



Submission on the draft Biodiversity Conservation Bill 2016

prepared by

**EDO NSW
June 2016**

About EDO NSW

EDO NSW 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 25 years' experience in environmental law, EDO NSW has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO NSW 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.

EDO NSW is part of a national network of centres that help to protect the environment through law in their [states](#).

Submitted to:

Biodiversity Reforms – Have Your Say
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EDO NSW and the NSW Government's proposed land management and conservation package

EDO NSW has been making recommendations for strong biodiversity, native vegetation and land management laws since 1995. We were heavily involved in the development of the current Native Vegetation Act between 2002 and 2005.

EDO NSW met with the Independent Biodiversity Legislation Review Panel during their deliberations and produced *A Legal Assessment of NSW Biodiversity Legislation* to assist the panel.

We engaged with representatives of the Office of Environment & Heritage, Department of Primary Industries and Department of Planning during targeted stakeholder consultations prior to the public exhibition process. We raised a number of key concerns and made recommendations in these meetings based on our extensive expertise in NSW environmental law.

Unfortunately none of these fundamental concerns or recommendations were addressed in the package developed for public consultation.

During the public consultation period we have published our expert analysis on the reforms (see: http://www.edonsw.org.au/biodiversity_legislation_review). We have compared the strengths and weaknesses of current laws with strengths and weaknesses of the proposed laws.

Our conclusion is that the proposed laws are a retrograde step for NSW biodiversity and land management. While the proposed investment private land conservation is welcome, once this money runs out, we will be left with weak laws that offer no real protection for our unique threatened species and ecological communities and will facilitate ongoing decline in biodiversity. Consequently, we cannot support the proposed package.

Through a series of workshops, seminars and forums, we have spoken to local communities, Landcare members, Local Land Services officers, local councils, ecological consultants, private land conservation agreement holders, Aboriginal people, conservationists, wildlife carers, and private individuals through our advice line. Areas covered include: Hunter, Greater Sydney, North Coast, Northern Tablelands, South East and Central West. We discussed concerns with over 600 people. With the exception of representatives of the NSW Farmers Association, no-one we spoke to stated that the proposed laws were an improvement on current laws, and almost all participants were seriously concerned at the implications of the new regime for biodiversity.

In addition to the analysis on our website, we make the following submissions.

- EDO NSW submission on the Local Land Services Amendment Bill 2016
- EDO NSW submission on the Biodiversity Conservation Bill 2016
- EDO NSW Technical submission on the Biodiversity Assessment Method and Mapping Method.

This is the second of our three submissions.

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Executive Summary

EDO NSW is a community legal centre specialising in public interest environmental law. We welcome the opportunity to provide comment on the NSW Government's proposed laws for land management and biodiversity conservation.

This is the second of three submissions by EDO NSW and focuses on the draft Biodiversity Conservation Bill (**BC Bill**).

The BC Bill would repeal and replace the *Threatened Species Conservation Act 1995* (**TSC Act**); *Nature Conservation Trust Act*, parts of the *National Parks & Wildlife Act*, and parts of the *Environmental Planning and Assessment Act 1979* (NSW) (**Planning Act**). In summary, the BC Bill seeks to give a legislative basis to the existing Saving Our Species approach (i.e., a triage approach of categorising threatened species into different streams for prioritised management actions and funding). The Bill retains the NSW Scientific Committee and aims to align the listing process to meet IUCN criteria and to coordinate better with Commonwealth lists. There are offence provisions for picking or harming threatened animals or damaging habitat without authorisation. The Bill provides for a category of "serious and irreversible impacts", although these have not yet been defined and will not act as a red light for major projects. Critical habitat will be replaced by a new category of "Area of Outstanding Biodiversity Value" that can be declared by the Minister for the Environment (although these areas can still be subject to clearing applications).

Noting that NSW now has over 1,000 listed threatened species and communities, will the new approach do anything to stop the decline in biodiversity?

The BC Bill may have familiar types of provisions for threatened species, but our analysis of the overall reform package, shows the prognosis for these species does not improve. While on one hand the BC Bill carries over provisions of our current threatened species laws (like listing threatened species and ecological communities by a scientific committee), the draft Local Land Services Amendment Bill (**LLS Bill**) will increase known threats to those species. The Bills fail to tackle the conflict between the need to reduce the impact of listed key threatening processes on biodiversity, and permitting more land clearing via self-assessed Codes and discretionary development applications. For example, the BC Bill lists "loss of hollow bearing trees" as a key threatening process, while the LLS Bill allows clearing of paddock trees without approval. Investment in private land conservation is intended to improve connectivity, whilst code based clearing allows for the clearing of peninsulas of native vegetation.

In summary, if you compare the laws that are being proposed with the laws that are being repealed, clearing will increase, offsets will expand – thereby justifying further clearing, private conservation will flourish in some areas but struggle in others, threatened species considerations can be traded off, and the new regime will not actually achieve the intended equity.

Rewriting our biodiversity laws is a once in a generation opportunity to put in place laws that will actually address the most significant threats to biodiversity. Unfortunately, the proposed legislation does not address necessary and important reforms, for example to address cumulative impacts and climate change impacts of clearing (and potential carbon gain from vegetation protection). Instead, the BC Bill carries over deficiencies of the current system, including exemptions and wide discretion for projects with the biggest impacts. Vulnerable ecological communities are excluded from the definition of threatened species, and mining is still permitted in areas that supposedly offset previous losses of biodiversity and areas of outstanding biodiversity value.

So what should be in a reform package and any future Biodiversity Conservation Act (**BC Act**)? Here is a short list of some of the elements that we think should be the foundations of new biodiversity laws:

10 things that biodiversity law reform should do:

- Be designed to prevent extinction;
- Apply a “no net loss or better” standard to *all* development;
- Address key threats such as broadscale land clearing of remnant vegetation and climate change;
- Establish a NSW Environment Commission or a Biodiversity Commissioner to provide independent advice and oversight;
- Mandate the use of leading practice scientifically robust assessment tools;
- Invest in *long term* private land conservation;
- Clearly require comprehensive data, monitoring, reporting on condition and trends (environmental accounts);
- Limit indirect offsetting;
- Commit to fully resourced compliance and enforcement; and
- Properly resource regional natural resource management (**NRM**) bodies to work with landholders, have expertise to do assessments, and make NRM plans that relate to clear targets.

This submission is to be read in conjunction with our:

- **Submission on the Local Land Services Amendment Bill 2016**
- **Technical submission on the Biodiversity Assessment Method and Mapping Method**

Summary of Recommendations

General- Integrating the Biodiversity Conservation Bill with the Planning Act and other laws

- The reform package must include additional amendments that integrate biodiversity and ecological integrity as a fundamental consideration across all decision making processes. This is especially needed in statutory plan-making under the Planning Act (Part 3) and LLS Act (Part 4).
- In particular amend Part 3 of the Planning Act to require plan-makers and the Minister to:
 - make regional plans in accordance with clear environmental and social criteria, including taking into account the aims of any new biodiversity legislation, Biodiversity Conservation Program and Investment Strategy;
 - seek advice from OEH or a new Biodiversity Commissioner on whether the planning proposal (i.e. a draft state, regional and local environmental plan or amendment) will exacerbate key threatening processes (KTPs) to biodiversity and cumulative impacts in the plan area, and how to minimise these impacts;
 - publish the above advice, and address how the draft plan avoids and minimises biodiversity impacts, including KTPs and cumulative impacts;
 - address how the final plan achieves any BC Bill objects and purposes (clause 1.3)
- Amend the LLS Act (Part 4) to require state and local strategic plans to have regard to the aims of the BC Act, Key Threatening Processes and priorities identified in the

Biodiversity Conservation Program and Biodiversity Investment Strategy.

- Establish an independent, statutory Biodiversity Commission (or a Biodiversity Commissioner within the NSW Natural Resources Commission). Its purpose would be to identify, develop and oversee a whole-of-government approach to make biodiversity protection a fundamental consideration in planning and NRM decisions.
- The native vegetation framework under the LLS Bill, including proposed Codes, must be subject to independent review by the NSW Scientific Committee or new Biodiversity Commission to ensure the framework will not exacerbate KTPs.
- Give further consideration to how cumulative impacts can be effectively considered.
- Biodiversity considerations must be supported and integrated in other NSW regulatory frameworks, such as public and private forestry, noxious weeds and bushfire management.

Part 1 – Purpose, objects and definitions

- The purpose section of the BC Bill (clause 1.3(a)) should be amended to state that conservation and threat abatement action is to “avoid extinction and facilitate recovery of threatened species and ecological communities”, not simply to “slow the rate of biodiversity loss.”
- We welcome the recognition of Aboriginal knowledge in the objects, but recommend that there be further consultation with Aboriginal people about how the legislation can more effectively protect the culture and heritage values of biodiversity for Aboriginal people.
- Include fish and marine species in any BC Act rather than the Fisheries Management Act.
- The existing definition of biological diversity should be carried over, including a recognition of genetic diversity.
- The definition of “biodiversity values” should recognise other ecosystem values, including soil and water quality and the ecosystem services they provide (salinity protection, carbon storage etc).

Part 2 - Protection of plants and animals

- The definition of harm should include destroying habitat.

Part 3 – Areas of outstanding biodiversity value (AOBVs)

- AOBVs (to replace critical habitat) must be determined on ecological grounds, and not be overridden by socio-economic considerations. In this context we support landholders with AOBVs declared over their land receiving priority funding.
- If AOBVs are to achieve their conservation purpose, they must be categorised effectively as a “red light” for land clearing under the proposed regime. It should be made clear that no code-based clearing, allowable activities, or development consents (including mining) can occur in AOBV.

