, and any alternatives available for the decision-maker to consider;
    - declare that SoS sites (outside national parks and reserves) are AOBVs; and
    - fund these AOBVs for protection and make them off-limits from harm – including from mining interests (which otherwise continue to override biodiversity protection).
- **Areas of Outstanding Biodiversity Value:**

### **Overview:**

Under the BC Act, the Minister can declare an area as an Area of Outstanding Biodiversity Value (AOBV). It is an offence to damage an AOBV without any relevant approval.<sup>17</sup> Certain assessment and determination pathways cannot be used in an AOBV,<sup>18</sup> and development proposals within an AOBV is deemed likely to significantly affect threatened species for the purpose of determining whether a BDAR is required.<sup>19</sup>

### **Key issues:**

- **No new AOBVs have been declared:** AOBVs are intended to identify the most valuable sites for biodiversity conservation in NSW outside of the national reserve system, and were flagged as a key safeguard in the Land Management and Biodiversity Conservation reforms. However, no new AOBVs have been declared since the BC Act came into effect in August 2017. The 5-year statutory review should interrogate why there has been no uptake of this mechanism and what improvements need to be made to the AOBV process or the BC Act more broadly to ensure valuable areas are being protected, as intended.

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<sup>17</sup> BC Act, s 2.3.

<sup>18</sup> For example, exempt development must not be carried out on land that is a declared AOBV – per State Environmental Planning Policy (Exempt and Complying Development Codes) 2008, cl 1.16(1)(b1).

<sup>19</sup> BC Act, cl 7.2.

- **Barriers to third-party nomination:** One significant barrier to third parties nominating an area for declaration as an AOBV is the requirement to demonstrate landholder support. This is not a legislative requirement, but a procedural step in the nomination process.<sup>20</sup> Requiring a person nominating an AOBV to provide landholder consent places an undue obligation on nominators, and may create an obstacle for nominations.
- **Serious and irreversible impacts mechanism:**

**Overview:**

The concept of ‘serious and irreversible impacts on biodiversity values’ is a mechanism used to assess the severity of impacts on biodiversity that would be caused by a proposed development or clearing activity. Specific provisions create obligations on decision makers once serious and irreversible impacts (**SII**) are identified. For example:

- *Part 4 development under the EP&A Act:* If proposed Part 4 development will have SII on threatened species, it must be refused.<sup>21</sup>
- *Vegetation clearing that requires approval by the Native Vegetation Panel:* If vegetation clearing that requires approval by the NVP will have SII on threatened species, it must be refused.<sup>22</sup>
- *Major projects (State significant development (SSD) and State Significant Infrastructure (SSI)):* If a development proposal for a major project will have SII on threatened species, the consent authority must take those impacts into consideration, and is required to determine whether there are any additional and appropriate measures that will minimise those impacts if consent or approval is to be granted.<sup>23</sup>

The Department of Planning and Environment (**DPE**) has published *Guidance to assist a decision-maker to determine a serious and irreversible impact*.<sup>24</sup> DPE has prepared a list of entities that it has assessed as likely to be at risk of SII to assist assessors and approval authorities.<sup>25</sup> The list is not exhaustive and the Guidelines should be applied on a case by case basis.

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<sup>20</sup> Section 3.3 of the BC Act provides that it is the role of the Environment Agency Head to notify landholders whose land is within the proposed area and give landholders a reasonable opportunity to make submissions. While there is no explicit obligation on the BC Act on a person nominating an AOBV to seek landholder support, the Department’s website and nomination form require evidence that the person nominating an area has have spoken to the owner of the land, and that the landowner supports your proposal being made < <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/areas-of-outstanding-biodiversity-value/proposals-for-areas-of-outstanding-biodiversity-value/making-a-proposal/area-of-outstanding-biodiversity-value-proposal-form>>

<sup>21</sup> BC Act, s 7.16(2).

<sup>22</sup> LLS Act, s 60ZF; Vegetation in non-rural areas SEPP, cl 2.14(6).

<sup>23</sup> BC Act, s 7.16(3) and (4).

