



Environmental
Defenders Office

**Submission to the Statutory Review of the Biodiversity
Conservation Act 2016**

21 April 2023

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

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

www.edo.org.au

Submitted to: biodiversity.review@environment.nsw.gov.au

For further information on this submission, please contact:

Rachel Walmsley
Head of Policy & Law Reform
T: (02) 9262 6989
E: rachel.walmsley@edo.org.au

Cerin Loane
Special Counsel, Nature
T: (02) 9262 6989
E: cerin.loane@edo.org.au

Acknowledgement of Country

The EDO recognises First Nations Peoples as the Custodians of the land, seas, and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present, and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through both Western and First Laws. In providing submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonisation.

EXECUTIVE SUMMARY

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 for biodiversity conservation and land management in NSW. There are serious questions to be asked about whether the *Biodiversity Conservation Act 2016* (**BC Act**) is up to the task of responding to these challenges and delivering outcomes for biodiversity. We say that it is not.

Since the BC Act commenced in 2017, there has been updated and strengthened international and national commitment in response to the biodiversity extinction crisis, including the Kunming-Montreal Global Biodiversity Framework, Glasgow Leaders' Declaration on Forests and Land Use, Leaders' Pledge for Nature and Threatened Species Action Plan: Towards Zero Extinctions. These policies set bold ambition for halting and reversing extinction and habitat loss.

The BC Act is the primary piece of legislation aimed at conserving biodiversity in NSW. It includes specific processes and mechanisms for protecting and conserving biodiversity in NSW, and many of its components, including threatened species lists and the Biodiversity Offsets Scheme (**BOS**), interact directly with other laws, including planning laws, land clearing laws and forestry laws.

Additionally, many other laws in NSW, such as mining laws, protected area laws, biosecurity laws and Crown lands laws, also have the potential to impact on biodiversity. In some instances, those laws can override or diminish important protections for biodiversity. While those laws are not directly under review, the interaction between those laws and the BC Act should be considered as part of this review.

This submission addresses the following key issues:

1. **Statutory Review Process**
2. **Objects and Purpose**
3. **Aboriginal knowledge**
4. **Key Elements of the BC Act**
5. **Conserving threatened species and ecological communities**
 - 5.1. Offences for harming native plants and animals
 - 5.2. Threatened species and ecological communities listing processes
 - 5.3. Key threatening processes
 - 5.4. Biodiversity Conservation Program
 - 5.5. Areas of Outstanding Biodiversity Value
 - 5.6. Serious and irreversible impacts mechanism
 - 5.7. Effectiveness of BC Act safeguards, and the role of other protections for areas of high conservation value
 - 5.8. Case study - Koalas
6. **Private land conservation and investment**
7. **Biodiversity Offsets Scheme**

8. **Biodiversity Certification**
9. **Regulating impacts on, and caring for, native animals and plants**
10. **Compliance and enforcement**
11. **Other important matters**
 - 11.1. Vegetation in non-rural areas
 - 11.2. Interaction with *Fisheries Management Act 1994* (NSW)
 - 11.3. Interaction with *Environmental Planning and Assessment Act 1979* (NSW)
 - 11.4. Interaction with forestry legislation
 - 11.5. Interaction with Federal laws and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
 - 11.6. Interaction with other laws

KEY RECOMMENDATIONS

Recommendation 1: The Government should consider the outcomes of the 5-year statutory review of the LLS Act and 5-year statutory review of the BC Act jointly, ensuring that all issues relating to the Land Management and Biodiversity Conservation reform package, and its interaction with other legislation, are considered.

Recommendation 2: The objects of the BC Act should be strengthened and brought into line with national and international policy ambition. This should include objects to *improve* the condition of biodiversity; *recover* species; and *prevent further extinctions*.

Recommendation 3:

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 or subordinate legislation.

Recommendation 4: Ensure First Nations are being consulted directly as part of the 5-year statutory review of the BC Act.

Recommendation 5: Better operationalise object c) in the BC Act. This could be achieved by, for example, provisions that explicitly provide opportunities for First Nations traditional ecological knowledge to be incorporated into planning and programming processes under the BC Act.

Recommendation 6: Consider how the BC Act or interrelated legislation can better promote the care and management of land by First Nations, including for conservation purposes, including, for example, through private land conservation, new environmental stewardship opportunities or shared governance models.

Recommendation 7: Consider how the BC Act and broader regulatory framework could better support First Nations aspirations for conservation. For example, by facilitating greater First Nations say in how important biodiversity is used or impacted.

Recommendation 8: Introduce a statutory requirement for whole-of-government NSW Biodiversity Conservation Strategy.

Recommendation 9: Establish an independent, statutory Biodiversity Commission tasked with leading and implementing a whole of government approach to biodiversity conservation.

Recommendation 10: Climate change considerations should be better embedded into the BC Act. This could be achieved 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.

Recommendation 11: Explicitly allow species to be rapidly listed on a provisional basis following a major event that results in, or is likely to result in, a material change in conservation status or viability of a species (e.g. by including a specific subsection to this effect in provisional listing provisions).

Recommendation 12: Require threatened species lists to be reviewed following a major event to determine whether any changes are required, in addition to regular, periodic reviews of threatened species lists.

Recommendation 13: Incorporate major event review provisions into all relevant environmental legislation across all jurisdictions. Provisions should:

- Include clear legislative criteria for determining whether a review should be triggered, and mandate reviews in appropriate circumstances.
- Clearly define ‘major event’. It should include, but not be limited to, bushfires, droughts, floods, disease, and biosecurity events. Provisions should also allow for cumulative impacts to be considered.
- Allow for temporary suspension of activities until the review is undertaken and relevant recommendations implemented.
- Set out a clear, transparent process for undertaking a review.
- Allow for effective, responsive action (i.e. the review should not restrict the scope of recommendations that can be made).

Recommendation 14: Strengthen offences under the BC Act, including by removing requirements for actual knowledge for harming an animal.

Recommendation 15: Reinstate the ability to list specific populations as threatened under the BC Act.

Recommendation 16: explicitly providing for the use of provisional listing provisions following a major event that has significantly impacted on the conservation status of a species.

Recommendation 16: Strengthen the broader regulatory framework to ensure KTPs are more comprehensively taken into consideration in decision making.

Recommendation 17: Strengthen the Biodiversity Conservation Program by:

- Updating the objectives for the Biodiversity Conservation Program to explicitly require *improvement* and *recovery* of biodiversity;

- Strengthening the interaction between Biodiversity Conservation Program and rules regulating land, including by:
 - imposing duties on developers and development decision makers to act consistently with SoS conservation priorities;
 - requiring environmental assessments to state whether approving the development will contribute to KTPs listed under the BC Act, and if so, how this will be minimised, and any alternatives available for the decision-maker to consider;
 - requiring proponents to monitor and report more regularly and consistently on biodiversity outcomes, particularly where conditions of consent require action to be taken to deliver biodiversity outcomes (e.g. offsetting);
 - establishing more robust processes for projects to be reviewed and modified where biodiversity outcomes are not being delivered;
 - declaring SoS sites (outside national parks and reserves) as AOBVs and funding them for protection.

Recommendation 18: Interrogate why the AOBV mechanism has not been utilised as intended.

Recommendation 19: Remove barriers to the process for declaring AOBVs under the BC Act.

Recommendation 20: Resource a strategic process for the identification and assessment of possible AOBV sites across NSW.

Recommendation 21: Strengthen the serious and irreversible impacts mechanism 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.

Recommendation 22: Examine whether the policy settings underpinning those key mechanisms in the BC Act are delivering the desired outcomes.

Recommendation 23: Consider the effectiveness of other mechanisms sitting outside the BC Act that can be used to deliver biodiversity outcomes, and whether those mechanisms align with the objects of the BC Act and the extent to which can also be strengthened to deliver biodiversity outcomes.

Recommendation 24: Strengthen Part 5 of the BC Act 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 area 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, Conservation Agreement or Wildlife Refuge Agreement.
- The terms of a Biodiversity Stewardship Agreement, Conservation Agreement or Wildlife Refuge should include mandatory monitoring, reporting and auditing requirements.

Recommendation 25: Overhaul the NSW Biodiversity Offsets Scheme, to ensure it meets best practice principles for biodiversity offsetting. In particular:

- 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 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 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).

Recommendation 26: Strengthen biodiversity certification provisions in the BC Act to ensure biodiversity certification delivers real and measurable outcomes for biodiversity. In particular, strengthen safeguards, remove discretionary decision making, improve monitoring and reporting and ensure clear, transparent and accessible processes for compliance and enforcement.

Recommendation 27: The proposed risk-based approach for wildlife licencing should be abandoned. A robust framework for native wildlife licencing must remain in place, and be further strengthened.

Recommendation 28: Strengthen compliance and enforcement of relevant regulatory frameworks, including by:

- Strengthening specific offences, including making some offences strict liability;
- Ensuring third-party appeal and civil enforcement powers are not unduly restricted;
- Removing privative clauses;

- Improving transparency - 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;
- Improving reporting and monitoring of compliance with consent and approval conditions to ensure conditions are met and biodiversity outcomes are achieved;
- Providing greater legal status to key policy documents; and
- Ensuring compliance and enforcement policies identify and promote opportunities to seek remedies for unlawful activities that include the restoration and enhancement of habitat.