Part 4 – Threatened species and ecological communities

- Any nationally harmonised listing process must ensure that NSW-listed species, populations and ecological communities do not receive less protection within NSW.
- The option to list a local population should be retained.
- The Biodiversity Conservation Program (and the BC Act) need clearer goals. It should aim to prevent extinction, minimise impacts of key threatening processes and reverse biodiversity decline by promoting and achieving recovery.
- The Program must develop strategies to minimise the impacts of key threatening

processes – this should not be discretionary (clause 4.36(2)).

- A BC Bill should:
 - impose duties on developers and development decision-makers to act consistently with Saving our Species (**SOS**) conservation priorities (i.e. Priorities Action Statement);
 - require environmental assessments to state whether approving the development will contribute to Key Threatening Processes (**KTPs**) listed under any BC Bill; how this threat will be minimised; and any alternatives available;
 - make clear that SOS sites (outside national parks and reserves) are AOBVs - the new term replacing critical habitat;
- We support retaining the independent expert Scientific Committee to determine listings based on ecological grounds. It is essential that the process be independent, science-based, and free from non-scientific considerations such as the implications a listing might have on future development.

Part 5 – Investment Strategy and private land conservation agreements

Biodiversity Stewardship Agreements

- Biodiversity Stewardship Agreements implicitly serve two separate purposes (i.e. offsets and altruistic conservation) that should be distinguished in the Bill. Biodiversity Stewardship Agreements established to offset loss should be called *Biodiversity Offset Agreements* – to clearly distinguish from Biodiversity Stewardship Agreements established purely for conservation gain (not offsets).
- A Biodiversity Stewardship Agreement (both types) should have effect in perpetuity.
- Terminating a Biodiversity Stewardship Agreement and retiring biodiversity credits (that is, offsetting an offset site) should be prohibited.

Conservation Agreements

- A Conservation Agreement should have effect in perpetuity unless the agreement states otherwise or is terminated with the consent of all parties.
- The purpose of a Conservation Agreement should be expanded to cover any of the following:
 - managing the land to which the agreement relates so as to protect its natural heritage (and any cultural heritage associated with the natural heritage);
 - protecting areas containing scenery, natural environments or natural phenomena worthy of preservation;
 - protecting areas of special scientific interest;
 - study, preservation, protection, care of fauna or native plants or other flora;
 - study, preservation, protection or care of karst environments;
 - the conservation of declared AOBVs, or the conservation of threatened species, populations or ecological communities, or their habitats.

Wildlife Refuge Agreements

- The purpose of a Wildlife Refuge should be expanded so as to cover preserving, conserving, and studying wildlife, or conserving and studying natural environments.

Agreements generally

- Mining should not be undertaken on private land subject to a Biodiversity Stewardship Agreement or Conservation Agreement or on a Wildlife Refuge where the land includes declared AOBVs or threatened species, populations or ecological communities, or their habitats.
- A Conservation Agreement or Wildlife Refuge where the land subject to the agreement includes declared AOBVs or threatened species, populations or

ecological communities, or their habitats should not be subject to section 28 of the Planning Act (Suspension of laws etc by environmental planning instruments).

- The terms of a Biodiversity Stewardship Agreement, Conservation Agreement or Wildlife Refuge should include mandatory monitoring, reporting and auditing requirements.
- A third party should be entitled to bring proceedings in the LEC for an order to remedy or restrain a breach of a Conservation Agreement or Wildlife Refuge. That is, ministerial consent should not be required to commence proceedings.
- It should be a strict liability offence to breach a Biodiversity Stewardship Agreement, Conservation Agreement or Wildlife Refuge; or for any person to cause a party to such an agreement to breach that agreement.
- The transitional provisions should specify that an existing Conservation Agreement or Wildlife Refuge will continue to have effect under the existing legislative framework unless the landholder chooses to convert such an agreement to a new agreement under the BC Act. This should include clear options to protect lands in-perpetuity.
- All private land conservation agreements should recognise future climate change impacts and ensure that sites remain appropriately protected and managed in situations where biodiversity on-site is altered as a consequence of climate change.

Part 6 – Biodiversity Offsets scheme

Serious/irreversible impacts

- Serious or irreversible impacts must act as a ‘red flag’ for unacceptable impacts (clauses 6.5; 7.17 etc). This test should consistently trigger mandatory refusal of:
 - non-major projects (as proposed)
 - major projects (State Significant Development (**SSD**) and Infrastructure (**SSI**)) and
 - Part 5 projects (for example, utilities and local infrastructure).
- The Bill should clearly state what constitutes serious or irreversible impacts – to be given further effect in the Biodiversity Assessment Method (**BAM**) and Regulation.
- The test should be defined as ‘serious or irreversible’ impacts, consistent with ESD principles (which call for preventative and precautionary measures).
- This should be clarified as an objective test, not a subjective opinion.
- In addition to refusal, any subsequent redesign or relocation in a fresh development application should trigger Office of Environment and Heritage (**OEH**) consultation or concurrence (including to certify revised likely impacts are not serious or irreversible).
- The list of serious or irreversible impacts should include, but not be limited to:
 - any *adverse effect* on the following:
 - Critically endangered species and ecological communities (i.e. those at extreme risk of extinction);
 - Areas of Outstanding Biodiversity Value; and
 - Nationally and Internationally Important Wetlands (i.e. Ramsar wetlands and/or those listed in Commonwealth Directory of Important Wetlands).
 - Any *significant effect* on the following (as determined by a species impact statement or equivalent BAM process):
 - Endangered species and ecological communities, including Vulnerable species and ecological communities; and
 - Important rivers and biodiversity corridors.
 - Consideration must also be given to how areas of culturally significant biodiversity could be protected, in full consultation with Aboriginal peoples of NSW. (At a minimum, the NSW Government should consider interactions with a new standalone culture and heritage framework).

Part 7 – Biodiversity assessment and approvals under the Planning Act

Major project assessment

- Major projects (SSD/SSI) should not be exempt from mandatory conditions to avoid, mitigate and (as a last resort) offset their impacts. Any approval should impose conditions as required by the BAM and its associated assessment report (clause 7.16(3)).
- Major projects that will have serious and/or irreversible impacts must be refused, with oversight, advice or concurrence from OEH as to any future redesign or relocation.
- All projects, but most of all major projects, should be assessed at arms-length from the developer or be accompanied by an independent peer-review.
- To avoid perverse outcomes to sensitive areas, revise SSD and SSI categories to determine which projects (if any) should continue to be considered 'State Significant'.
- Consult ICAC on whether proposed discretion in applying (and discounting) results of Biodiversity Development Assessment Reports could increase corruption risks.

Assessment for 'Part 4' development

- Consent authorities such as local councils or LLS should not have discretion to reduce biodiversity offset credits required on socio-economic grounds (BC Bill clause 7.15(4); see also LLS Bill clause 60CC(4)).
- A strong 'BAM threshold' must be implemented that assesses, avoids and minimises the cumulative impacts of multiple, smaller-scale impacts, as well as major vegetation-clearing proposals.
- BAM threshold provisions must clarify the interaction between biodiversity assessment of subdivisions and subsequent complying development – to ensure cumulative impacts of complying development are fully assessed. The BC Bill excludes the BAM from complying development (clause 7.15(1)(b)). Meanwhile the Government continues to significantly expand complying development.

Urban and Environmental-zone clearing

- Any new State Environmental Planning Policy (**SEPP**) and Development Control Plan (**DCP**) on urban and E-zone clearing must include, and contribute to, state-wide and LLS biodiversity objectives and priorities (as per Review Panel recommendation 15).
- To improve public consultation, any urban SEPP should set minimum consultation requirements for Local Council and other Part 5 activities that involve clearing trees. Also consider standardising a best-practice approach to 'significant tree' protection.
- Further public consultation is needed on the Government's E-Zone Review, including its implications for maintaining and improving biodiversity protection in NSW.

Part 5 activity assessment

- Part 5 activities should not be exempt from the BAM or serious/irreversible impact restrictions.
- Mining/gas exploration should be assessed under Part 4 (with consent), not Part 5.

Environment agency consultation and concurrences

- Clarify the role of consultation and concurrences related to biodiversity impacts, and the circumstances they apply. This must be more clearly drafted in Part 7 (Div. 3).

Part 8 – Biodiversity certification of land

- The revised Biocertification scheme under Part 8 of the BC Bill must reinstate a requirement that the plan, policy or program for an area meets a *no net loss or better* test for biodiversity and other environmental outcomes (reflecting the current NSW Environmental Outcomes Assessment Methodology (**EOAM**) under the *Native*

- Vegetation Act 2003* and the need to '*maintain or improve environmental outcomes*').
- An appropriate model for Biocertification (i.e. strategic environmental assessment) must have the following additional safeguards:
 - *Mandatory required information standards* for strategic assessment (including verified site data and consideration of alternative development scenarios).
 - Comprehensive requirements for *public participation* in both the assessment and accreditation process.
 - Clear mechanisms (such as zoning) to provide for *adaptive management* and deal with *impacts at a fine scale* that may not be foreseeable at the time of the assessment.
 - *Monitoring, auditing, and reporting* to ensure policy outcomes are being achieved.
 - The 'strategic' biocertification option should be removed in the absence of clear criteria and environmental standards.