<sup>24</sup> See <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/local-government-and-other-decision-makers/serious-and-irreversible-impacts-of-development>

<sup>25</sup> See <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/local-government-and-other-decision-makers/serious-and-irreversible-impacts-of-development>

### **Key issues:**

- The SII mechanism is discretionary for major projects: The requirement to refuse proposals that will have SII on biodiversity must also extend to major projects, not just to local projects. That is, major projects with serious and irreversible impacts on biodiversity should be refused.
- The SII mechanism could be further strengthened to more accurately reflect the principles of ecologically sustainable development: For example:
  - the standard should be serious ‘**or**’ irreversible, not ‘and’;
  - the test should be objective, rather than subjective;
  - references to extinction risk should be clarified to refer to an appropriate scale and scope; and
  - consent authorities should be required to have regard to the precautionary principle and cumulative impacts on threatened species.

- **Indigenous knowledge**

#### **Overview:**

Object c) of the BC Act is to improve, share and use knowledge, including local and traditional Aboriginal ecological knowledge, about biodiversity conservation. However, there are no specific elements in the BC Act to achieve this.

### **Key issues:**

- Despite object c) of the BC Act being “to improve, share and use knowledge, including local and traditional Aboriginal ecological knowledge, about biodiversity conservation”, the BC Act framework fails to effectively build in effective mechanisms to achieve this.
- Object c) should be better operationalised in the BC Act. This could be achieved by, for example, provisions that explicitly require or provide opportunities for Aboriginal ecological knowledge to be incorporated into planning and programming, e.g. the Biodiversity Conservation Program.
- As part of the review, the independent experts and Government should consult with First Nations people about how the legislation can better incorporate Aboriginal ecological knowledge.

#### **Consultation Paper - Focus Questions**

7. How could the Act best support landscape-scale actions to prevent species from becoming threatened?
8. Are there improvements that could be made to AOBVs and the SoS program to give them a greater role in enhancing biodiversity?
9. How can perspectives of Aboriginal people and indigenous knowledge be embedded in the conservation of threatened species and ecological communities?

## Private land conservation and investment

### Overview:

Part 5 of the BC Act sets out a framework for investment in and administration of private land conservation agreements. For example:

- The Minister is required to make a Biodiversity Conservation Investment Strategy to guide investment in biodiversity conservation.
- The Minister can enter into a biodiversity stewardship agreement (**BSA**) with a landholder. BSAs provide for the permanent protection and management of the biodiversity on the stewardship site. BSAs are a key component of the Biodiversity Offsets Scheme (**BOS**). BSAs are used to establish offsets sites and create biodiversity credits under the BOS.
- The Biodiversity Conservation Trust can enter into a conservation agreement with a landholder, for the purpose of conserving or studying the biodiversity of the land. Conservation agreements are intended to be in-perpetuity (forever) (although some can be for a fixed term, and there are strict limits on terminating the agreement).
- The Biodiversity Conservation Trust may enter into a wildlife refuge agreement with a landholder, for the purpose of conserving or studying the biodiversity of the land. While these are legal agreements, unlike conservation agreements, they are not intended to be in-perpetuity agreements and can be terminated at any time.

### Key issues:

- Private land conservation can play a critical role in achieving the objects of the BC Act and conserving biodiversity in line with national and international commitments.
- The framework in Part 5 of the BC Act can be strengthened to ensure that the investment strategy and private land conservation agreements are delivering the best possible outcomes for biodiversity. For example, the framework under Part 5 should:
  - Establish a process for public consultation for reviews of the Biodiversity Conservation Investment Strategy.
  - Recognise and regulate biodiversity stewardship agreements for what they are i.e. offsets agreements. For example, these should be called offset agreements, and must be regulated in accordance with best-practice offsetting principles – they should have effect in-perpetuity and should not be able to be terminated.
  - Expand the purpose for which a Conservation Agreement or Wildlife agreement can be entered into, including, for example managing the so as to protect its natural heritage (and any cultural heritage associated with the natural heritage); or protecting areas containing scenery, natural environments or natural phenomena worthy of preservation.
  - Mining should not be undertaken on private land subject to a Biodiversity Stewardship Agreement or Conservation Agreement or on a Wildlife Refuge where the land includes declared AOBVs or threatened species, populations or ecological communities, or their habitats.