Recommendation 29: Examine the effectiveness of Chapter 2 of the Biodiversity and Conservation SEPP and makes recommendations for strengthening the framework regulating tree clearing on non-rural land.

Recommendation 30: The conservation of freshwater and saltwater fish should be within the remit of the BC Act, not the FM Act. This will ensure that the conservation of those species is not undermined by conflicting use interests and that those species are afforded the same level of protection and resourcing as terrestrial species.

Recommendation 31: Seek input from the Federal government on opportunities to align NSW biodiversity conservation laws with national and international commitments.

Recommendation 32: Consider the interaction of the BC Act with other regulatory frameworks in NSW, identify key areas where achieving the BC objects may be undermined by other processes and makes recommendations to better align the broader NSW regulatory framework with the objects of the BC Act.

KEY ISSUES

1. STATUTORY REVIEW PROCESS

Overview:

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).¹ The new legal framework involved:

- The repeal of the *Native Vegetation Act 2003* (NSW) (**NV Act**), the *Threatened Species Conservation Act 1995* (NSW) (**TSC Act**), the *Nature Conservation Trust Act 2001* (NSW) and parts of the *National Parks and Wildlife Act 1974* (NSW) (**NPW Act**) 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. Section 212(2) of the LLS Act similarly requires a review of Part 5A of the LLS Act to be undertaken after five years in conjunction with the review of the BC Act.

Presently, two separate review processes are underway: this review of the BC Act² and a review of Part 5A of the LLS Act³. EDO's submission to the review of Part 5A of the LLS Act is available on our website.⁴

Key issues:

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. 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”.⁵

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. It is also unclear to what extent the operation of the Chapter 2 – Vegetation in non-rural areas of *State Environmental Planning Policy (Biodiversity*

¹ 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>

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

³ https://www.lls.nsw.gov.au/_data/assets/pdf_file/0008/1445462/Discussion-Paper.pdf#:~:text=The%20Minister%20for%20Agriculture%20is%20required%20to%20carry,the%20assistance%20of%20an%20independent%20expert%20advisory%20panel.

⁴ EDO, *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*, December 2022, available at <https://www.edo.org.au/wp-content/uploads/2022/12/221219-LLS-Act-Review-EDO-submission.pdf>

⁵ *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.

and Conservation) 2021 (formerly *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017*), which was also developed as part of the package will be considered.

Further, in addition to the BC Act and LLS Act, there are a broad range of other laws (e.g. planning laws, forestry laws, fisheries laws, and mining and petroleum laws) that impact on biodiversity and can significantly undermine the objects of the BC Act. Given the scale of the biodiversity crisis, there is a real risk that any recommendations that the panel may make for specific biodiversity legislation following its review will be undermined if planning and other laws do not adequately integrate biodiversity considerations. However, we are hopeful that the terms of reference for the review of the BC Act are broad enough to consider these interrelated issues.

Recommendation 1: The Government should consider the outcomes of the 5-year statutory review of the LLS Act and 5-year statutory review of the BC Act jointly, ensuring that all issues relating to the Land Management and Biodiversity Conservation reform package, and its interaction with other legislation, are considered.

2. OBJECTS AND PURPOSE

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?*

Overview:

The objects of the BC Act are set out in section 1.3 of the BC Act and include conserving biodiversity and maintaining the diversity and quality of ecosystems and enhancing their capacity to adapt to change and provide for the needs of future generations. The full objects are set out in **Appendix 1**.

When considering the objects of the Act, including whether the objects are being met and whether they are still fit-for-purpose, it is important to consider the broader environmental and policy landscape and significant changes in the past 5 years. In particular:

- ***Biodiversity continues to decline in NSW***

Generally, the 2021 NSW State of the Environment report (**NSW SoE**) shows that biodiversity in NSW continues to be in decline.⁶ For example:

- The number of threatened species, communities and populations is getting worse. 18 species were added to the threatened species list in the three-year period leading to December 2020 (a 2% increase).⁷
- The overall diversity and richness of native species and communities in NSW remains under threat of further decline.⁸

⁶ *NSW State of Environment*, 2021, available at <https://www.soe.epa.nsw.gov.au/>

⁷ *NSW State of Environment*, 2021, pp 66 and 67, op. cit.

⁸ *NSW State of Environment*, 2021, p 69, op. cit.

The BC Act itself requires monitoring and reporting on the status of biodiversity and the effectiveness of conservation actions (object (e)). Specifically, section 14.3 of the BC Act requires the Environment Agency Head to establish programs for the collection, monitoring and assessment of information on biodiversity, with clause 14.2 of the *Biodiversity Conservation Regulation 2017 (BC Regulation)* providing more detail on how this should be done. To meet these requirements the Government has established the *Biodiversity Indicator Program*.⁹

The *Biodiversity Indicator Program* has developed a method by which to assess changes in the status of biodiversity across NSW.¹⁰ The first assessment is presented in the *NSW Biodiversity Outlook Report*¹¹ and aims to show changes up to the commencement of the BC Act. Alarming, modelling in the first assessment forecasts that without concerted investment in management:

- 50% of listed threatened species in New South Wales are likely to become extinct within the next 100 years.
- 27% of vascular plant species are likely to become extinct within 100 years.
- Only 59% of threatened ecological communities were expected to exist in 100 years.

While it is too early in the monitoring and reporting process to determine how the BC Act is affecting trends in biodiversity, it is clear that the task ahead is momentous. A challenge for this review is to consider whether the BC Act and the broader Land Management and Biodiversity Conservation framework, while still in its relative infancy, is up to the job. We say that it is not. As outlined in this submission and our submission to the LLS Act statutory review, we highlight many ways that the framework can be strengthened. We cannot risk waiting any longer before we bolster our efforts to reverse current trends and halt extinctions.

- ***Bushfires and floods have had catastrophic impacts***

The bushfire season of 2019-2020 was unprecedented in terms of scale, intensity and duration in Australian bushfire history. Around the country 33 lives were lost,¹² an estimated 417 people died due to smoke inhalation,¹³ more than 3,000 homes burnt down,¹⁴ and other property and infrastructure was impacted or destroyed.

The bushfires also had a devastating impact on our natural environment. Significant ecosystems and landscapes were decimated, including World Heritage-listed National Parks,¹⁵ ancient

⁹ See <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/biodiversity-indicator-program>

¹⁰ See State of New South Wales and Office of Environment and Heritage *Measuring biodiversity and ecological integrity in NSW: Method for the Biodiversity Indicator Program*, 2019, available at <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Biodiversity/measuring-biodiversity-and-ecological-integrity-in-nsw-method-190132.pdf>

¹¹ <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Biodiversity/Biodiversity-Indicator-Program/biodiversity-outlook-report-first-assessment-200621.pdf>

¹² Parliament of Australia, 2020, *2019–20 Australian bushfires—frequently asked questions: a quick guide*, available at https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1920/Quick_Guides/AustralianBushfires

¹³ Arriagada, N.B, et al, 2020, *Unprecedented smoke-related health burden associated with the 2019–20 bushfires in eastern Australia*. *Med J Aust* 2020; 213 (6): 282-283. Available at <https://www.mja.com.au/journal/2020/213/6/unprecedented-smoke-related-health-burden-associated-2019-20-bushfires-eastern>

¹⁴ AFAC (Australasian Fire and Emergency Service Authorities Council), *Cumulative Seasonal Summary*, AFAC National Resource Sharing Centre, 28 February 2020. Accessed at <https://twitter.com/AFACnews/status/1233262259612213248/photo/1>.

¹⁵ See, for example, Department of Agriculture, Water and the Environment, *Greater Blue Mountains Area State of Conservation update - April 2020*, 2020, available at <http://www.environment.gov.au/system/files/resources/2073fd28-88e8-42f6-8b2a-20a811f7a279/files/greater-blue-mountains-area-state-conservation-update-april-2020.pdf>

rainforests¹⁶ and even waterways,¹⁷ following post-fire flooding. An estimated 950 million tonnes of greenhouse gases were emitted.¹⁸ While it is difficult to estimate the exact number of native animals impacted by the fires, some experts originally predicted it could be as many as 800 million in NSW and one billion nationally,¹⁹ with more recent analyses suggesting as many as three billion.²⁰ In NSW, bushfires burnt over 5.5 million hectares of land, including 38% of the NSW national park estate and 42% of NSW state forest.²¹ 293 threatened animals and 680 threatened plants have sightings recorded in the fire ground.²²

The NSW Government's *NSW Wildlife and Conservation Bushfire Recovery - Medium-term response plan* states:

"Biodiversity in New South Wales is still experiencing the impacts of the bushfires even as the next bushfire season begins. Many species and communities will take years to recover, particularly those not adapted to fire or impacted by prolonged drought or other threatening processes".²³

NSW and Queensland experienced multiple, unprecedented floods across vast areas of the landscape during the first six months of 2022. Concerningly, flooding events have occurred in many of the same areas as the bushfires, further compromising already reduced populations of species. Reports indicate that the floods have had devastating impacts on wildlife in flood-affected areas,²⁴ yet the extent of the impacts is still unknown.²⁵