Part 9 – Public consultation and public registers

- Public registers provided for in the BC Bill should include:
 - A register of applications for biodiversity conservation licences.
 - For a Conservation Agreement or Wildlife Refuge, copies of the agreements themselves.
 - For a Biodiversity Stewardship Agreement, copies of the agreements themselves and the location of each Biodiversity Stewardship Agreement site.
 - For declarations of AOBV, copies of the declarations and any amendment or revocation of the declaration, as well as maps of these areas (unless sensitive).
- Discretion to restrict access to information on public registers should be strictly limited to: disclosure of information which would contravene the *Privacy and Personal Information Protection Act 1998*, or restrictions for the purposes of protecting threatened species or ecological communities/AOBV.

Part 11 – Regulatory compliance mechanisms

- The limitation period for judicial review should be 3 months (rather than 30 days).
- Decisions by the Minister or Agency head should be made on objective criteria, thresholds and standards (rather than on the basis of 'opinion').
- The privative clauses concerning the validity of AOBV, biodiversity certification and community consultation should be removed.
- 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 should be a strict liability offence.
- The 5 tier penalty system should be replaced with a 3 tier system.
- Stop work orders should prevail over any other approval, notice or order that requires or permits the environment in question to be significantly affected.
- The requirement that the Court 'have regard to' 'any hardship caused to the landholder caused by making of the order or any of its terms...' when considering an appeal by a landholder against an interim protection order should be removed.
- The NSW Government should engage a suitably qualified third party to undertake a costing of compliance and enforcement under the new legislative framework. The Government should commit to funding the OEH and LLSs in accordance with this costing.

Introduction

Review of the current Act and the rationale for reform

The *Threatened Species Conservation Act 1995 (TSC Act)* has been in operation since 1995 but despite strong objectives, it has failed to arrest the decline of biodiversity in NSW. The stresses on biodiversity are significant, debilitating and increasing. These include:

pressures that arise from meeting human needs including food production, urban expansion and consumption of natural resources. The loss and degradation of habitat has been compounded by the introduction of pests and weeds, diseases, the impacts of altered fire regimes and pollution that alone, or in combination, affect individual species and ecosystems.¹

Over 1,000 species, populations and ecological communities are listed as 'vulnerable', 'endangered' or 'critically endangered' under the TSC Act. This list is growing despite the existence of legislative objectives to protect biodiversity in NSW planning legislation for over 30 years.

Successive NSW *State of Environment* Reports in 2009 and 2012 highlight the dire situation for biodiversity. Since European colonisation 19% of mammals (26 of 138 species) in NSW have become extinct. In addition, 34 species of plants, 12 species or subspecies of birds, two invertebrates and one species of reptile and fish are also now 'presumed extinct' under the TSC Act. In the three years to 2012, 35 additional species were added to the listings – a rate of one species per month – including 11 terrestrial vertebrates. Three more species were listed as extinct.²

It is clear that the TSC Act is not achieving its objective of conserving and protecting biodiversity in NSW, particularly threatened species, endangered ecological communities and critical habitat. This challenge – and the costs of reversing it – will only increase as the impacts of climate change reverberate; and require us to re-evaluate our priorities in light of dynamic and far-reaching changes to ecosystems.

As evidenced in our report to the Independent Panel, the limited effectiveness of the current TSC Act is largely due to the fact that it is consistently overridden by other legislation (for example, for urban development and mining) and effective implementation is under-resourced. In order to meet a goal of protecting and recovering threatened species and ecological communities, it is necessary to have strong biodiversity protection. The range of provisions and tools available under the current Act is strongly supported, but these tools must be effectively applied.

Any new biodiversity regime must contain necessary protections and be effectively resourced for implementation.

Biodiversity reform must better integrate with strategic planning

Many public submissions to the Independent Biodiversity Legislation Review Panel (**Review Panel**) pointed to the *Environmental Planning and Assessment Act 1979 (NSW) (Planning Act)* as limiting the success of biodiversity protections in NSW, rather than biodiversity laws themselves. This reform process needs to close the gap between plan-making and NRM

¹ NSW Government, *State of Environment Report 2009*, Chapter 7, at: http://www.epa.nsw.gov.au/soe/soe2009/chapter7/chp_7.2.htm#7.2.13; *State of Environment Report 2012*, Chapter 5, at http://www.epa.nsw.gov.au/soe/soe2012/chapter5/chp_5.1.htm#5.1.7.

² *Ibid* (2012).

systems, and fully integrate biodiversity in statutory plan-making. There are significant risks in expecting the new offsets market, through the proposed Biodiversity Assessment Method (**BAM**) and Biocertification, and private land conservation (via the Biodiversity Investment Strategy) to replace the need for planning law amendments.

Problems with the Planning Act that the Bills do not address include:

- lack of any clear environmental aims or statutory criteria for strategic planning;
- cumulative impacts are not effectively addressed in the BC Bill and will not be adequately addressed by the proposed biocertification scheme;
- listing of threatened species and communities doesn't trigger obligations to review LEPs;
- vulnerable ecological communities are excluded when considering threatened species;³
- allowing State Environmental Planning Policy (**SEPPs**) to override threatened species protections and local zoning (for example, SEPPs for major projects, mining and infrastructure); and
- limited consideration of species recovery plans⁴, critical habitat or Key Threatening Processes⁵ (**KTPs**), such as climate change, in decision-making.

The Review Panel's report did not analyse integrating biodiversity in the planning system in any great detail. However, the Panel was clear that biodiversity laws needed to be more effectively integrated at the strategic planning stage.

Most importantly, Review Panel called for integrating biodiversity objectives and priorities into state planning policies and regional plans. The draft Bills and amendments to the Planning Act comprehensively fail to do this. For example, in the BC Bill:

- there is no reference to integrating biodiversity goals and targets in strategic plans or 'environmental planning instruments' generally (such as SEPPs and LEPs);
- there are no relevant amendments to Part 3 of the Planning Act (statutory plan-making);
- there is no additional requirement to consider KTPs anywhere in the planning system – the Bill simply carries over the KTP listing process, instead of integrating responses to KTPs in plan-making and development controls; and
- under the new Biodiversity Conservation Program provisions – currently 'Saving Our Species'), the Program 'may', but is not required to, address KTPs (clause 4.36(2)). This is despite the one of the Program's objectives being to minimise the impacts of KTPs (clause 4.35) and one of the draft objects of the BC Bill (at clause 1.3) to conserve biodiversity at a bioregional and state scale; to be achieved by (among other things) taking threat abatement action.

In its submission to the Review Panel the Natural Resources Commission (**NRC**) called for:

...an integrated legislative framework that builds whole-of-landscape management, including biodiversity conservation, into the land use planning system. This would be supported by the expertise and participation of all relevant agencies together with decision-frameworks that consider environmental economic and social outcomes,

³ Section 5D of the Planning Act excludes VECs except in preparing planning instruments under s. 26. The BC Bill continue to exclude VECs from the definition of threatened species (etc) - clause 1.6.

⁴ Section 79C of the Planning Act does not require a species recovery plan to be considered when evaluating the environmental impacts of a development, or the public interest. Rather, a recovery plan becomes a relevant consideration only where an SIS is submitted, or in considering whether the proposed development is likely to have a significant effect on threatened species, populations or ecological communities, or their habitats. (See *Western Sydney Conservation Alliance Inc v Penrith City Council* [2011] NSWLEC 244, http://www.edonsw.org.au/native_plants_animals_cases; *Environmental Planning and Assessment Act 1979* (NSW), ss 5A, 79B).

⁵ The current Planning Act only refers to KTPs once – in determining 'significant effect' (s 5A). There is no reference to KTPs in the Environmental Planning and Assessment Regulations 2000.

and strategies to maintain environmental values within thresholds of landscape function.

The draft Bills package does not improve the Planning Act in the ways the NRC suggested.

We therefore **recommend** that:

- The Biodiversity Conservation reform package must include additional amendments that integrate biodiversity and ecological integrity as a fundamental consideration across all decision making processes. This is especially needed in statutory plan-making under the Planning Act (Part 3) and LLS Act (Part 4).
- In particular amend Part 3 of the Planning Act to require plan-makers and the Minister to:
 - make regional plans in accordance with clear environmental and social criteria, including taking into account the aims of any new biodiversity legislation;⁶
 - seek advice from OEH or a new Biodiversity Commissioner on whether the planning proposal (i.e. a draft state, regional and local environmental plan or amendment) will exacerbate Key Threatening Processes (**KTPs**) to biodiversity in the plan area, and how to minimise these impacts;
 - publish the above advice, and address how the draft plan avoids and minimises biodiversity impacts, including KTPs;
 - address how the final plan achieves the BC Bill objects and purposes (clause 1.3)
- Amend the LLS Act (Part 4) to require state and local strategic plans to have regard to the aims of the Biodiversity Conservation Act, Key Threatening Processes and priorities identified in the Biodiversity Conservation Program and Biodiversity Investment Strategy.
- An independent, statutory Biodiversity Commission should be created (or alternatively, a Biodiversity Commissioner established under the NRC). This Commissioner would to identify, develop and oversee a whole-of-government approach to ensure biodiversity protection is a fundamental consideration in planning, conservation and NRM decisions.
- The native vegetation framework under the LLS Bill, including proposed Codes, must be subject to independent review by the NSW Scientific Committee or new Biodiversity Commissioner to ensure the framework will not exacerbate Key Threatening Processes.
- Give further consideration to how cumulative impacts can be effectively considered.
- Biodiversity considerations must be supported and integrated in other NSW regulatory frameworks, such as the Fisheries Management Act, public and private forestry, Noxious Weeds Act and bushfire management.