- The terms of a Biodiversity Stewardship Agreement, Conservation Agreement or Wildlife Refuge should include mandatory monitoring, reporting and auditing requirements.

### **Consultation Paper - Focus Questions**

10. How could the Act best support partnerships with private landholders to conserve, restore and enhance biodiversity across NSW?
11. How could the Act best support strategic landscape-scale biodiversity conservation outcomes and improve connectivity?
12. How could the Act enable financial investment by government, businesses and philanthropic organisations?

## **Biodiversity Offsets Scheme**

### **Background:**

The NSW Biodiversity Offsets Scheme (**BOS**) was introduced by the BC Act, replacing a number of earlier offsetting frameworks. The BOS is underpinned by the Biodiversity Assessment Method (**BAM**). The BOS applies to any application for clearing or development that exceeds the BOS Threshold.<sup>26</sup>

- **The NSW Audit Office has raised concerns regarding the effectiveness of the BOS.** For example, in August 2022, a report by the NSW Audit Office of New South Wales found:<sup>27</sup>
  - “DPE has not effectively designed core elements of the Scheme”.
  - “Key concerns around the Scheme’s transparency, sustainability and integrity are yet to be fully resolved”.
  - There is a “risk that biodiversity gains made through the Scheme will not be sufficient to offset losses resulting from development, and that the DPE will not be able to assess the Scheme’s overall effectiveness”.
- In November 2022, following its inquiry into the integrity of the BOS, **the NSW Legislative Council Portfolio Committee No. 7 - Planning and Environment, made recommendations for reforming the BOS,**<sup>28</sup> including:

<sup>26</sup> For more information on the BOS threshold, see the Department of Planning and Environment’s website: <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/about-the-biodiversity-offsets-scheme/when-does-bos-apply#:~:text=The%20Biodiversity%20Conservation%20Regulation%202017%20sets%20out%20threshold,Values%20Map%20published%20by%20the%20Environment%20Agency%20Head.>

<sup>27</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme*, 31 August 2022, available at <https://www.audit.nsw.gov.au/our-work/reports/effectiveness-of-the-biodiversity-offsets-scheme>

<sup>28</sup> New South Wales. Parliament. Legislative Council. Portfolio Committee No. 7, *Integrity of the NSW Biodiversity Offsets Scheme*, Report no. 16, November 2022, <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2822/Report%20No.%2016%20-%20PC%207%20-%20Integrity%20of%20the%20NSW%20Biodiversity%20Offsets%20Scheme.pdf>

- “That the Department of Planning and Environment review and reform the design of the Biodiversity Offsets Scheme, to ensure it meets best practice principles for biodiversity offsetting” (Recommendation 1).
- “That the NSW Government define a set of scientifically sound principles that govern the operation of the Biodiversity Offsets Scheme, and ensure these are embedded in the Biodiversity Conservation Act 2016” (Recommendation 2).

### Key issues:

- The BOS does not align with best practice. The BOS permits an inappropriate level of variation to ‘like-for-like’ rules, and does not contain the ecologically necessary limits to prevent extinctions.
- The BOS must be strengthened in order to meet best practice and deliver improved outcomes for biodiversity. Key recommendations for reform include:
  - The BOS must adopt a clear and objective environmental standard to *improve* biodiversity outcomes (e.g. no net loss or better).
  - Legislate a scientifically-robust set of principles that govern the operation of BOS.
  - Areas of high conservation value must be off-limits to offsetting.
  - Require genuine attempts to avoid and minimise impacts on threatened species and ecological communities be demonstrated before the BOS can be applied. Clear guidance on the required steps and evidence of steps taken should be developed.
  - Like-for-like offsetting requirements must be tightened. Variation rules and the use of indirect offsets must be strictly limited.
  - There must be stricter parameters around the payment of money to the Biodiversity Conservation Trust (**BCT**) in lieu offsets, including allowing/requiring the BCT to refuse to accept an offset liability for a proponent where it would not be possible for them to obtain like-for-like offset.
  - Do not allow future mine rehabilitation to generate offset credits and be counted as an upfront offset.
  - Remove the ability to discount offsets. However, if a discounting mechanism is retained, it should be strictly limited – e.g. any discounts should only be allowed if based on ecological reasons, and if reasons are provided for decisions.
  - Formulas used to determine credit pricing must incorporate an appropriate risk factor to ensure that like for like offsets can be sourced and managed in perpetuity and that increasing scarcity of biodiversity is embedded in the pricing mechanism in a non-linear fashion (to ensure that it becomes increasingly expensive to purchase credits for increasingly scarce species and ecosystems).