¹⁶ See, for example, Queensland Government, *Altered fire regimes pressure on the Gondwana Rainforests*, 2020, available at <https://www.stateoftheenvironment.des.qld.gov.au/heritage/world/altered-fire-regimes-pressure-on-the-gondwana-rainforests-of-australia>

¹⁷ NSW Government, *Bushfire impacts on water quality*, February 2020, available at <https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/water/20p2093-bushfire-impacts-on-water-quality.pdf>

¹⁸ DISER, *Estimating greenhouse gas emissions from bushfires in Australia's temperate forests: focus on 2019-20*, 2020, Australian Government, available at <https://www.industry.gov.au/data-and-publications/estimating-greenhouse-gas-emissions-from-bushfires-in-australias-temperate-forests-focus-on-2019-20>

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

²⁰ WWF-Australia, *Impacts of the Unprecedented 2019-20 Bushfires On Australian Animals*, November 2020, available at https://www.wwf.org.au/ArticleDocuments/353/WWF_Impacts-of-the-unprecedented-2019-2020-bushfires-on-Australian-animals.pdf.aspx

²¹ Department of Planning, Industry and Environment, *NSW Wildlife and Conservation Bushfire Recovery Medium-term response plan*, 2021, available at <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Parks-reserves-and-protected-areas/Fire/nsw-wildlife-and-conservation-bushfire-recovery-medium-term-response-plan-200478.pdf>

²² Department of Planning, Industry and Environment, *NSW Fire and the Environment 2019-20 Summary Biodiversity and landscape data and analyses to understand the effects of the fire events*, March 2020, available at <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Parks-reserves-and-protected-areas/Fire/fire-and-the-environment-2019-20-summary-200108.pdf>

²³ Department of Planning, Industry and Environment, *NSW Wildlife and Conservation Bushfire Recovery Medium-term response plan*, 2021, op. cit.

²⁴ See, for example, ABC News, *Hundreds of dead animals as rescue services struggle with volume of call-outs and impact of floods*, 4 March 2022, available at <https://www.abc.net.au/news/2022-03-04/animals-stranded-drowning-floods-rspca-rescue/100880008>; see also Australian Geographic, Euan Ritchie, Deakin University and Chris J Jolly, Macquarie University, *What are the effects on wildlife during flooding and how can you help?*, 8 March 2022, available at <https://www.australiangeographic.com.au/topics/wildlife/2022/03/what-are-the-effects-on-wildlife-during-flooding-and-how-can-you-help/>

²⁵ Unlike the impact assessment undertaken by respective governments following the 2019-2020 bushfires, it is unclear if similar analysis will be done following the 2022 NSW and Queensland floods. The Commonwealth has however committed \$3.5 million to support flood-affected wildlife and habitat, see Media Release, Minister Sussan Ley, *\$3.5 million support for flood-affected wildlife and habitat*, 8 April 2022, <https://minister.awe.gov.au/ley/media-releases/35-million-support-flood-affected-wildlife-and-habitat>

Climate change impacts also compound other threats to threatened species. For example, species will not only be affected by direct impacts such as fires or floods but will be more susceptible to other key threats such as disease, invasive species and pests, and habitat loss.

Clearly, the state of play in 2023 is not what it was in the mid-2010's, when the BC Act was being developed. The impacts of the fires and floods on NSW biodiversity have been catastrophic. The Land Management and Biodiversity Conservation framework must be reviewed within this context.

- **National and international ambition has strengthened**

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 15th Biodiversity Conference of the Parties (COP 15) in December 2022.²⁶ The GBF sets out 4 goals (Section G) including that “the integrity, connectivity and resilience of all ecosystems are maintained, 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**).²⁷ 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 2030.²⁸ 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*”.²⁹

²⁶ <https://www.cbd.int/gbf/>

²⁷ See <https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/>

²⁸ 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>

²⁹ 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>

- **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 ensuring 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.

The current objects of the BC Act:

- Do not aim to **improve** the condition of biodiversity. In order to overcome baseline decline and prevent further extinctions, the objects must require *improvement* in the condition of biodiversity (e.g. maintain and improve, conserve and enhance, or no net loss or better).
- Similarly, the objects do explicitly include **recovery** of species. Biodiversity laws should aim to improve the condition of biodiversity to the point where species are recovering. For example, we should be aiming for the conservation status of species to improve, and for species to be removed, rather than added to, the threatened species list.
- Finally, the objects should explicitly aim to **prevent further extinctions**.

Notably, the objects of the BC Act can be seen as a step backwards from the former TSC Act, which included the key objective “to prevent the extinction and promote the recovery of threatened species, populations and ecological communities”.³⁰

The objects of the BC Act should be amended to be consistent with national and international policy ambitions outlined above and to urgently respond to the biodiversity crisis.

Additionally, 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. For example, section 3 of the Federal *Recycling and Waste Reduction Act 2020* (Cth) set out the objects of the Act and provisions for how those objects are to be achieved.³¹

³⁰ TSC Act, s 3 (repealed).

³¹ Section 3 of the provides:

(1) The objects of this Act are as follows:

- a) to reduce the impact on human and environmental health of products, waste from products and waste material, including by reducing the amount of greenhouse gases emitted, energy and resources used and water consumed in connection with products, waste from products and waste material;
- b) to realise the community and economic benefits of taking responsibility for products, waste from products and waste material;
- c) to develop a circular economy that maximises the continued use of products and waste material over their life cycle and accounts for their environmental impacts;
- d) to contribute to Australia meeting its international obligations concerning the impact referred to in paragraph (a).

(2) These objects are to be achieved by:

- a) regulating the export of waste material to promote its management in an environmentally sound way; and
- b) encouraging and regulating the reuse, remanufacture, recycling and recovery of products, waste from products and waste material in an environmentally sound way; and

- Specific provisions that require decision-makers to make decisions consistent with the objects of the Act. See, for example, section 4B(1) of the Victorian *Flora and Fauna Guarantee Act 1988* (Vic), which provides: “In performing any of their functions that may reasonably be expected to impact on biodiversity in Victoria, including a function under this Act or any other Act, a Minister and a public authority must give proper consideration to the objectives of this Act, so far as is consistent with the proper exercising of their functions”.
- Specific standards and goals embedded in the Act or subordinate legislation. For example, the United Kingdom has set biodiversity targets in its *Environmental Targets (Biodiversity) (England) Regulations 2023* (UK). These include that:
 - The long-term biodiversity target for species’ extinction risk is to reduce the risk of species’ extinction by 2042, when compared to the risk of species’ extinction in 2022.³²
 - The long-term biodiversity target for the restoration or creation of wildlife-rich habitat is that on or after the day these Regulations come into force, in excess of 500,000 hectares of a range of wildlife-rich habitats are to be restored or created by 31st December 2042.³³
 - The long-term biodiversity target to reverse the decline of species abundance is that the overall relative species abundance index by 31st December 2042 is—
 - a) higher than the overall relative species abundance index for 31st December 2022; and
 - b) at least 10% higher than the overall relative species abundance index for 31st December 2030 (the specified date for the 2030 species abundance target).³⁴

Recommendation 2: The objects of the BC Act should be strengthened and brought into line with national and international policy ambition. This should include objects to *improve* the condition of biodiversity; *recover* species; and *prevent further extinctions*.

Recommendation 3:

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 or subordinate legislation.

-
- c) encouraging and regulating manufacturers, importers, distributors, designers and other persons to take responsibility for products, including by taking action that relates to:
 - i. reducing or avoiding generating waste through improvements in product design; and
 - ii. improving the durability, reparability and reusability of products; and
 - iii. managing products throughout their life cycle.

³² *Environmental Targets (Biodiversity) (England) Regulations 2023*, Regulation 4.

³³ *Environmental Targets (Biodiversity) (England) Regulations 2023*, Regulation 7.

³⁴ *Environmental Targets (Biodiversity) (England) Regulations 2023*, Regulation 14.

4. Aboriginal knowledge

Consultation Paper Focus Questions

4. *How could the Act better integrate Aboriginal knowledge and support the aspirations of Aboriginal people in biodiversity conservation?*
9. *How can perspectives of Aboriginal people and indigenous knowledge be embedded in the conservation of threatened species and ecological communities?*

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:

EDO is a non-Indigenous organisation and we do not speak on behalf of First Nations Peoples. As part of the review, the independent experts and Government should consult with First Nations Peoples about how the legislation can better incorporate First Nations traditional ecological knowledge. We do however provide the following observations and suggestions below.

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 provide opportunities for First Nations ecological knowledge to be incorporated into planning and programming processes, e.g. the Biodiversity Conservation Program. Partnerships between First Nations experts and non-First Nations environmental scientists can foster an increased understanding of First Nations traditional ecological knowledges and help shape conservation and management practices. However, self-determination is paramount, and First Nations must have the ability to decide what to share and how to share it, including with equitable access and benefit sharing (ABS) arrangements where appropriate.