The remainder of this submission makes recommendations relating to the proposed Divisions of the BC Bill.

- Part 1 – Purpose, objects and definitions
- Part 2 – Protection of plants and animals
- Part 3 – Areas of outstanding biodiversity value
- Part 4 – Threatened species and ecological communities
- Part 5 – Investment Strategy & private land conservation agreements
- Part 6 – Biodiversity Offsets scheme
- Part 7 – Biodiversity assessment and approvals under the Planning Act
- Part 8 – Biodiversity certification of land
- Part 9 – Public consultation and public registers
- Part 10 – Biodiversity Conservation Trust
- Part 11 – Regulatory compliance mechanisms
- Part 14 – Miscellaneous
- Schedules

⁶ Previous provisions for regional conservation plans were repealed from the Planning Act and not replaced. Regional plans are currently given effect by s. 117 directions made by Planning Ministers.

Part 1 – Purpose, objects and definitions

Purpose and objects

The purpose section of the BC Bill (1.3 (a)) should be amended to state that conservation and threat abatement action is to “avoid extinction and facilitate recovery of threatened species and ecological communities”, not simply to “slow the rate of biodiversity loss.”

We welcome the recognition of the principles of ecologically sustainable development (**ESD**) in the objects of the Bill (clause 1.3), however the effective implementation of ESD principles is not operationalised by the provisions in the Bill.

EDO NSW has undertaken analysis of the extent to which the proposed regime is consistent with ESD principles. While the proposed regime zealously embraces the principle that market mechanisms may be used to provide environmental outcomes, it fails to ensure that biodiversity is a *fundamental* consideration, there are no effective “red lights” to prevent serious or irreversible impacts as required by the precautionary principle, and the removal of mandatory soil, salinity, water for clearing is not consistent with ensuring landscape health and productivity for future generations to achieve intergenerational equity.

The whole reform package is about removing regulatory controls and relying almost entirely on a market to provide desired environmental outcomes. The proposed offsets scheme is such a market mechanism, and incentive structures are potentially funded through the proposed private land conservation scheme. However, there is a lack of a clearly established environmental goal and there is no evidence that the proposed market will actually deliver the intended biodiversity outcomes.

ESD principles also require that “environmental factors should be included in the valuation of assets and services”. The proposed scheme does not attempt to effectively and comprehensively value ecosystem services that biodiversity provides - despite an object in the BC Bill that suggests this. Such valuation should include the value of native vegetation ensuring stable soils, reduced salinity, cleaner water, and the pollination and pest control services provided by local biodiversity. Instead, under the LLS Bill, paddock trees are simply seen as a financial burden on farmers for obstructing certain farm machinery or activities such as centre pivot irrigation, rather than having any asset value.

Our full analysis of how the new regime fails to implement the principles of ESD is available on our website.⁷

We welcome the recognition of Aboriginal knowledge in the objects, but recommend that there be further consultation with Aboriginal people about how the legislation can more effectively protect the culture and heritage values of biodiversity for Aboriginal people.

Application

The BC Bill does not include fish and marine species, similar to the current regime. As previously submitted, there is no logical reason for maintaining threatened species lists for marine species in a separate Act. The *Fisheries Management Act 1997* is not an appropriate place for biodiversity protection mechanisms as it 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

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See: http://www.edonsw.org.au/2016_nsw_biodiversity_reforms_offsets_and_ecologically_sustainable_development

marine environment also responsible for conservation of these species. This is demonstrated by the fact that no commercially harvested species were listed as threatened until 10 years after the legislation was enacted. Similarly, no species that require changes to commercial fishing practices to ensure recovery has had a recovery plan finalised. Moreover, 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. Other jurisdictions, like the Australian federal jurisdiction have a single list for terrestrial and marine biodiversity.⁸ Rewriting NSW biodiversity laws presents an opportunity to address these issues and establish a comprehensive and consolidated scheme.

Definitions

The new legislation removes the definition of biodiversity entirely and does not replace it with anything similar. The definition of biodiversity values is completely overhauled.

There is no definition of '*biodiversity*' or '*biological diversity*' under the new legislation. This is a serious gap, although it may be addressed in the regulations. The definitions of animals and plants vary only in that the *Threatened Species Conservation Act 1995 (TSC Act)* definitions specify that the animals or plants must be indigenous to NSW, and explicitly include migratory species.

Under the TSC Act, *biodiversity* (as 'biological diversity') is defined as: the diversity of life and is made up of the following 3 components:

- (a) genetic diversity—the variety of genes (or units of heredity) in any population,
- (b) species diversity—the variety of species,
- (c) ecosystem diversity—the variety of communities or ecosystems.⁹

We recommend that the existing definition of biological diversity is carried over, including a recognition of genetic diversity. As discussed below, we recommend retaining recognition of, and protection for, threatened local populations to maintain genetic diversity.

The definitions of '*biodiversity values*' between the two instruments are very different. The main difference appears to be a move away from a holistic, ecosystem approach and a focus on specific aspects of an ecosystem such as habitat and vegetation.

Under the TSC Act, '*biodiversity values*' is defined as:

- the composition, structure and function of ecosystems, and includes (but is not limited to) threatened species, populations and ecological communities, and their habitats (s4A(1)). It does not include fish or marine vegetation (s4A(2)).

Under the Biodiversity Conservation Bill, '*biodiversity values*' is defined as being the following terrestrial biodiversity values (clause 1.5):

- (a) vegetation integrity—being the degree to which the composition, structure and function of vegetation at a particular site and the surrounding landscape has been altered from a near natural state,
- (b) habitat suitability—being the degree to which the habitat needs of threatened species are present at a particular site,

⁸ *Environment Protection & Biodiversity Conservation Act 1999*.

⁹ *Threatened Species Conservation Act 1995*, s4.

(c) biodiversity values, or biodiversity-related values, prescribed by the regulations.
Consultation note. Values that might be prescribed include soil health (to enable assessment of the degree to which proposed development impacts on soil salinity or soil degradation).

The BC Bill definition should incorporate ecosystem values. Soil, water and salinity assessment must be mandatory modules of the BAM. Carbon should also be added.

We are concerned that the definition of “harm” retains the exclusion of harm by changing the habitat of the animal. Habitat removal can clearly cause harm - for example, if a hollow bearing tree is cut down with a threatened species nesting in the hollow, then that action is clearing going to harm the individual.

Part 2 - Protection of plants and animals

Offences and Defences

We note that a number of offence provisions from the existing legislative framework have been carried over into Part 2 of the BC Bill that provides for Offences (Division 1), and Defences (Division 2). We are also pleased to see that some new provisions have been adopted, including new court orders,¹⁰ a tiered criminal penalty scheme¹¹ and larger penalties for certain criminal offences.¹² Enforcement of the offence provisions is discussed further below in Part 13 – civil and criminal proceedings).

However, we are concerned that the BC Bill makes actual knowledge a requirement 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 (clause 2.1(2)). This should be a strict liability offence. This problem compounded by the fact that the definition of “harm” does not include harm by changing the habitat of the animal (clause 1.6 – definitions) as noted.

Acts authorised by Regulations

We are extremely concerned about the note to clause 2.9 that identifies proposed exemptions to offences and the potential for these exemptions to leave to significant environmental harm. Further consultation on specific proposals is required.

Biodiversity Conservation Licences

The BC Bill foreshadows significant changes to the regulation of wildlife interactions with implications for native wildlife carers. Again, further, targeted consultation with relevant groups on the proposed changes is required.

¹⁰ For example BC Bill, clause.13.24(1)(a) (which empowers the Court to order the offender to take a specified action to publicise the offence. This reflects s. 250 of the *Protection of the Environment Operations Act 1997* (NSW)).

¹¹ BC Bill, clause 13.1.

¹² See for example: BC Bill, clauses 11.12 (interim protection orders); 11.22 (remediation order);

Part 3 – Areas of outstanding biodiversity value

The current category of ‘critical habitat’ under the TSC Act has been an extremely under-utilised tool, despite the protection of critical habitat being vital to biodiversity conservation. Only four areas of critical habitat are declared under the TSC Act (Wollemi Pine, Gould’s Petrel, Little Penguin population, and the Mitchells Rainforest Snail). In our opinion, the reason behind the lack of listings relates to the fact that unlike the listing process for threatened species, economic considerations can be taken into account for critical habitat listings.

There are considerable benefits and strengths of listing critical habitat in addition to single species and populations, consistent with the “ecosystems approach” which is endorsed internationally and nationally. The BC Bill proposes a new category of “areas of outstanding biodiversity value” (**AOBV**) that is intended to be broader than critical habitat, as recommended by the Independent Panel.

The proposed declaration procedure in Part 3 of the BC Bill sets out five steps. However, clause 3.3(3) states that any failure to fully comply with this section does not render a declaration invalid. While economic considerations are not explicitly mentioned, the Minister can take into account any considerations raised in submissions.

We submit that AOBV should be assessed on ecological considerations. Social and economic impacts can be addressed by private land funding that is related to a declaration. This is included in a consultation note in clause 3.2(2).

We welcome the potential for climate refugia to be declared as AOBV (clause 3.2(2)). We welcome further consultation on AOBV criteria that will be included in the regulation.

Finally, if AOBV are to achieve their conservation purpose, they must be categorised effectively as a “red light” under the proposed land clearing regime. It should be made clear that no code-based clearing, allowable activities, development consents (including for major project such as urban and mining developments) can occur in AOBV. This is discussed below in Part 7 – assessment and approvals.