### **Consultation Paper - Focus Questions**

13. Is the Act providing an effective mechanism to ensure that the right developments and land use changes are being assessed?
14. Does the Act provide the appropriate framework for avoiding and minimising impacts and addressing serious and irreversible impacts?
15. Can the Act in its current form result in improved ecological and environmental outcomes?

16. How can complexity and costs be minimised while still achieving positive biodiversity outcomes?

17. How could the Act better support an effective and efficient offset market?

## Biodiversity Certification

### Overview:

Biodiversity certification is a streamlined biodiversity assessment process for large areas of land proposed for development. It involves large-scale, upfront assessment of biodiversity values and impacts in a designated area. Once land is certified, development may proceed without the usual requirement for site-by-site biodiversity assessment.

Biodiversity certification is provided for under Part 8 of the BC Act, which distinguishes between standard biodiversity certification and strategic biodiversity certification:

- *Biodiversity certification*: Biodiversity certification is available to landholders and planning authorities e.g. (local council, DPE). An application must be accompanied by a biodiversity certification assessment report and the BOS applies. The proponent may be required to retire biodiversity credits in accordance with the BOS.
- *Strategic biodiversity certification*: Strategic biodiversity certification is only available to planning authorities, who can seek to have an application for biodiversity certification declared strategic by the Environment Minister. While the proponent for strategic biodiversity certification may elect to retire biodiversity credits, additional conservation measures are also allowed as a way of offsetting impacts on biodiversity, including reservation of land under the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**); adoption of development controls or state infrastructure contributions under the EP&A Act that conserve or enhance the natural environment; or any other measure determined to be an approved conservation measure by the Environment Minister.<sup>29</sup>

### Key issues:

- **Overriding site specific assessment**: Upfront strategic land use planning is an important planning tool that can help manage land use conflicts and identify high conservation areas for protection. However, it should not, as biodiversity certification does, comprehensively remove the need for individual site assessment at the development assessment phase. Doing so does not allow the impacts of individual projects to be assessed, once the details are better known. Also, it does not allow more up-to-date information about biodiversity values and potential impacts of development to easily be taken into account down the track.
- **Ability to deliver biodiversity gains**: It is unclear whether biodiversity certification will deliver proposed biodiversity in the long-term. In the case of standard biodiversity certification, reliance on the BOS is problematic, as there are ongoing concerns about the ability of the BOS

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<sup>29</sup> BC Act, s8.3(2)(b).

to deliver effective biodiversity gains. In the case of strategic biodiversity certification, new provisions are untested and the significant discretion and lack of scientific rigour around ‘additional conservation measures’ is concerning.

- **Inadequate safeguards:** Safeguards, such as the serious and irreversible impacts (SII) mechanism, are not strictly applied (the Minister only has to consider SII, rather than refuse proposals that will have SII).
- **Implementation and enforcement of strategic biodiversity certification plans:** The issuing of the first strategic biodiversity certification (for land covered by the Cumberland Plain Conservation Plan (CPCP)) has highlighted issues regarding implementation and enforcement. While specific to the CPCP, many of these concerns would relate to the implementation and enforcement of strategic biodiversity certification more broadly. These include: multiple agencies and levels of government being responsible for delivering actions; uncertain language adopted in commitments and measures, which will make compliance difficult to measure, and enforcement action difficult to take; the applicant (NSW Department of Planning and Environment) and the regulator (the Environment Minister) are essentially the same (the NSW Government); and civil enforcement requires the consent of the Minister (meaning there is no “open standing” to remedy or restrain a breach of the CPCP).<sup>30</sup>

#### **Consultation Paper - Focus Questions**

18. How can the Act support better ‘up front’ consideration of impacts on biodiversity from development?
19. How can the Act support better consideration of impacts on biodiversity from development at a regional level?