Additionally, consideration should also be given to how the BC Act or interrelated legislation can better promote the care and management of land by First Nations, including for conservation purposes. This could include, for example:

- *Building capacity for First Nations to engage in existing private land conservation schemes:* Targeted funding or capacity building could be incorporated into private land conservation frameworks outlined above at 3.1. At a minimum, notions of capacity building must address the specific barriers to participation, the attributes of individual stakeholders that facilitate participation and the characteristics of the decision-making environment.
- *Enabling First Nations to lead the design and implementation of new environmental stewardship programs:* Such opportunities must provide for First Nations governance and decision-making protocols that are agreed and based on cultural histories and geographies. One example of First Nations led design and implementation is the Victorian BushBank program. This program was announced in 2020 and it included a component that was intended

to be specifically designed by First Nations, to increase capacity and participation in restoration and carbon markets.³⁵

- *Using shared governance models to enable cooperative decision-making between First Nations and Commonwealth, State and local-level government in the management of protected areas:* For example, Part 4A of the NPW Act allows for land reserved under the NPW Act to be vested, on behalf of the First Nations owners, in one or more Local Aboriginal Land Councils or the New South Wales Aboriginal Land Council, and subsequently leased back to the Environment Minister and managed as a reserve, with the Board of Management having a majority of its members appointed from the Aboriginal owners.

Finally, the review should consider how the BC Act and broader regulatory framework could better support First Nations aspirations for conservation. For example, by facilitating greater First Nations say in how important biodiversity is used or impacted, for example, by incorporating a free prior and informed consent (**FPIC**) principle for impacts on a totem animal.

Recommendation 4: Ensure First Nations are being consulted directly as part of the 5-year statutory review of the BC Act.

Recommendation 5: Better operationalise object c) in the BC Act. This could be achieved by, for example, provisions that explicitly provide opportunities for First Nations traditional ecological knowledge to be incorporated into planning and programming processes under the BC Act.

Recommendation 6: Consider how the BC Act or interrelated legislation can better promote the care and management of land by First Nations, including for conservation purposes, including, for example, through private land conservation, new environmental stewardship opportunities or shared governance models.

Recommendation 7: Consider how the BC Act and broader regulatory framework could better support First Nations aspirations for conservation. For example, by facilitating greater First Nations say in how important biodiversity is used or impacted.

4. KEY ELEMENTS OF THE BC ACT

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?*

Overview:

The BC Act includes the following key elements:

³⁵ See <https://www.environment.vic.gov.au/bushbank>

- 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 (**BCT**).
- 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:

In general, key elements for biodiversity conservation are in place in the BC Act. However, there are a number of gaps where key issues could be better addressed throughout the legislation. These are discussed below.

- ***A whole of government Biodiversity Strategy and Biodiversity Commission can help coordinate biodiversity conservation across Government***

The BC Act is not the only framework relevant to biodiversity conservation. There are a wide range of regulatory frameworks such as planning laws, fisheries management, native vegetation protection, public and private forestry, mining and extractive industries, biosecurity, noxious weed

control and bushfire management, where biodiversity considerations are relevant. See Key Issue 10 below for further discussion on how the BC Act interacts with other frameworks.

Biodiversity protection must be integrated across all decision-making processes across Government. To assist this integration, we recommend:

- The BC Act requires a NSW Biodiversity Conservation Strategy to be developed outlining a whole-of-government approach to biodiversity conservation. This would have a different role to the Biodiversity Conservation Investment Strategy (which guides the BCT), and the Biodiversity Conservation Program (which is aimed specifically at species conservation and recovery).
- An independent, statutory Biodiversity Commission or similar body should be created. The focus of the Commission should be on developing and implementing the NSW Biodiversity Conservation Strategy across Government, ensuring biodiversity conservation is genuinely a fundamental consideration across all decision making.

Recommendation 8: Introduce a statutory requirement for whole-of-government NSW Biodiversity Conservation Strategy.

Recommendation 9: Establish an independent, statutory Biodiversity Commission tasked with leading and implementing a whole of government approach to biodiversity conservation.

- ***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 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.

Recommendation 10: Climate change considerations should be better embedded into the BC Act. This could be achieved 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.

- ***The BC Act can be strengthened to better respond to major events***

While the NSW Government took important steps in response to the 2019-2020 bushfires including in relation to understanding the impacts of the bushfires on biodiversity and developing a recovery plan, the bushfires highlighted that environmental laws can be strengthened to facilitate an immediate and wholistic response to major events. This will become more important in the future as the impacts of climate change, including an increase in extreme weather events and more intense fire seasons, will continue to threaten Australia's wildlife. Timely, practical and responsive legal provisions for threatened species protection are a necessary part of the required recovery and management response. More information is set out in EDO's report *Defending the Unburnt: Wildlife can't wait: Ensuring timely protection of our threatened biodiversity*.³⁶ In summary, this could include:

- **Strengthened provisions for rapid provisional listing or uplisting of threatened species, until full assessments can be completed**

NSW is the only Australian jurisdiction with provisional listing powers for threatened species, allowing species to be listed as threatened on an emergency basis, until a full assessment and determination can be carried out. To the best of our knowledge, the provisional listing provisions in the BC Act have not been used following a major event that has significantly impacted on the conservation status of a species (e.g. bushfire). A nomination was made to list the koala on an emergency basis under the BC Act following the 2019-2020 bushfires. However, the NSW Threatened Species Scientific Committee (**TSSC**), acknowledging that a full assessment was already underway by the Commonwealth, elected to await the Commonwealth assessment and make a full determination in accordance with the Common Assessment Method (**CAM**), rather than to list the koala provisionally – see **Case Study: Koala nomination for provisional listing**, in **Appendix 2**.

While the BC Act did not explicitly preclude the NSW TSSC from provisionally listing the koala in NSW, the case study highlights the potential limitations of the provisions, especially in regard to how the provisions interact with the CAM. The BC Act could be amended to explicitly provide for species to be rapidly listed on a provisional basis following a major event that results in, or is likely to result in, a material change in conservation status or viability of a species (e.g. by including a specific subsection to this effect in provisional listing provisions). This would be consistent with the precautionary principle, which provides that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

- **Mandatory reviews of threatened species lists following a major event**

Section 4.18 of the BC Act provides that the Scientific Committee must keep the lists of species and ecological communities under review and must, at least every 5 years,³⁷ determine whether any changes to the lists are necessary. The purpose of this provision is, presumably, to ensure that lists are kept up-to-date and reflect the current understanding of the conservation status of species. However, the BC Act could also require a review of the list following a major event to determine whether any changes are required. While Action 1.3.1 of the *NSW Wildlife and Conservation Bushfire Recovery: Medium-term response plan* requires the NSW TSSC to review the conservation status of fire affected species and ecological communities under the BC Act, this is not a legislative requirement and there is no guarantee that similar action would be taken following any similar future event. As part of the review,

³⁶ EDO, *Defending the Unburnt: Wildlife can't wait: Ensuring timely protection of our threatened biodiversity*, November 2022, available at <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Wildlife-cant-wait.pdf>

³⁷ This differs from earlier provisions in the repealed TSC Act (NSW), which required a review of the schedules of threatened species every two years, see *Threatened Species Conservation Act 1995* (NSW) (repealed), s25A

the NSW TSSC could determine whether species should be prioritised for provisional listing in the first instance (see above), and then undertake subsequent, more comprehensive reviews at a later date.

We also note, generally, that there is little guidance on the process for undertaking such reviews, and the former NSW Office of Environment and Heritage has acknowledged that “*(i)n practice, comprehensive reviews involving all listed species are not undertaken due to the significant costs involved*”.³⁸ Consideration should be given to how this process can be better supported to ensure it provides the outcomes intended – namely, that the list of threatened species and ecological communities is being regularly reviewed and kept up to date.

- **Mandatory reviews and updating of threatened species protections following a major event**

In addition to threatened species listings, other protections or policies, such as the Biodiversity Conservation Program, may require revision following a major event that impacts on the conservation status of a species. However, in most instances, there is no legal requirements compelling such a review. This can undermine recovery efforts and put species at a greater risk of extinction.

New provisions should be introduced that trigger a review of relevant rules relating to threatened species protections following a major event. This should not be limited to elements of the BC Act. Rather, threatened species protections that sit outside the BC Act, such as threatened species prescriptions in forestry rules, should also be subject to review.

Provisions should:

- Include clear legislative criteria for determining whether a review should be triggered, and mandate reviews in appropriate circumstances.
- Clearly define ‘major event’. It should include, but not be limited to, bushfires, droughts, floods, disease, and biosecurity events. Provisions should also allow for cumulative impacts to be considered.
- Allow for temporary suspension of activities until the review is undertaken and relevant recommendations implemented.
- Set out a clear, transparent process for undertaking a review. It is important that the review process is transparent and key information is publicly available, and that there are opportunities for public participation where relevant.
- Allow for effective, responsive action to be undertaken in response to a review. There is no point in undertaking a review if there are limited powers to take action to remedy key concerns identified during a review. The review should not restrict the scope of recommendations that can be made.

- **Provisions for varying, suspending or revoking existing approvals**

Major events, such as the 2019-2020 bushfires or 2022 floods, may have such catastrophic impacts that certain approved activities should no longer be allowed to proceed as originally approved.