Part 4 – Threatened species and ecological communities

In Part 4, the BC Bill gives a legislative basis to the existing Saving Our Species (**SOS**) approach, i.e., a triage approach of categorising threatened species into different streams for prioritised management actions and funding. The BC Bill retains the NSW Scientific Committee and aims to align the listing process to meet IUCN criteria and to coordinate better with Commonwealth lists. We support the continuation of these provisions and make recommendations below.

Listing of species and ecological communities (Divisions 2, 3, 4)

EDO NSW has met with representatives from the Commonwealth Department of Environment to discuss the current processes for harmonising threatened species lists. Any harmonisation process must ensure that species that are threatened in NSW (but not nationally listed) do not lose protection within NSW.

We recommend that the option to list a local population should be retained under the BC Bill. As noted above, the ability to recognise distinct local populations is essential for conserving

and retaining genetic diversity¹³ – a fundamental component of biological diversity. We spoke to local communities during our recent workshops on the biodiversity reforms and some groups who had spent several years getting local populations recognised (for example, koalas in Tea Gardens) were deeply concerned at the removal of protections. As drafted, the BC Bill will actually facilitate local extinctions. This is discussed further in relation to major project approvals in Part 7 below.

We support the ability of any person to initiate a listing (clauses 4.10 and 4.24) in addition to the nomination themes set by the Scientific Committee.

Key threatening processes (Division 5)

Addressing the key threats to biodiversity is fundamental to the success of the whole regime. While we support the continuation of current listed Key Threatening Processes (**KTPs**) in the schedule to the BC Bill, we are concerned that the broader regime will not effectively address those threats, and will in fact exacerbate certain threats.

While on one hand the BC Bill carries over provisions to recognise key threatening processes, at the same time the draft Local Land Services Bill (**LLS Bill**) will increase known threats to those species. The Bills fail to tackle the conflict between reducing the impact of listed key threatening processes to biodiversity, and permitting more land clearing via self-assessed Codes and discretionary development applications. For example, the BC Bill lists “loss of hollow bearing trees” as a key threatening process, while at the same time, the LLS Bill allows clearing of paddock trees without approval.

Anthropogenic climate change is listed as a threat (Schedule 4) and yet there is minimal recognition otherwise. While AOBV could be for climate refugia as noted above, climate change impacts on biodiversity are not explicitly required to be assessed.

Biodiversity Conservation Program (Division 6)

The Government is increasing monitoring and reporting of threatened species under its SOS program – to be given effect as the Biodiversity Conservation Program (Part 4, Division 6). This will be supported by \$100m announced in 2015 (re-announced 2016), to be delivered over 5 years from 2016-17. SOS has an overall goal of conserving as many NSW species in the wild as possible in 100 years time. We submit that it will be difficult to assess whether the program has saved as many species ‘as possible’.

The Biodiversity Conservation Program, and any BC Act, need clearer goals:

- the strategy should aim to reverse biodiversity decline and prevent extinction
- it should focus on *recovering* threatened species and ecological communities, rather than slowing decline as proposed in the objects of the BC Bill. This should include the need to maintain genetic diversity to ensure species can adapt and evolve into the future;
- the strategy should include an integrated habitat or ‘ecosystem functioning’ approach to managing threatened species and ecological communities, including by identifying keystone species and regional habitats important to maintaining and improving ecosystem services;

¹³ 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.

- performance indicators and individual actions should be specific, measurable, attainable, realistic and timely (**SMART**), and should relate to the ability to recover species and ecological communities;
- climate change must be considered. Species and ecological communities ability to adapt to a changing climate is fundamental to their future survival. Part of this consideration should be whether NSW will become a higher priority area for the recovery of some species and ecological communities in future, particularly for species at the edge of their geographic range in NSW.
- a whole of government approach to threatened species and ecological communities management should be used to ensure that site-based projects do not take precedence over effective landscape management without an appropriate prioritisation process across all threatened species and ecological communities.

Strategies to minimise the impacts of KTPs should be part of the program – this should not be discretionary as suggested in clause 4.36(2). As noted above, failure to address key threats will render the new regime ineffective.

In 2014 we outlined 27 recommendations to improve the SOS program, including the need to better address KTPs like land-clearing and climate change in the wider Planning Act. We also argued this should have been in scope for the Independent Biodiversity Legislation Review Panel (**Review Panel**). However, the Review Panel endorsed the SOS program and said it should have legislative status.

Our reservations about SOS remain and should be addressed. While providing a general legislative basis for SOS as noted, it is not clear that the Bills give specific elements of the SOS program meaningful legislative effect. To do so, the BC Bill should:

- impose duties on developers and development decision-makers to act consistently with SOS conservation priorities (i.e. the Priorities Action Statements);
- require environmental assessments to state whether approving the development will contribute to KTPs listed under the BC Bill; how this will be minimised; and any alternatives available, for decision-makers to consider.
- make clear that SOS sites (outside national parks and reserves) are AOBVs;
- fund these AOBVs for protection and make them off-limits from harm - including by mining interests (which otherwise continue to override biodiversity protection).

Threatened Species Scientific Committee (Division 7)

We strongly support the continuation of an independent expert Scientific Committee to determine listings based on ecological grounds. It is essential that the process be independent, science-based, and free from non-scientific considerations such as the implications a listing might have on future development.

Part 5 – Investment strategy and private land conservation agreements

A key element of the reforms is that the package is accompanied by a commitment for \$240 million over 5 years to support private land conservation, with \$70 million each subsequent year following performance reviews.

EDO NSW strongly supports incentives for environmental stewardship and payments for landholders to manage land for conservation. We work with many landholders across the state who are fantastic stewards of the native vegetation and biodiversity on their properties. In this context we welcome the proposed investment.

During the consultation period, we have been invited to participate in Landcare seminars and workshops on the reforms. We strongly support funding being directed at the projects undertaken by Landcare members across NSW.

The potential stewardship agreements and payments may result in biodiversity gains on these sites. However, our biggest concern is that the **conservation gains are not guaranteed in law, but dependent on funding decisions.**

The proposed regime places almost complete reliance on political, budgetary decisions (which may be short-term) to achieve biodiversity gains, rather than on protections in the BC Bill to prevent continued biodiversity decline.

It is unclear what funding will go to LLS to manage biodiversity and native vegetation. This is discussed further in our **Submission on the Local Land Service Amendment Bill.**

The introduction of the current Native Vegetation Act was accompanied by a \$430 million package for CMAs, with a minimum of \$120 million for the development of property vegetation plans – including incentive PVPs that would pay farmers to manage areas of their properties for conservation. When the current regime was introduced, money for farmers and on-ground works catapulted from \$18 million in 2002/03 to \$118 million in 2004/05. The public register shows over 1,000 PVPs were put in place. In some CMAs, such as Murrumbidgee, a huge number of incentive PVPs were swiftly established.

When that allocated funding ran out after the initial 4 year commitment period, there were no longer resources for enough CMA staff to visit farms and develop PVPs, and the wait time for PVPs extended into months. That was a resourcing and implementation failure. But the protections in the Act remained to prevent inappropriate clearing.

When the bucket of money runs out again for these new reforms, we will be left with a system that allows increased clearing at a site scale and the overall benefits at a regional or state scale that were dependent on funding, will not be realised.

Funding alone is not sufficient. Legal protections must be clearly set out in legislation.

Biodiversity Conservation Investment Strategy

We welcome the requirement to map existing public and private biodiversity protected areas (clause 5.2) as this information will be fundamental to the ability of the Biodiversity Conservation Trust and decision makers to assess the adequacy of protection across the state.

As discussed, we are concerned that gains achieved through investment may be undermined by other elements of the new regime. Core areas and corridors (as identified in

clause 5.3(5)), and any areas that receive funding must be off limits to clearing applications, clearing exemptions and future development applications). The legislation must clearly state once funded, these areas are red light areas. This is discussed in the next section and in our **Technical Submission on the Biodiversity Assessment Method and Mapping Method**.

Private land conservation agreements

There are currently several options for landholders who wish to do private land conservation. EDO NSW has undertaken extensive analysis of the pros and cons of different types of agreements. This analysis was provided to the Review Panel.¹⁴

The proposed scheme reduces this variety to 3 options:

- Biodiversity Stewardship agreements (as set out in Division 2)
- Conservation agreements (as set out in Division 3)
- Wildlife refuge agreements (as set out in Division 4)

EDO NSW is concerned about the following elements of the proposed system.

Purpose

Biodiversity Stewardship Agreements implicitly serve two separate purposes that should be distinguished in the Bill. Biodiversity Stewardship Agreements established to offset loss should be called *Biodiversity Offset Agreements* – to clearly distinguish from Biodiversity Stewardship Agreements established purely for conservation gain (not offsets).

The BC Bill provides that a Conservation Agreement or Wildlife Refuge may be entered into between the relevant parties 'for the purpose conserving or studying the biodiversity values of the land...' (clauses 5.20(1), 5.25(1)). As 'biodiversity values' is narrowly defined,¹⁵ the proposed purpose is arguably too limited. For example, it excludes the conservation of related Aboriginal culture and heritage (as is currently the case for Trust agreements),¹⁶ and does not extend to preserving or, conserving wildlife, including non-threatened species¹⁷ (which is currently the case for Wildlife Refuges).¹⁸

EDO NSW submits that the BC Bill should at the very least maintain the scope of the current suite of conservation agreements. The advantages of doing so include offering protection to non-threatened species and promoting the recovery of threatened species and ecological communities.