### **Regulating impacts on, and caring for, native animals and plants**

#### **Overview:**

A person may apply to the Department of Planning and Environment for a Biodiversity Conservation Licence where they propose to carry out an activity that could cause harm to protected and threatened animals and/or plants, or damage habitat of threatened species or ecological communities, or damage an Area of Outstanding Biodiversity Value.<sup>31</sup>

The power for the Environment Agency Head to grant licences under the BC Act are broad. At present, the Department administer over 30 classes of licences.<sup>32</sup> These include:

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<sup>30</sup> For further information, refer to EDO’s submission on the Draft Cumberland Plain Conservation Plan: EDO, *Submission on the Draft Cumberland Plain Conservation Plan*, October 2019, available at <https://www.edo.org.au/publication/submission-draft-cumberland-plain-conservation-plan/>

<sup>31</sup> BC Act, sections 2.11 and 2.10.

<sup>32</sup> <https://www.environment.nsw.gov.au/licences-and-permits/wildlife-licences/wildlife-licensing-reforms>



- Scientific licence e.g. licences for bird or bat banding, licences for ecological burns, licences for ecological surveys, and licences for education and research.<sup>33</sup>
- Licences to keep native animals as pets.<sup>34</sup>
- Licences to move native animals across state borders or commercially trade native animals and plants.<sup>35</sup>
- Licences to catch and release reptiles and possums.<sup>36</sup>
- Licences to control or harm protected native animals or threatened species.<sup>37</sup>
- Licences for taxidermy.<sup>38</sup>
- Protected native plant licences to pick, possess, buy or sell protected or threatened plant species or ecological communities for commercial purposes.<sup>39</sup>

A Biodiversity Conservation Licence may have conditions which include standards for the humane treatment of animals, and any other conditions that the Department of Planning and Environment considers to be appropriate.<sup>40</sup> A Biodiversity Conservation Licence is not required where activities are approved under development consents.

Following the introduction of the Land Management and Biodiversity Conservation framework, the Government commenced a review of wildlife licencing, including wildlife licencing classes.<sup>41</sup> This review has not been fully finalised and implemented.

#### **Key issues:**

- The outstanding review of the wildlife licencing regime must be finalised.
- Conservation stakeholder engaged in the review of wildlife licencing have raised concerns about the deregulation of the framework, and the ongoing keeping of native animals as pets.<sup>42</sup>

#### **Consultation Paper - Focus Questions**

20. How could the Act best support the protection of native animals and plants?
21. Are the requirements and conditions for biodiversity conservation licences in the Act suitable? Do you have any suggestions for improvements?
22. How should wildlife licencing be modified to allow for climate-adaptation conservation activities

<sup>33</sup> <https://www.environment.nsw.gov.au/licences-and-permits/scientific-licences>

<sup>34</sup> <https://www.environment.nsw.gov.au/licences-and-permits/wildlife-licences/native-animals-as-pets>

<sup>35</sup> <https://www.environment.nsw.gov.au/licences-and-permits/wildlife-licences/trading-in-native-animals>

<sup>36</sup> <https://www.environment.nsw.gov.au/licences-and-permits/wildlife-licences/catch-and-release-licence>

<sup>37</sup> <https://www.environment.nsw.gov.au/licences-and-permits/wildlife-licences/licences-to-control-or-harm>

<sup>38</sup> <https://www.environment.nsw.gov.au/licences-and-permits/wildlife-licences/taxidermy-licence>

<sup>39</sup> <https://www.environment.nsw.gov.au/licences-and-permits/protected-native-plant-licences>