³⁸ NSW Office of Environment and Heritage *Biodiversity Legislation Review OEH Paper 2: Information Provisions*, 2014, p 14, available at <https://www.environment.nsw.gov.au/research-and-publications/publications-search/biodiversity-legislation-review-keh-paper-2-information-provisions>

For example, a situation may arise where an existing approval permits the clearing of an area of habitat that, following a major event, is now a critical remaining stand of habitat for a particular species. Approval frameworks need to provide the ability for decision makers to intervene in circumstances where, if an approved action were to proceed, there is a high likelihood that a species would become extinct.

This could be achieved in a number of ways, for example:

- Standard conditions of consent that trigger a review of relevant conditions following a major event.
- Powers for decision makers to vary approvals or approval conditions, including in response to a material change in circumstances or a major event review.
- Powers for decision makers to suspend or revoke approvals.

While approval frameworks generally sit outside the BC Act, the interaction between those frameworks and the BC Act should be considered.

Recommendation 11: Explicitly allow species to be rapidly listed on a provisional basis following a major event that results in, or is likely to result in, a material change in conservation status or viability of a species (e.g. by including a specific subsection to this effect in provisional listing provisions).

Recommendation 12: Require threatened species lists to be reviewed following a major event to determine whether any changes are required, in addition to regular, periodic reviews of threatened species lists.

Recommendation 13: Incorporate major event review provisions into all relevant environmental legislation across all jurisdictions. Provisions should:

- a) Include clear legislative criteria for determining whether a review should be triggered, and mandate reviews in appropriate circumstances.
- b) Clearly define 'major event'. It should include, but not be limited to, bushfires, droughts, floods, disease, and biosecurity events. Provisions should also allow for cumulative impacts to be considered.
- c) Allow for temporary suspension of activities until the review is undertaken and relevant recommendations implemented.
- d) Set out a clear, transparent process for undertaking a review.
- e) Allow for effective, responsive action (i.e. the review should not restrict the scope of recommendations that can be made).

5. CONSERVING THREATENED SPECIES AND ECOLOGICAL COMMUNITIES

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?*

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

Each of these is discussed in more detail below.

5.1 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. For example, section 2.1(2) of the BC Act makes actual knowledge of likely harm to an animal a where the harm is caused by a landholder or their agent clearing native vegetation on category 1 – exempt land under Part 5A of the LLS Act.⁵⁶ This should be a strict liability offence.

Recommendation 14: Strengthen offences under the BC Act, including by removing requirements for actual knowledge for harming an animal.

5.2 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 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 diversity³⁹ - a fundamental component of biological diversity. For example, in the case of koalas, the removal of the option to list local populations is problematic because whilst the overall koala population in NSW is considered to be endangered, some koala populations are in a significantly worse state in particular bioregions. The ability to list a specific population with an appropriate threatened

³⁹ 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.

species classification is useful for triggering more rigorous protections for more threatened populations.

- **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. As outline above, 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).⁴⁰

Recommendation 15: Reinstate the ability to list specific populations as threatened under the BC Act.

Recommendation 16: explicitly providing for the use of provisional listing provisions following a major event that has significantly impacted on the conservation status of a species.

5.3 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 KTPs on biodiversity and ecological integrity. The Biodiversity Conservation Program may include strategies to minimise the impacts of KTPs.
- One of the factors that must be considered as part of the ‘Test of Significance’⁴¹ is whether the proposed development or activity is or is part of a KTP or is likely to increase the impact of a KTP. The test of significance is used to determine whether a proposed development or activity is 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 more comprehensively 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.

⁴⁰ 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>>

⁴¹ 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>

Recommendation 16: Strengthen the broader regulatory framework to ensure KTPs are more comprehensively taken into consideration in decision making.

5.4 Biodiversity Conservation Program:

Overview:

Part 4, Division 6 of the BC Act requires the Environment Agency Head⁴² 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.⁴³

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:

- **Objects of Biodiversity Conservation Program can be strengthened:** Section 4.35 of the BC Act includes specific objectives for the Biodiversity Conservation Program. Consistent with our recommendations above, the objectives for the Biodiversity Conservation Program should explicitly require *improvement* and *recovery* of biodiversity.
- **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 give elements of the SoS program more meaningful legislative effect, including by:
 - imposing duties on developers and development decision makers to act consistently with SoS conservation priorities;

⁴² Environment Agency Head refers to the head of the Environment and Heritage division of the NSW Department of Planning and Environment.

⁴³ See <https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species/programs-legislation-and-framework/biodiversity-conservation-program>

- requiring environmental assessments to state whether approving the development will contribute to KTPs listed under the BC Act, and if so, how this will be minimised, and any alternatives available for the decision-maker to consider;
- requiring proponents to monitor and report more regularly and consistently on biodiversity outcomes, particularly where conditions of consent require action to be taken to deliver biodiversity outcomes (e.g. offsetting);
- establishing more robust processes for projects to be reviewed and modified where biodiversity outcomes are not being delivered;
- declaring SoS sites (outside national parks and reserves) as Area of Outstanding Biodiversity Value (**AOBVs**) and funding them for protection.

Recommendation 17: Strengthen the Biodiversity Conservation Program by:

- a) Updating the objectives for the Biodiversity Conservation Program to explicitly require *improvement* and *recovery* of biodiversity;
- b) Strengthening the interaction between Biodiversity Conservation Program and rules regulating land, including by:
 - imposing duties on developers and development decision makers to act consistently with SoS conservation priorities;
 - requiring environmental assessments to state whether approving the development will contribute to KTPs listed under the BC Act, and if so, how this will be minimised, and any alternatives available for the decision-maker to consider;
 - requiring proponents to monitor and report more regularly and consistently on biodiversity outcomes, particularly where conditions of consent require action to be taken to deliver biodiversity outcomes (e.g. offsetting);
 - establishing more robust processes for projects to be reviewed and modified where biodiversity outcomes are not being delivered;
 - declaring SoS sites (outside national parks and reserves) as AOBVs and funding them for protection.

5.5 Areas of Outstanding Biodiversity Value (AOBV):

Overview:

Under the BC Act, the Minister can declare an area as an AOBV. It is an offence to damage an AOBV without any relevant approval.⁴⁴ Certain assessment and determination pathways cannot be used in an AOBV,⁴⁵ and development proposals within an AOBV is deemed likely to significantly affect threatened species for the purpose of determining whether a biodiversity development assessment report (**BDAR**) is required.⁴⁶

⁴⁴ BC Act, s 2.3.

⁴⁵ 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).

⁴⁶ BC Act, cl 7.2.

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.
- **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.⁴⁷ Requiring a person nominating an AOBV to provide landholder consent places an undue obligation on nominators, and may create an obstacle for nominations, particularly when nominators may have no existing relationship with landholders or appropriate avenue to commence discussions. Further, the consent and support of the landholder should not be a factor in deciding whether an area should be declared as an AOBV.
- **Government should lead a strategic process for identifying and assessing possible AOBV sites:** Given the key roles that AOBVs are intended to play within the framework, the Government should fund and lead a process for systemically identifying and assessing key sites for declaration as AOBVs.

Recommendation 18: Interrogate why the AOBV mechanism has not been utilised as intended.

Recommendation 19: Remove barriers to the process for declaring AOBVs under the BC Act.

Recommendation 20: Resource a strategic process for the identification and assessment of possible AOBV sites across NSW.

5.6 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.⁴⁸

⁴⁷ 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>>

⁴⁸ BC Act, s 7.16(2).

- *Vegetation clearing that requires approval by the Native Vegetation Panel (NVP)*: If vegetation clearing that requires approval by the NVP will have SII on threatened species, it must be refused.⁴⁹
- *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.⁵⁰

The Department of Planning and Environment (DPE) has published *Guidance to assist a decision-maker to determine a serious and irreversible impact*.⁵¹ 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.⁵² The list is not exhaustive and the Guidelines should be applied on a case by case basis.

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 SII 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.

Recommendation 21: Strengthen the serious and irreversible impacts mechanism 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.

5.7 Effectiveness of BC Act safeguards, and the role of other protections for areas of high conservation value

Overview:

⁴⁹ LLS Act, s 60ZF; Vegetation in non-rural areas SEPP, cl 2.14(6).

⁵⁰ BC Act, s 7.16(3) and (4).

⁵¹ 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>

⁵² 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>

While both the AOBV and SII mechanisms provide important safeguards for biodiversity, the threshold for using those mechanisms is quite high, and they have not been used effectively in practice.