Perpetuity

The BC Bill provides considerable discretion to vary or terminate Biodiversity Stewardship Agreements and Conservation Agreements.¹⁹ This degree of discretion is problematic for four central reasons:

¹⁴ EDO NSW (2013) *Assessment and Evaluation of NSW Conservation Mechanisms. A report for the Hunter & Central Coast Regional Environmental Management Strategy (HCCREMS)*, December 2013.

¹⁵ As discussed in relation clause. 1.5. We note that the definition may be extended by regulations, but this is entirely discretionary.

¹⁶ *Nature Conservation Trust Act 2001* (NSW), s. 30.

¹⁷ The current definition of 'biodiversity values' focuses on habitat for threatened species: s. 1.5(b). As noted above, there is no guarantee that the definition will be extended by the regulations to include the protection of wildlife habitat more generally.

¹⁸ *National Parks and Wildlife Act 1974* (NSW), s. 68(2).

¹⁹ BC Bill, insert references (clauses.5.10)

- It is inconsistent with the very purpose of private land conservation, namely to protect biodiversity in perpetuity (which is in turn intended to complement the comprehensiveness, adequacy and representativeness of the public reserve system).
- Gains on a site subject to a Biodiversity Stewardship Agreements take time and to that extent require ongoing protection.
- A Biodiversity Stewardship Agreement site is intended to offset adverse impacts that have occurred elsewhere as a result of development. Consequently, terminating such an agreement undermines its core function.
- Broad discretion to terminate a Biodiversity Stewardship Agreement or Conservation Agreement creates uncertainty regarding the true level of protection offered by these agreements, which may (perversely) deter landholders from entering into an agreement.

The following provisions are of particular concern:

- A new provision empowering the newly created Biodiversity Conservation Trust (**BCT**) to terminate a Conservation Agreement without the consent of the owners of the land if it 'is of the opinion that the agreement is no longer needed for, or is no longer capable of being used to achieve, any purpose for which the agreement was entered into.'²⁰ The use of the word 'any', effectively entitles the BCT to terminate a Conservation Agreement in a wide variety of circumstances (including a minor deviation from one stated purpose of the agreement).
- Provisions which enable the Minister to terminate a Biodiversity Stewardship Agreement to facilitate development by a government agency on the site.²¹
- A Biodiversity Stewardship Agreement site that is generating offsets can itself be offset at a later date with no apparent penalty for the further biodiversity loss.²²
- Environmental planning instruments (**EPIs**) such as a Local Environment Plan (**LEP**) may override a Conservation Agreement or Wildlife Refuge which may thereby result in a variation or termination of any such agreement. This gives rise to uncertainty regarding the level of protection offered by these agreements.
- As is currently the case, the Minister may terminate a Biodiversity Stewardship Agreement, Conservation Agreement or Wildlife Refuge without the landholder's consent in order to facilitate mining and petroleum activities on the site (clause 5.18 and 5.19). EDO NSW submits that there is a strong public interest argument in favour of ensuring that high value biodiversity covered by a conservation agreement is embargued from mining and petroleum tenements.

EDO NSW submits that there is a strong public interest argument in favour of ensuring *actual* rather than *notional* protection of these sites from development. In the case of Conservation Agreements, this must extend to *actual* protection in perpetuity. Exceptions to this rule must be limited.

Offsetting

A Biodiversity Stewardship Agreement site may be used to generate biodiversity credits (or offsets).²³ However, the proposed framework is problematic for the following reasons:

²⁰ BC Bill, clause 5.23(4).

²¹ BC Bill, clause 5.16

²² BC Bill, clause 5.11(3),(4)(b).

²³ BC Bill, clause 5.6(1)(b),(c),(d),(e).

- The BAM is inherently flawed and to that extent undermines the integrity of Biodiversity Stewardship Agreements themselves (refer to our **Technical Submission on the Biodiversity Assessment Method and Mapping Method**).
- The Minister is empowered to terminate a Biodiversity Stewardship Agreement without the landholder's consent in any circumstances authorised by the Act.²⁴ These circumstances include a proposal by a public authority to undertake development on the site.²⁵ While the agency must offset impacts to the site by retiring credits (that is, offset the offset site, which is in itself problematic), no such obligation exists where the development is for 'an essential public purpose or for a purpose of special significance to the State'.²⁶

In summary, these provisions undermine in perpetuity protection of Biodiversity Stewardship Agreement sites and are likely to contribute to net loss of biodiversity in NSW as opposed to maintenance or (ideally) improvement of biodiversity over time. For further comments on the BAM and offsetting, refer to our **Technical Submission on the Biodiversity Assessment Method and Mapping Method**.

Climate change

The BC Bill does not address the relationship between climate change and biodiversity protected under a Biodiversity Stewardship Agreement, Conservation Agreement or Wildlife Refuge. Biodiversity may alter over time due to climatic variations. These agreements must therefore include terms which ensure ongoing and appropriately adapted protection of the site in such instances.

Monitoring

EDO NSW is concerned that there is no mandatory requirement for monitoring, independent auditing and evaluation/reporting to be included in a Biodiversity Stewardship Agreement, Conservation Agreement or Wildlife Refuge.²⁷ These actions are fundamental to the success of both offsetting and private conservation agreements. Specifically:

- Monitoring is required to measure change over time.
- Reporting is required to 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. This contributes to the overall robustness of the offsetting and private conservation systems.

Enforcement

The BC Bill provides for third party enforcement of breaches of Biodiversity Stewardship Agreements.²⁸ However the Bill does not:

- include an equivalent provision in relation to breaches of Conservation Agreements or Wildlife Refuges. Rather, a third party seeking to enforce a Conservation

²⁴ BC Bill, clause 5.10(2)(b).

²⁵ BC Bill, clause 5.16(6).

²⁶ BC Bill, clause. 5.16(2)(b),(c).

²⁷ Inclusion of these in the contents of a Biodiversity Stewardship Agreement is discretionary: Biodiversity Bill, s. 5.6(h). No such provision exists in relation to Conservation Agreements or Wildlife Refuges.

²⁸ BC Bill, clause 13.14.

Agreement or Wildlife Refuge may only do so if they obtain the written consent of the Minister.²⁹

- include specific criminal offence provisions for breaches of a Biodiversity Stewardship Agreement,³⁰ Conservation Agreement or Wildlife Refuge (including breaches committed by third parties).

Transitional provisions

The BC Bill does not provide any clarity regarding the status of conservation agreements entered into under the existing system.³¹ That is, the transitional provisions only include a non-binding 'consultation note' which states that the BC Bill will eventually include more detailed transitional provisions that:³²

- continue the operation of existing biodiversity offset arrangements (including continuation the operation of biodiversity certified land and biobanking statements under the TSC Act); and
- preserve existing private land conservation agreements 'and continue their operation under either the former repealed provisions or by the application of the new provisions of this Act.'

EDO NSW does not support the application of the new provisions to existing biodiversity offset arrangements or conservation agreements, and submits that the common law presumption in favour of non-retrospectivity must be upheld in this instance.

The transitional provisions should clearly specify that an existing Conservation Agreement or Wildlife Refuge will continue to have effect under the existing legislative framework unless the landholder chooses to convert such an agreement to a new agreement under the BC Act. Landholders must be able to stipulate if they do not want their land used as an offset site to justify clearing elsewhere. This should include clear options to protect lands in-perpetuity.

BCT Funding

We are also concerned about the ability of the private land conservation agreements to operate effectively given the financial uncertainty created by the funding arrangements proposed in the BC Bill. Specifically the regulations may make provision for the winding up the Biodiversity Stewardship Payments Fund (clause 6.34(5)) potentially reducing Parliamentary oversight of this process and the BC Bill allows for money to be paid out of the Biodiversity Stewardship Operations Account into the Consolidated Fund at the discretion of the Minister.

²⁹ BC Bill, clause 13.14(2).

³⁰ We note that the BC Bill does make it an offence to contravene a biodiversity offsets enforcement order: clause 11.27. However, the BC Bill does not compel the Minister to issue such an order: clause 11.26.

³¹ That is, Trust agreements under the *Nature Conservation Trust Act 2001* (NSW) and conservation agreements and wildlife refuges under the *National Parks and Wildlife Act 1974* (NSW).

³² BC Bill, Schedule 9, Part 3 (h), (i).

Part 6 – Biodiversity offsets scheme

The proposed regime is highly reliant on an offsets market to deliver environmental outcomes. The proposed offsets rules are not on exhibition as they will be in a future regulation. Similarly, the BAM thresholds are not yet confirmed. The proposed reforms aim to establish a single scientific method for assessing impacts at a development site and calculating how many biodiversity offset credits would be needed to offset that impact.

Of all the offset methodologies developed to date (including the Environmental Outcomes Assessment Methodology under the current *Native Vegetation Act*, biobanking and biocertification methods under the current *Threatened Species Conservation Act*, and the Commonwealth offsets standard under the *Environment Protection and Biodiversity Conservation Act*), the NSW Government has opted to largely reproduce the tool with arguably the weakest offset standards, namely the NSW Offsets Policy for Major Projects.

Therefore, under the new offset scheme, direct ‘like for like’ offsetting requirements are relaxed and can be circumvented. For example offsets do not need to be of the same species or vegetation type as the one being impacted. The new option to pay money in lieu of an actual offset will result in net loss of certain threatened species and communities - including loss of local threatened populations. Offset areas and set asides may be cleared and offset again later on rather than actually protected in perpetuity.