<sup>39</sup> <https://www.environment.nsw.gov.au/licences-and-permits/protected-native-plant-licences>

<sup>40</sup> BC Act, s 2.14(2) *Biodiversity Conservation Act*

<sup>41</sup> See *Discussion Paper Towards a risk-based approach to wildlife licences*, <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Licences-and-permits/wildlife-licences-discussion-paper-180297.pdf>

<sup>42</sup> See for example, WIRES: <https://www.wildforlife.org.au/wildforlife>

## Compliance and enforcement

### Overview:

The BC Act's compliance and enforcement framework is generally set out in:

- Part 11 - Regulatory compliance mechanisms
- Part 12 - Investigation powers
- Part 13 Criminal and civil proceedings

### Key issues:

- As with all regulatory regimes, accountability and enforcement are vital for ensuring laws are properly implemented and the aims and objectives of the laws are being met.
- While there are some positive elements of the compliance and enforcement framework (e.g. reasonable penalties and civil enforcement provisions), there are key opportunities for strengthening the compliance and enforcement framework to better achieve the objectives of the BC Act. For example:
  - Third-party appeal and civil enforcement powers are a key accountability mechanism and must be readily available across the Land Management and Biodiversity Conservation framework, and not unduly restricted.
  - Privative clauses (clauses that purport to prevent the Court from invalidating the administrative decision in question even where it finds that a jurisdictional error had been made) should be removed from the BC Act.
  - Transparency should be improved. For example, public registers under both the BC Act and interrelated legislation must be required, and information available on those registers must be comprehensive and readily accessible. This includes registers of approvals for development, clearing and forestry, offset and biodiversity conservation agreements, biodiversity certifications etc.
  - While not regulated directly under the BC Act, improving reporting and monitoring of compliance with consent and approval conditions to ensure conditions are met and biodiversity outcomes are achieved. This can include, for example, monitoring and reporting on set aside obligations under clearing laws, biodiversity offsets obligations under development approvals and clearing approvals, and mitigation measures under biodiversity certificates.
  - A number of key policies designed to conserve biodiversity in NSW, such as the *NSW Koala Strategy*, are not legally enforceable. Consideration should be given to giving such key documents legal status.
  - Compliance and enforcement policies should identify and promote opportunities to seek remedies for unlawful activities that include the restoration and enhancement of habitat.

### **Consultation Paper - Focus Questions**

23. Are the Act's penalties and enforcement instruments an effective way to support the Act to achieve its objectives?

24. How can the Act give the community more confidence and clarity in the approach to regulation? Should the Act be strengthened to require data collection under the regulatory frameworks in place? Is the risk assessment approach suitable

## Other important matters

### Overview:

The independent experts also seek feedback on any other relevant issues, including, but not limited to:

- the adequacy of climate change considerations in the Act and how we may integrate climate considerations better in future;
- the adequacy of existing policy evaluation and reporting frameworks to assess the Act's effectiveness in meeting its objectives;
- the adequacy, accessibility and application of ecological data and information, including the Biodiversity Indicator Program, to understand and respond to biodiversity impacts and threats;
- use of interactive maps, technology and innovation to inform and support decision-making, including the Biodiversity Values Map and Native Vegetation Regulatory Map; and,
- opportunities for public participation in conservation programs and decision-making to draw on local and Aboriginal communities' knowledge and expertise, keep people informed and support government accountability

### Examples of other important matters:

- **Vegetation in non-rural areas**

The former *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017* (now Chapter 2 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (**Chapter 2, Biodiversity and Conservation SEPP**)) was also introduced as part Land Management and Biodiversity Conservation reform package. It regulates tree clearing (not associated with development) in non-rural areas, and is also a key component of the State's biodiversity conservation response.

Chapter 2 of the Biodiversity and Conservation SEPP should be considered as part of this review process as it sets out interdependent policy settings linked to the objectives of the BC Act.

In particular, the review should consider:

- To what extent local councils have updated Development Control Plans to declare the SEPP applies, and how effectively local councils are regulating tree clearing on non-rural land.
- Policy settings that have led to the NVP having not assessed any applications under Chapter 2 of the Biodiversity and Conservation SEPP, and whether this has implications for the conservation of biodiversity in NSW.