Some other mechanisms for protecting areas of high conservation value sit outside the BC Act but can play a key role in achieving biodiversity conservation outcomes. These includes:

- **Land use zoning:** Land use zones are identified in local environmental plans (**LEPs**) prepared by councils for their LGA. Land use zones are used to categorise land and specify what type of development activities can be carried out in that land use zone without consent, with consent, or those activities which are prohibited. Conservation zones (previously known as environmental zones) are used to classify land for the purpose of conserving the environmental values and natural qualities in areas where this land use zoning is applied. Councils may choose to use conservation zones as a way to identify and protect areas of high conservation value. Councils are also able to identify permissible and prohibited development using appropriate land use zones.
- **State Environmental Planning Policies:** State environmental planning policies (**SEPPs**) are environmental planning instruments (**EPIs**) made under the EP&A Act.⁵³ They are used to address planning issues in NSW. SEPPs can apply to certain areas of land or certain types of development. The *State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity and Conservation SEPP)* contains specific rules aimed achieving biodiversity conservation outcome in the planning system.
- **Planning controls and consent conditions:** Planning controls are used to describe measures put in place, often at the strategic planning phase, to manage and regulate impacts of development. Examples of planning controls can include, for example, land use zoning, identification of permissible and prohibited development, and planning controls in Development Control Plans (**DCPs**). Conditions of consent are put in place at the time of determining a development application and can require certain action to be taken to ameliorate impacts of development, including impacts on biodiversity.

Key issues:

Safeguards in the BC Act appear to be underperforming – particularly because they are underutilised. This review should examine whether the policy settings underpinning those mechanisms are delivering the desired outcomes.

Additionally, the review should consider the effectiveness of other mechanisms that can be used to deliver biodiversity outcomes, whether those mechanisms align with the objects of the BC Act and the extent to which can also be strengthened to deliver biodiversity outcomes.

Recommendation 22: Examine whether the policy settings underpinning those key mechanisms in the BC Act are delivering the desired outcomes.

Recommendation 23: Consider the effectiveness of other mechanisms sitting outside the BC Act that can be used to deliver biodiversity outcomes, and whether those mechanisms align

⁵³ EP&A Act, Part 3, Division 3.3.

with the objects of the BC Act and the extent to which can also be strengthened to deliver biodiversity outcomes.

5.8 Case studies – Koalas

Overview:

In February 2023, EDO released a new report, *Protecting koalas in the Sydney Basin bioregion - Strengthening NSW laws to protect the trees that koalas call home*.⁵⁴ The report, commissioned by the Sydney Basin Koala Network, looks at the many laws and policies aimed at protecting koalas and their habitat in NSW and explains how they are failing to halt the decline of the koala. The report includes a specific section on the BC Act, but also looks at how other laws, including land clearing, forestry and planning laws are also failing the koala. It provides a useful insight into how the laws interact and how they are failing koalas. Key learnings from the report would be equally as relevant to other threatened species in NSW.

Key issues:

EDO's report, *Protecting koalas in the Sydney Basin bioregion Strengthening NSW laws to protect the trees that koalas call home*, found that the biggest threats to the species are well known: habitat loss, modification and fragmentation, vehicle strike, dog attack, and stress-induced disease. Yet despite efforts to improve koala conservation (for example, through actions identified in the *NSW Koala Strategy* and Save our Species (SoS) program), planning, environment and natural resource laws continue to allow koala habitat to be destroyed or degraded and the species remains at risk.

For example:

- The *NSW Koala Strategy* is not legally enforceable and fails to effectively address the major threat of habitat loss, fragmentation, and modification.
- The failure to comprehensively map core koala habitat through Koala Plans of Management (KPoMs) across all relevant local government areas means that associated legal safeguards have limited application.
- Significant amounts of clearing and development can occur with very little oversight through exemptions, clearing codes or complying development codes. Safeguards in codes and exemptions have limited application (including due to the failure to implement comprehensive mapping of core koala habitat).
- Other safeguards intended to protect threatened species, including koalas, are often discretionary, meaning that environmental interests are often trumped, especially in the case of major projects.
- Ongoing issues with the implementation of the state environmental planning policy for koala habitat (Koala SEPP) remain unresolved - two different Koala SEPPs remain temporarily in place, guidelines have not been finalised, and the vast majority of councils still don't have KPoMs in place.

⁵⁴ EDO, *Protecting koalas in the Sydney Basin bioregion Strengthening NSW laws to protect the trees that koalas call home*, February 2023, available at <https://www.edo.org.au/2023/02/08/new-report-legislative-loopholes-driving-sydneys-koalas-to-extinction/>

- The NSW Biodiversity Offset Scheme does not align with best practice, permits an inappropriate level of variation, and does not contain the ecologically necessary limits to prevent extinctions, including with respect to koalas.
- Important conservation initiatives, such as the Save our Species program and investment in protected areas, are often undermined by inadequate regulatory frameworks that continue to allow activities that greatly impact on threatened species and their habitat.
- Other conservation tools (such as Areas of Outstanding Biodiversity Values) are underutilised.
- Changes to the rules for private native forestry means that any newly mapped core koala habitat will not be off limits to logging.
- Koala protections for logging on public land are poorly implemented in practice, and have not been revised to take into account the significant impacts that the 2019-2020 bushfires have had on areas of state forest and koala populations.
- The 10-year review of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) found that national environmental laws are failing to protect and conserve Australia’s biodiversity.

In 2022 the conservation status of koalas was upgraded from vulnerable to endangered under NSW and Commonwealth laws. Without urgent reform and improved implementation of law and policies, koalas in NSW will continue on the sharp decline to extinction.

The NSW State of the Environment report suggests that other species may be on a similar trajectory. This review of the BC Act is important for determining whether, not only the BC Act, but the broader regulatory framework in which it is a key part, is up to the task of reversing biodiversity decline and stopping further species becoming extinct.

6. PRIVATE LAND CONSERVATION AND INVESTMENT

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?*

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 BCT 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 BCT 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. EDO strongly supports incentives and resourcing for private land conservation.

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 area 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, Conservation Agreement or Wildlife Refuge Agreement
- The terms of a Biodiversity Stewardship Agreement, Conservation Agreement or Wildlife Refuge should include mandatory monitoring, reporting and auditing requirements. For example:
 - Monitoring should be required to measure change over time.
 - Reporting must ensure that all monitoring data is properly collated and evaluated and adaptive management actions and strategies are recommended as necessary.
 - Independent auditing is required to ensure that Biodiversity Stewardship Agreements, Conservation Agreements and Wildlife Refuge sites are being managed in accordance with the terms of the agreement in question.

Recommendation 24: Strengthen Part 5 of the BC Act 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 area 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, Conservation Agreement or Wildlife Refuge Agreement
- The terms of a Biodiversity Stewardship Agreement, Conservation Agreement or Wildlife Refuge should include mandatory monitoring, reporting and auditing requirements.

7. BIODIVERSITY OFFSETS SCHEME

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?*

Overview:

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.⁵⁵

Independent reviews have raised significant concerns about the BOS:

- **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:⁵⁶
 - “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”.

⁵⁵ 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.>

⁵⁶ 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>

- **The NSW Legislative Council Portfolio Committee No. 7 - Planning and Environment, made recommendations for reforming the BOS,**⁵⁷ including:
 - “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 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).

EDO’s concerns and recommendations are set out in more detail in the following:

- EDO, *Submission to the inquiry into the integrity of the NSW Biodiversity Offsets Scheme*, September 2021.⁵⁸

⁵⁷ 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>

⁵⁸ <https://www.edo.org.au/publication/submission-to-the-inquiry-into-the-integrity-of-the-nsw-biodiversity-offsets-scheme/>

- EDO, *Defending the Unburnt: Offsetting our way to extinction*, November 2022.⁵⁹

Recommendation 25: Overhaul the NSW Biodiversity Offsets Scheme, to ensure it meets best practice principles for biodiversity offsetting. In particular:

- 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 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).

8. BIODIVERSITY CERTIFICATION

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?*

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:

⁵⁹ <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Offsetting-our-way-to-extinction.pdf>

- *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 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.⁶⁰

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, and identify/manage cumulative impacts. 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 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 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 (DPE) and the regulator (the NSW 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).⁶¹

⁶⁰ BC Act, s8.3(2)(b).

⁶¹ 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/>

Recommendation 26: Strengthen biodiversity certification provisions in the BC Act to ensure biodiversity certification delivers real and measurable outcomes for biodiversity. In particular, strengthen safeguards, remove discretionary decision making, improve monitoring and reporting and ensure clear, transparent and accessible processes for compliance and enforcement.

9. REGULATING IMPACTS ON, AND CARING FOR, NATIVE ANIMALS AND PLANTS

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?*

Overview:

A person may apply to DPE 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 AOBV.⁶²

The power for the Environment Agency Head to grant licences under the BC Act are broad. At present, DPE administers over 30 classes of licences.⁶³ These include:

- Scientific licence e.g. licences for bird or bat banding, licences for ecological burns, licences for ecological surveys, and licences for education and research.⁶⁴
- Licences to keep native animals as pets.⁶⁵
- Licences to move native animals across state borders or commercially trade native animals and plants.⁶⁶
- Licences to catch and release reptiles and possums.⁶⁷
- Licences to control or harm protected native animals or threatened species.⁶⁸
- Licences for taxidermy.⁶⁹
- Protected native plant licences to pick, possess, buy or sell protected or threatened plant species or ecological communities for commercial purposes.⁷⁰

A Biodiversity Conservation Licence may have conditions which include standards for the humane treatment of animals, and any other conditions that DPE considers to be appropriate.⁷¹ A

⁶² BC Act, sections 2.11 and 2.10.