Detailed discussion of our concerns with the proposed offsetting scheme is provided in our **Technical Submission on the Biodiversity Assessment Method and Mapping Method**. A summary of these issues as they relate to the BC Bill is provided here.

General provisions - Division 1

Relevant impacts

Clause 6.3 states that climate change impacts are not assessed under the scheme. As noted above, the failure to address climate change is a significant deficiency of the scheme and a missed opportunity. Perversely, the proposed scheme pays more attention to subjecting wind farms to additional layers of assessment than addressing climate change.

Indirect offsets

We do not support the supplementary measures that are deemed to qualify as offsets under clause 6.4(3). While offset categories are not yet defined, the BC Bill allows for “other actions” such as research or education to potentially qualify as offsets. The consultation note indicates that the regulation will “generally” require like for like offsets, but that these can be varied and supplemented. Anything that is not like for like is not an offset, it is simply an environmental contribution related to a development.

Furthermore, we note that the use of supplementary measures may be inconsistent with the offset standard under the *Environment Protection & Biodiversity Conservation Act 1999*.

Serious and irreversible impacts – clause 6.5

As drafted, almost everything is amenable to being offset under the new regime. To have any ecological credibility, offsetting should be strictly limited. An essential part of this is having ‘red lights’ for species and communities, i.e. areas that simply cannot be offset.

We recommend that a clear statement of what constitutes serious *or* irreversible impacts should be set out in the BAM and the regulation. To accurately reflect the ESD definition, the test must be serious “or” irreversible impacts, not “and”. As noted in our **Technical Submission on the Biodiversity Assessment Method and the Mapping Method**:

We recommend that a clear statement of what constitutes **serious or irreversible impacts** should be set out in the BAM and the regulation. To accurately reflect the ESD definition, the test must be serious “or” irreversible impacts, not “and”. The list of relevant impacts should include:

- Any adverse effect on the following:
 - Critically endangered species and ecological communities (i.e. those at extreme risk of extinction);
 - Areas of Outstanding Biodiversity Value; and
 - Nationally and Internationally Important Wetlands (i.e. Ramsar wetlands and/or those listed in Commonwealth Directory of Important Wetlands).
- Any significant effect (as determined by a species impact statement, or equivalent BAM process) on the following:
 - Endangered species and ecological communities, including Vulnerable species and ecological communities; and
 - Important rivers and biodiversity corridors.

In the absence of a dedicated legislative framework for Aboriginal culture and heritage, consideration must also be given to how areas of culturally significant biodiversity could be protected, in full consultation with Aboriginal peoples of NSW.

Biodiversity Assessment Method (Division 2)

Our **Technical Submission on the Biodiversity Assessment Method and Mapping Method** and mapping method sets out our concerns with the offsetting tools and makes recommendations for the necessary changes. That submission also includes comment on the proposed Offsets Calculator and accreditation of assessors who use the tools.

Some of the key concerns discussed in that submission include:

- The lack of red lights, as ‘significant and irreversible’ is undefined.
- BAM thresholds mean large areas of clearing may not be assessed by the BAM, including in Endangered Ecological Communities (**EECs**).
- Important information on the detail of the BAM is missing from the consultation documents.
- Significant changes (reductions) in number of credits generated and some offset ratios appear to have been reduced.
- The scheme incorporates the highly criticised swamp offset policy.
- There are no salinity, soil, or water assessment modules.
- Increasing use of like for like variations and supplementary measures.
- No guarantee the BCT will actually be able to find the offset credits as required.
- Credit for mine rehabilitation is available when proponents should already be required to do this.

Accreditation – clause 6.10

EDO NSW has long argued the need for an appropriate ecological consultant accreditation system.³³ While the existing BioBanking model may form an appropriate basis for such a scheme, further refinement, particularly in the area of assessment and review is necessary. Appropriate implementation of the BAM will require skills in botany, ecology and mapping and any accreditation scheme must ensure that each BAM assessment is completed by an individual or individuals with the appropriate range of skills. Despite the importance of the ecological consultant in ensuring environmental outcomes, there is no obvious role for OEH in assessing the effective implementation of the BAM apart from data collection via Biodiversity Assessment Reports (**BDARs**) discussed below.

We recommend that further targeted consultation occur with bodies such as ECA and EIANZ to determine the integrity, transparency and accountability requirements for the necessary scheme.

Biodiversity assessment reports (Division 3)

BDARs (Division 3) report on impacts and offsets in relation to “biodiversity values” of land. As noted at the start of this submission, we have concerns about the new definition of biodiversity values.

BDARs should require a *detailed* explanation of how impacts were avoided or minimised (clause 6.12(c)). This will be an ineffectual requirement if proponents need only make a short statement that measures to avoid impacts were not undertaken as they were too expensive or time consuming.

Further comment on BDARs and Biodiversity Certification Assessment Reports (**BCARs**) is below in Part 7.

Biodiversity credits (Divisions 4 and 5)

The BC Bill should be clear that any credits created from existing conservation agreements that have been managed for conservation rather than offsetting, if upgraded to a new agreement, will be retired by OEH and will not go into the offset market. At recent workshops and on our telephone advice line, EDO NSW has heard several concerns from existing stewards who are concerned that their management and conservation work on their properties will be translated into offset credits under new agreements and used to justify clearing elsewhere. The BC Bill needs to clarify this.

We do not support deferred credit arrangements or upfront credits for mine rehabilitation.

Payment into fund in lieu of a credit (Division 6)

We do not support payments into the fund in lieu of finding actual direct offsets (clause 6.30). As noted, this puts the onus on the BCT to find a credit without stopping to check if a relevant credit can be found. Clause 6.31 allows payments for “other biodiversity conservation measures or actions” as an alternative to retirement of credits. We do not support this option as constituting an offset.

³³ Most recently this was discussed in our *Submission on A New Planning System for New South Wales – White Paper* June 2013 available at: http://www.edonsw.org.au/new_edo_nsw_white_paper_submission_final

We have concerns about the proposed offsets calculator (clause 6.32). EDO NSW has received expert economic advice that, as it is currently proposed, the offsets payment calculator does not adequately reflect the environmental damage caused by land clearing. These concerns are discussed in our **Technical Submission on the Biodiversity Assessment Method and Mapping Method**. If the offset payment calculator is used, the prices generated by the offset payment calculator must reflect the true marginal damages caused by land clearing. Otherwise the financial incentive to avoid clearing of high conservation value land will not exist. We will be providing further feedback to OEH on the tool following a briefing session after the public exhibition period.

Part 7 – Biodiversity assessment and approvals under the Planning Act

For the purposes of assessments and approvals, the BC Bill would repeal and replace the TSC Act; and parts of the Planning Act that deal with threatened species impact assessment.

Some parts of both Acts are carried over to the BC Bill with modification. For example:

- listing processes for threatened species and ecological communities under the TSC Act; and
- the ‘*assessment of significance*’ or 7-part test for impacts on threatened species (etc) under the Planning Act, which is proposed to apply to ‘Part 5’ activities and part 4 development below the BAM threshold.

Test of Significance

The scope of the test for determining whether proposed development or activity is likely to significantly affect threatened species or ecological communities, or their habitats described in clause 7.3 has been reduced. Consistent with the broader changes that remove the ability to list endangered populations, the test of significance relating to these populations has been removed and consideration of adverse effect on critical habitat has been changed to consider adverse effect on declared areas of outstanding biodiversity value. The need to consider whether the action proposed is consistent with the objectives or actions of a recovery plan or threat abatement plan has been removed, reflecting the shift from recovery planning to triage management.

EDO NSW’s key concern in this regard is removal of the requirement to consider “whether the action proposed constitutes or is part of a key threatening process or is likely to result in the operation of, or increase the impact of, a key threatening process”. Removal of consideration of key threatening processes is inconsistent with the objectives of the Bill to slow the rate of biodiversity loss, and is certainly inconsistent with the need to avoid extinction and recover threatened species.

Any changes should more explicitly require a consideration of cumulative effects, including past, present and approved future development.

It appears the revised ‘5-part test’ continues to exclude Ecological Communities listed as *vulnerable (VECs)* (clause 7.1: definition of *threatened ecological communities*). VECs are listed because they face a *high risk of extinction in NSW in the medium-term* (clause 4.5) – perhaps the next 50 years. Ignoring these species as if they were not listed means they will inevitably end up with a higher threat-status soon. The reforms are an opportunity to correct this policy oversight and prevent or slow ‘up-listing’.

Biodiversity Assessment for major projects (SSD and SSI)

In addition to inherent weaknesses in the BAM, major projects continue to have additional concessions at the expense of biodiversity protection compared with lower-impact projects. This perpetuates double-standards that limit the effectiveness of threatened species laws. Major projects are often those with the greatest individual impacts on the environment, including biodiversity. They include coal mines, roads, prisons, schools, ports, marinas, hospitals, railways, chemical plants and large factories. The largest developments with the most significant potential impacts must be subject to higher, not lower, assessment standards.

For major projects, namely State Significant Development (**SSD**) and Infrastructure (**SSI**) the BC Bill largely carries over requirements under the Major Projects Biodiversity Offsets Policy (Sept. 2014) (**Major Projects Policy**).

The Review Panel's report endorsed this process two months later, without sufficient evidence of the new Major Projects Policy in action. However, the Policy has been criticised by many (including the NSW Scientific Committee and EDO NSW) for adopting weak standards that compromise the integrity of offsetting. Stronger standards can be found in the BioBanking Offsets Methodology and EOAM, including a clear 'maintain or improve' test.