### **Consultation Paper - Focus Questions**

25. Do you have any feedback on these matters or other issues you would like considered in the review of the Act?

### **ADDITIONAL RESOURCES**

- EDO, *Submission to the inquiry into the integrity of the NSW Biodiversity Offsets Scheme (BOS)*, September 2021, available [here](#).<sup>43</sup>
- EDO, *Defending the Unburnt: Offsetting our way to extinction*, November 2022, available [here](#).<sup>44</sup>
- EDO, *Defending the Unburnt: Wildlife can't wait: Ensuring timely protection of our threatened biodiversity*, November 2022, available [here](#).<sup>45</sup>
- EDO, *Defending the Unburnt: Discussion Paper - Opportunities to expand and enhance environmental stewardship*, October 2022, available [here](#).<sup>46</sup>
- EDO, *Defending the Unburnt: A guide to private land conservation for landholders*, September 2021, available [here](#).<sup>47</sup>
- Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme*, 31 August 2022, available [here](#).<sup>48</sup>
- New South Wales Parliament, Legislative Council, Portfolio Committee No. 7, *Integrity of the NSW Biodiversity Offsets Scheme*, November 2022, available [here](#).<sup>49</sup>

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<sup>43</sup> <https://www.edo.org.au/publication/submission-to-the-inquiry-into-the-integrity-of-the-nsw-biodiversity-offsets-scheme/>

<sup>44</sup> <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Offsetting-our-way-to-extinction.pdf>

<sup>45</sup> <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Wildlife-cant-wait.pdf>

<sup>46</sup> <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Opportunities...-environmental-stewardship.pdf>

<sup>47</sup> <https://www.edo.org.au/wp-content/uploads/2022/05/private-land-conservation-2.pdf>

<sup>48</sup> <https://www.audit.nsw.gov.au/our-work/reports/effectiveness-of-the-biodiversity-offsets-scheme>

<sup>49</sup> <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2822/Report%20No.%2016%20-%20PC%207%20-%20Integrity%20of%20the%20NSW%20Biodiversity%20Offsets%20Scheme.pdf>

## **Appendix 1 – Objects of the *Biodiversity Conservation Act 2016***

### **1.3 Purpose of Act**

The purpose of this Act is to maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future, consistent with the principles of ecologically sustainable development (described in section 6(2) of the *Protection of the Environment Administration Act 1991*), and in particular—

- a) to conserve biodiversity at bioregional and State scales, and
- b) to maintain the diversity and quality of ecosystems and enhance their capacity to adapt to change and provide for the needs of future generations, and
- c) to improve, share and use knowledge, including local and traditional Aboriginal ecological knowledge, about biodiversity conservation, and
- d) to support biodiversity conservation in the context of a changing climate, and
- e) to support collating and sharing data, and monitoring and reporting on the status of biodiversity and the effectiveness of conservation actions, and
- f) to assess the extinction risk of species and ecological communities, and identify key threatening processes, through an independent and rigorous scientific process, and
- g) to regulate human interactions with wildlife by applying a risk-based approach, and
- h) to support conservation and threat abatement action to slow the rate of biodiversity loss and conserve threatened species and ecological communities in nature, and
- i) to support and guide prioritised and strategic investment in biodiversity conservation, and
- j) to encourage and enable landholders to enter into voluntary agreements over land for the conservation of biodiversity, and
- k) to establish a framework to avoid, minimise and offset the impacts of proposed development and land use change on biodiversity, and
- l) to establish a scientific method for assessing the likely impacts on biodiversity values of proposed development and land use change, for calculating measures to offset those impacts and for assessing improvements in biodiversity values, and
- m) to establish market-based conservation mechanisms through which the biodiversity impacts of development and land use change can be offset at landscape and site scales, and
- n) to support public consultation and participation in biodiversity conservation and decision-making about biodiversity conservation, and
- o) to make expert advice and knowledge available to assist the Minister in the administration of this Act.