⁶³ <https://www.environment.nsw.gov.au/licences-and-permits/wildlife-licences/wildlife-licensing-reforms>

⁶⁴ <https://www.environment.nsw.gov.au/licences-and-permits/scientific-licences>

⁶⁵ <https://www.environment.nsw.gov.au/licences-and-permits/wildlife-licences/native-animals-as-pets>

⁶⁶ <https://www.environment.nsw.gov.au/licences-and-permits/wildlife-licences/trading-in-native-animals>

⁶⁷ <https://www.environment.nsw.gov.au/licences-and-permits/wildlife-licences/catch-and-release-licence>

⁶⁸ <https://www.environment.nsw.gov.au/licences-and-permits/wildlife-licences/licences-to-control-or-harm>

⁶⁹ <https://www.environment.nsw.gov.au/licences-and-permits/wildlife-licences/taxidermy-licence>

⁷⁰ <https://www.environment.nsw.gov.au/licences-and-permits/protected-native-plant-licences>

⁷¹ BC Act, s 2.14(2) *Biodiversity Conservation Act*

Biodiversity Conservation Licence is not required where activities are approved under development consents.

The BC Act introduced the framework for a risk-based approach to licencing, where:

- lower risk activities may be exempted from specified wildlife offences;
- moderate-risk activities will be regulated by enforceable codes of practice; and
- higher risk activities will remain subject to licensing.

Ahead of implementing a system based on this framework, the Government commenced a review of wildlife licencing, including a review of wildlife licencing classes, and proposed three Codes of Practice for keeping native amphibians, reptiles and birds.⁷² This review has not been fully finalised and implemented.

Key issues:

The outstanding review of the wildlife licencing regime has left this component of the framework in uncertainty. Conservation stakeholders engaged in the review of wildlife licencing have raised concerns that the risk-based approach represents deregulation of wildlife licencing and will lead to further rates of native wildlife harm.⁷³ This risk-based approach should be abandoned, with robust licencing requirements remaining in place, and further strengthened.

The keeping of native animals can have detrimental impacts on those species. Native species do not thrive in captivity. Many experience serious health issues due to inadequate housing, diet and care provided, and some individuals may need to be euthanised due to poor health.⁷⁴

Recommendation 27: The proposed risk-based approach for wildlife licencing should be abandoned. A robust framework for native wildlife licencing must remain in place, and be further strengthened.

10. COMPLIANCE AND ENFORCEMENT

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?*

Overview:

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

- Part 11 - Regulatory compliance mechanisms
- Part 12 - Investigation powers

⁷² 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>

⁷³ See for example, WIRES: <https://www.wildforlife.org.au/wildforlife>

⁷⁴ See, generally, RSPCA: <https://kb.rspca.org.au/knowledge-base/what-is-the-rspcas-view-on-keeping-native-animals-as-pets/>; WIRES: <https://www.wildforlife.org.au/wildforlife>

- 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:

- **Offence provisions:** The threshold for some offences should be strengthened. For example, section 2.1(2) of the BC Act requires actual knowledge for harming animals where the harm is caused by a landholder or their agent clearing native vegetation on category 1 – exempt land under Part 5A of the LLS Act. This should be a strict liability offence. Notably, another key weakness is that the definition of “harm” does not include harm by changing the habitat of the animal (BC Act, section 1.6).
- **Third-party appeal and civil enforcement powers:** 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. For example, while civil enforcement is generally available under the provisions of Part 13, Division 2 of the BC Act, civil enforcement proceedings to remedy or restrain a breach of any private land conservation agreement can only be brought with the consent of the Minister (s13.15(2)). Similarly, civil enforcement proceedings to remedy or restrain a breach of any private land conservation agreement biodiversity certification agreement can only be brought with the consent of the Minister (s 13.16(1)).
- **Privative clauses:** 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 - see, for example: s 8.26, which relates to the conferring of biodiversity certification and s 9.5, which relates to the validity of public consultation documents.
- **Transparency:** 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.
- **Compliance:** 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.

- **Legal status of key policy documents:** 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:** Compliance and enforcement policies should identify and promote opportunities to seek remedies for unlawful activities that include the restoration and enhancement of habitat.

Additionally, opportunities to strengthen compliance and enforcement extend beyond the BC Act. As outlined elsewhere in our submission, the frameworks that regulate activities that impact on biodiversity, such as development, land clearing and forestry, also have the potential to undermine the BC Act. We have similar concerns about the enforcement of those frameworks, especially in the context of ensuring that measures put in place to ameliorate impacts on biodiversity are being properly implemented. See, for example:

- EDO, *Submission to the Inquiry into koala populations and habitat in New South Wales*, August 2019.⁷⁵
- EDO, *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*, December 2022.⁷⁶

Recommendation 28: Strengthen compliance and enforcement of relevant regulatory frameworks, including by:

- Strengthening specific offences, including making some offences strict liability;
- Ensuring third-party appeal and civil enforcement powers are not unduly restricted;
- Removing privative clauses;
- Improving transparency - 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;
- Improving reporting and monitoring of compliance with consent and approval conditions to ensure conditions are met and biodiversity outcomes are achieved;
- Providing greater legal status to key policy documents; and
- Ensuring compliance and enforcement policies identify and promote opportunities to seek remedies for unlawful activities that include the restoration and enhancement of habitat.

11. OTHER IMPORTANT MATTERS

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?

⁷⁵ EDO, *Submission to the Inquiry into koala populations and habitat in New South Wales*, August 2019, https://www.edo.org.au/wp-content/uploads/2019/12/190814_NSW_Koala_Inquiry_-_EDO_NSW_Submission_-_Edited.pdf

⁷⁶ EDO, *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*, December 2022, available at <https://www.edo.org.au/wp-content/uploads/2022/12/221219-LLS-Act-Review-EDO-submission.pdf>

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.

The terms of reference acknowledge that achievement of some objectives of the BC Act is significantly dependent on intersections with other legislation, and that BC Act was established as part of an 'integrated legislative package'. As highlighted earlier in our submission, many other laws in NSW, such as planning laws and mining and petroleum laws, also have the potential to impact on biodiversity. However, in some instances those laws can override or diminish important protections for biodiversity. While those laws are not directly under review, the interaction between those laws and the BC Act should be considered as part of this review.

We highlight the following key issues that should also be given consideration as part of the BC Act review.

11.1 Vegetation in non-rural areas

Overview:

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.

Key issues:

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.

Recommendation 29: Examine the effectiveness of Chapter 2 of the Biodiversity and Conservation SEPP and makes recommendations for strengthening the framework regulating tree clearing on non-rural land.

11.2 Interaction with *Fisheries Management Act 1994 (NSW)*

Overview:

The BC Act does not extend to the conservation of freshwater or saltwater fish. This is covered by the *Fisheries Management Act 1994 (FM Act)*. Fish is defined in section 5 of the FM Act as follows:

- (1) In this Act, *fish* means marine, estuarine or freshwater fish or other aquatic animal life at any stage of their life history (whether alive or dead).
- (2) In this Act, *fish* includes—
 - (a) oysters and other aquatic molluscs, and
 - (b) crustaceans, and
 - (c) echinoderms, and
 - (d) beachworms and other aquatic polychaetes.

The objects of the FM Act include the conservation of threatened species, populations and ecological communities of fish and marine vegetation, but also the promotion of commercial fishing and aquaculture industries, and recreational fishing.⁷⁷

The FM Act did not fall within the scope of the Biodiversity Legislation Review which led to the introduction of the Land Management and Biodiversity Conservation reform package.⁷⁸

Key issues:

There is no logical reason to have two separate frameworks for the conservation of terrestrial and marine biodiversity. Other jurisdictions, like the Australian federal jurisdiction, Victoria, Queensland, and Tasmania have a single framework for listing and conserving terrestrial and marine biodiversity. There is no compelling reason why there should be a separate scientific committee for considering listings of fish, since the members of the Scientific Committee are not required to be experts in the species or even phyla in question, simply to assess the available information scientifically.

The FM Act is essentially resource-use legislation that facilitates commercial use of fish species, including those that are threatened. There is a clear conflict of interest with the Minister and department responsible for exploitation of the marine environment also responsible for conservation of these species. In our experience, the conservation of marine biodiversity takes a backseat to resource management. The FM Act is also a weaker cousin of the BC Act, with key mechanisms such as the Biodiversity Conservation Program, Areas of Outstanding Biodiversity Value and Serious and Irreversible Impacts trigger not featuring in the FM Act.

Recommendation 30: The conservation of freshwater and saltwater fish should be within the remit of the BC Act, not the FM Act. This will ensure that the conservation of those species is not

⁷⁷ *Fisheries Management Act 1994*, s 3.

⁷⁸ <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/overview-of-biodiversity-reform/legislation/independent-panel>

undermined by conflicting use interests and that those species are afforded the same level of protection and resourcing as terrestrial species.

11.3 Interaction with *Environmental Planning and Assessment Act 1979 (NSW)*

Overview:

The BC Act interacts closely with the *Environmental Planning and Assessment Act 1979 (EP&A Act)*, particularly in setting out how the impacts of development on biodiversity is to be assessed, the application of the Biodiversity Offsets Scheme and the process for biodiversity certification.

Key issues:

As outlined above, the interaction between the BC Act and the EP&A Act could be improved to provide better outcomes for biodiversity. For example:

- Key mechanisms for biodiversity conservation may be undermined by different rules for different types of development (e.g. the serious and irreversible impacts safeguard requires mandatory refusal for Part 4 development, but not State significant development or infrastructure).
- 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.

See detailed recommendations above.

11.4 Interaction with forestry legislation

Overview:

Forestry on private land is regulated under Part 5B of the LLS Act. Forestry operations undertaken on public (Crown) land (e.g. State forests) are primarily regulated under the *Forestry Act 2012 (NSW) (Forestry Act)* and Integrated Forest Operations Approvals (**IFOAs**).

The BC Act interacts with forestry legislation in a number of key ways:

- Generally, forestry operations authorised under the LLS Act or Forestry Act provide a defence to prosecution for an offences under the BC Act.⁷⁹
- Certain provisions apply specifically to Crown-timber lands. For example, the Minister must not enter into a biodiversity stewardship agreement relating to Crown-timber lands except with the consent of the Minister administering Forestry Act.⁸⁰ Similarly, the BCT is not to enter into a conservation agreement or wildlife refuge agreement except with the consent of the Minister administering the Forestry Act.⁸¹

⁷⁹ *Biodiversity Conservation Act 2016*, s 2.8(10)(h).

⁸⁰ *Biodiversity Conservation Act 2016*, s 5.9(4).

⁸¹ *Biodiversity Conservation Act 2016*, s 5.21(4) and s 5.28(4)

- Enforcement of Part 5B of the LLS Act and Part 5B of the Forestry Act is provided for under the BC Act.⁸² We note, however, that s69ZA of the Forestry Act specifically restricts third party civil enforcement of breaches of the Forestry Act.

However, unlike the case of the EP&A Act, assessing the impacts of forestry operations on biodiversity does not rely on processes set out in the BC Act. For example, the BOS does not apply to forestry operations.

Key issues:

While the BC Act sets up processes for assessing the impacts of certain activities on biodiversity (e.g. development and infrastructure, land clearing), those processes do not apply to forestry operations. For example, the BOS does not apply to forestry operations. Instead, forestry rules themselves outline how biodiversity impacts are intended to be managed including through Codes of Practice, IFOAs and specific threatened species prescriptions. There is nothing explicitly requiring forestry rules to be consistent with the BC Act or its objects, however the concurrence of the Minister administering the BC Act is required when making Codes of Practice for private native forestry.⁸³ This means that the forestry framework has the potential to be inconsistent with and generally undermine the BC Act. On way to improve consistency across the various frameworks and ensure common biodiversity goals across all of government would be through a NSW Biodiversity Strategy and Biodiversity Commission – **see Recommendations 8 and 9 above.**

11.5 Interaction with Federal laws and the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

Overview:

In December 2022, the Federal government released its *Nature Positive Plan: better for the environment, better for business (Nature Positive Plan)* in response to the 10-year statutory review of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) (Samuel Review)*.

The *Nature Positive Plan* includes key commitments to reforming the EPBC Act, including the introduction of National Environmental Standards. If states such as NSW want to be accredited for assessments involving matters of national environmental significance, NSW laws will need to be amended to ensure they are consistent with the new National Environmental Standards. We note that the BC Act is likely to require amendment in this context.

The Federal government has also introduced the Nature Repair Market Bill 2023.⁸⁴ The Bill aims to establish a new regulatory framework for a nature repair market, underpinned by the issuing of biodiversity certificates. The proposed market and its interaction with biodiversity conservation laws should be considered as part of this review. While EDO strongly supports investment in restoration and conservation management and for funding to go to landholders across Australia for biodiversity stewardship, our submission on the Nature Repair Market Bill 2023 highlights key concerns with the proposed framework.⁸⁵

⁸² See, for example, *Biodiversity Conservation Act 2016*, Part 12, Division 7, 13.6(1)(e2), s 13.14A, s 14.7A.

⁸³ *Local Land Services Act 2013*, s 60ZT(2).

⁸⁴ <https://www.legislation.gov.au/Details/C2023B00056>

⁸⁵ EDO, *Submission on the Nature Repair Market Bill*, March 2023, available at <https://www.edo.org.au/publication/edo-submission-on-the-nature-repair-market-bill/>

Key issues:

In considering the role of the BC Act and opportunities to align NSW biodiversity conservation laws with national and international commitments, this review should consider input from the Federal government.

Recommendation 31: Seek input from the Federal government on opportunities to align NSW biodiversity conservation laws with national and international commitments.

11.6 Interaction with other laws

Overview:

As outlined upfront in our submission,

The review should also consider the interaction of the BC Act with other key legislation that may have implications for biodiversity conservation, including but not limited to:

- *Mining Act 1992*
- *Water Management Act 2000*
- *Coastal Management Act 2015*
- *Crown Land Management Act 2016*
- *Biosecurity Act 2015*
- *Rural Fires Act 1997*
- *NSW Reconstruction Authority Act 2022*
- *Marine Estate Management Act 2014*
- *National Parks and Wildlife Act 1974*

Recommendation 32: Consider the interaction of the BC Act with other regulatory frameworks in NSW, identify key areas where achieving the BC objects may be undermined by other processes and makes recommendations to better align the broader NSW regulatory framework with the objects of the BC Act.

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.

Appendix 2: Case Study: Koala nomination for provisional listing*

Following the 2019-2020 bushfire season, the International Fund for Animal Welfare (**IFAW**) commissioned an assessment of changes to the distribution and abundance of koalas in NSW as measured across three generations of koalas and culminating in the 2019-20 fire season.

The assessment report, prepared by the Biolink research group, found:

- A minimum of 6,382 koalas are estimated to have perished in the 2019-2020 bushfires, representing 15% of the NSW population;
- Up to two-thirds of the NSW population has been lost due to drought, bushfires and human-made causes over the last three koala generations; and
- the impacts of climate change, including the resulting increased risk of high frequency bushfires, pose an immediate, ongoing and significant threat of extinction to the NSW koala population.⁸⁶

Off the back of the report, in March 2020, IFAW wrote to the NSW TSSC to nominate the state-wide NSW koala population for provisional listing as an endangered species on an emergency basis, pursuant to Part 4, Division 4 of the BC Act. The nomination was co-signed by Friends of the Koala, Humane Society International (**HSI**), and Port Macquarie Koala Hospital.

At the same time, IFAW, together with WWF-Australia and HSI put forward a nomination to uplist the Koala (combined populations of Queensland, NSW and the Australian Capital Territory) from vulnerable to endangered under the EPBC Act. In this instance, as the nominated species spanned multiple states, the Commonwealth government led the assessment for the nomination under the EPBC Act pursuant to the CAM.

In September 2021 the NSW TSSC advised that, while it had carried out an assessment for the provisional listing of the koala, it would be preferable to conduct a full listing review as soon as possible after a decision by the Commonwealth rather than to list the koala provisionally.⁸⁷

In February 2022, then Federal Environment Minister, Sussan Ley, made the decision to uplist the Koala (combined populations of Queensland, NSW and the Australian Capital Territory) as endangered under the EPBC Act.⁸⁸

The NSW TSSC subsequently determined to list the koala as endangered under the BC Act on 20 May 2022, over two years since the koala was first nominated for provisional listing on an emergency basis in NSW.

There is nothing in the BC Act that explicitly precluded the NSW TSSC from provisionally listing the koala in NSW, despite the ongoing assessment by the Commonwealth government. The decision not to make a decision under the provisional listing provisions undermines the intent of those provisions – to provide provisional protection to threatened species pending a final decision. It is disappointing that with NSW being the only jurisdiction with provisional listing provisions, and the

⁸⁶ Lane, A., Wallis, K., and Phillips, S. 2020. *A review of the conservation status of New South Wales populations of the Koala (Phascolarctos cinereus) leading up to and including part of the 2019/20 fire event*. Report to International Fund for Animal Welfare (IFAW). Biolink Ecological Consultants, Uki NSW, available at <https://www.ifaw.org/au/resources/koala-conservation-status-new-south-wales>

⁸⁷ Personal communication, NSW Threatened Species Scientific Committee, Letter to International Fund for Animal Welfare, dated 24 September 2021.

⁸⁸ See http://www.environment.gov.au/cgi-bin/sprat/public/publicspecies.pl?taxon_id=85104

most severely affected by the 2019-20 bushfires, these were not used to provide much-needed protection for the species to recover immediately following the bushfires.

It also raises questions about the interaction of the CAM with the provisional listing provisions under the BC Act. Any uncertainty that persists about how nominations for provisional listing should be dealt with if species are also being assessed under the CAM by another jurisdiction is likely to arise again in the future.

** This case study was originally published in EDO's publication Defending the Unburnt: Wildlife can't wait: Ensuring timely protection of our threatened biodiversity, November 2022.⁸⁹*

⁸⁹ EDO, *Defending the Unburnt: Wildlife can't wait: Ensuring timely protection of our threatened biodiversity*, November 2022, available at <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Wildlife-cant-wait.pdf>