Projects with the greatest impacts - and often the largest budgets - deserve the greatest scrutiny. We agree that all projects listed as SSD or SSI should be subject to a BAM assessment (BC Bill Part 6, Division 3), but this must be a more robust method than the BAM rules proposed.

Weaknesses in how the Bills apply BAM results

In addition to our concerns about the BAM noted in our **Technical Submission on the Biodiversity Assessment Method and Mapping Method**, other weaknesses emerge in the way the two draft Bills apply the BAM, or respond to its findings in Biodiversity Development Assessment Reports (**BDAR**). Once a robust BDAR is complete, the BC Bill should not give significant discretion as to whether to apply the results. Continued wide discretion around major projects undermines public trust in the fairness of the system. It could also increase corruption risks, as ICAC (2010, 2012) has warned about 'Part 3A' (still in transition to repeal) and other discretionary decision-making.³⁴

The integrity of biodiversity assessment is weakened further by various BC Bill (and LLS Bill) provisions which confer alternative approval pathways and decision-making discretion – instead of rigorous avoidance, mitigation, and offsetting (as a last resort and where ecologically appropriate). Unlike other projects, for SSD and SSI there is no mandatory requirement to apply the results of the BDAR, and project conditions are subject to broad ministerial or PAC discretion (BC Bill clause 7.16; Planning Act ss. 79C, 89H and 115ZB). For example:

- There is discretion as to whether the developer has to buy and retire biodiversity credits to offset their impacts.
- There is further discretion as to the number and type of credits required.
- The Minister 'may' require the applicant to retire biodiversity credits to offset the development's impact; 'whether of the number and class set out in the report' – or not (BC Bill clause 7.16(3)).

³⁴ See ICAC: *Anti-corruption safeguards in the NSW planning system* (2012).

It also appears that voluntary planning agreements (under the Planning Act, section 93F) can require offsets without requiring the BAM to be applied. If this is not the intent then this must be clarified (BC Bill clauses 7.13-7.14).

Major projects can go ahead even if ‘serious and irreversible’ biodiversity impacts

An example of double-standards for SSD and SSI is that high-impact projects like coal mines and large port facilities could proceed even if they would have ‘serious and irreversible’ impacts on biodiversity. As there is no law against it, this could presumably include extinction.

As discussed, the new concept of avoiding ‘serious and irreversible’ impacts is positive in principle, because it could act as a ‘red flag’ to demarcate unacceptable impacts if appropriately applied. For non-major projects, the BC Bill requires refusal of the development *if* the consent authority agrees there are serious and irreversible impacts. However, for major projects, the BC Bill gives broad ministerial discretion to decide whether anything needs to be done (clause 7.17). It is also impossible to evaluate the real-life effectiveness of ‘serious and irreversible impacts’ in protecting biodiversity, as the Government has proceeded to public consultation without being able to define what this threshold means.

As noted in our **Technical Submission on the Biodiversity Assessment Method and the Mapping Method**:

We recommend that a clear statement of what constitutes **serious or irreversible impacts** should be set out in the BAM and the regulation. To accurately reflect the ESD definition, the test must be serious “or” irreversible impacts, not “and”. The list of relevant impacts should include:

- Any adverse effect on the following:
 - Critically endangered species and ecological communities (i.e. those at extreme risk of extinction);
 - Areas of Outstanding Biodiversity Value; and
 - Nationally and Internationally Important Wetlands (i.e. Ramsar wetlands and/or those listed in Commonwealth Directory of Important Wetlands).
- Any significant effect (as determined by a species impact statement, or equivalent BAM process) on the following:
 - Endangered species and ecological communities, including Vulnerable species and ecological communities; and
 - Important rivers and biodiversity corridors.

In the absence of a dedicated legislative framework for Aboriginal culture and heritage, consideration must also be given to how areas of culturally significant biodiversity could be protected, in full consultation with Aboriginal peoples of NSW.

Major project categories may create perverse outcomes

To avoid perverse outcomes, the categories of SSD and SSI should be revised to determine which projects (if any) should continue to be considered ‘State Significant’. The current lists includes a mixture of private (mines, factories) and public development (schools, hospitals). Perversely, mines become ‘State Significant’ if they are in environmentally sensitive areas.

Yet under current and proposed laws, SSD status confers undue discretion around the level and rigour of environmental assessment and approval conditions. For example, currently a Species Impact Statement and Aboriginal Heritage Impact Permit is not required for SSD (the AHIP exemption will continue). In the BC Bill, the Minister has discretion not to apply the offset requirements identified in the BDAR; and may allow *serious and irreversible* impacts on biodiversity, including extinction.

Biodiversity Assessment of ‘Part 4’ Planning Act projects (non-major projects)

The BC Bill repeals the 7-part test for threatened species (‘assessment of significance’) for most development (other than Part 5 activities and Part 4 projects below the BAM threshold). In its place the BC Bill extends the new ‘BAM’ process to Part 4 projects that are likely to have biodiversity impacts over a certain threshold (‘**BAM threshold**’) – yet to be confirmed.

Where the BAM applies, there is still discretion around how many offsets are required. Importantly though, the BC Bill proposes that if a non-major project would have ‘*serious and irreversible*’ impacts on biodiversity, consent must be refused as noted. However it is impossible to evaluate the strength of this safeguard, because the BC Bill does not define what it means.

In proposing to replace the 7-part test with a single, scientifically robust assessment methodology (which we agree is good in principle), the Review Panel (2014 p 34) noted:

Apart from the inefficiencies associated with multiple assessment pathways, the seven-part test and environmental impact statement processes for assessing biodiversity impacts are less likely to be applied consistently across NSW because they are more subjective and rely heavily on consent authority discretion.

The draft Bills run the risk of repeating this inconsistency by relying on heavy discretion.

Discounting

We are very concerned that consent authorities have discretion to ‘discount’ how many offsets are required after the BAM is applied (clause 7.15(4)). This discretion should be removed because:

- It further undermines the integrity of a consistent and robust scientific assessment method, to replace current ad hoc biodiversity assessments and approval conditions.
- In particular, it undermines the concept of ‘no net loss’ of threatened species and ecological communities, which we are told the BAM implicitly promotes.
- Experts who formally peer-reviewed the BAM already express concern that uncertain offset rules may undermine the effective ‘price signal’ that protects rare and valuable biodiversity values from clearing (even without knowing about discounting provisions). Discretionary discounting will exacerbate this problem.
- The ability to ‘discount’ offsets was strongly criticised in public consultation on the draft Major Projects Offset Policy (which the BAM largely reflects). The Bills ignore this criticism and extends discounting to all Part 4, LLS-vetted and major projects.
- It is inconsistent with ESD principles such as paying for the full environmental costs of development, and conservation of biodiversity as a fundamental consideration.
- There is no oversight of discretionary discounting, only a requirement to give reasons. This contrasts with current OEH oversight of projects with *significant effects*.
- Such unfettered discretion could increase both the perception and risk of corruption.

If the ‘discounting’ discretion is removed (from both BC Bill and LLS Bill), the Bills would properly require the developer to offset the ‘residual’ biodiversity impact of their development after avoiding and mitigating impacts (clause 7.15(3)). This is far more consistent with the BC Bill’s aims to maintain a resilient environment, conserve biodiversity and ‘facilitate’ ESD – including full environmental valuation, and seeing biodiversity conservation as fundamental.

BAM threshold

The Government is consulting on what the BAM threshold should be, including for development that requires consent under the Planning Act. EDO NSW supports a strong BAM threshold that captures the cumulative impacts of multiple, smaller-scale impacts as well as major vegetation-clearing proposals. As discussed in our **Technical Submission on the Biodiversity Assessment Method and Mapping Method** we believe that it would be more appropriate to use ecological criteria to set a BAM threshold but in the absence of such a criteria threshold of 0.5ha for all lot sizes should apply.

BAM threshold provisions must clarify the interaction between biodiversity assessment of subdivisions and subsequent complying development – to ensure cumulative impacts of complying development are fully assessed. The BC Bill (clause 7.15(1)(b)) excludes the BAM from complying development. Meanwhile the Government continues to significantly expand complying development.

Urban and E-zone clearing

Recent high-profile planning disputes have renewed public concerns about tree protection in urban and Environmental zones. These include the so-called ‘10/50’ Bushfire Code, the North Coast E-Zone Review and removal of historic trees at Randwick for an amended light-rail route.

The fate of biodiversity in urban areas and E-zones across NSW (including Greater Sydney) remains unclear. However, it will ultimately rely on several ongoing reforms fitting together:

- a new urban tree-clearing SEPP and Development Control Plan (**DCP**) proposed under these biodiversity reforms;
- coastal management law reforms (which will integrate and replace current Littoral Rainforest and Coastal Wetlands SEPPs);
- the Government’s E-zone review, which began in the North Coast but may expand;
- continued expansion and amendment of ‘complying development’ categories; and
- reforms to the Planning Act announced at the same time as the draft Bills.

The Government will need to clarify the interaction of the various reforms underway above.

Urban tree-clearing SEPP

We note that the consultation documents foreshadow a new State Environmental Planning Policy (**SEPP**) to regulate tree-clearing in cities, towns and other non-rural zones.

We understand the SEPP is proposed to apply in urban zones (residential, industrial, commercial etc), environmental (E) zones and large-lot residential areas (R5). It would only apply to clearing for land uses that *do not require development consent* (as set out in LEP land use tables). The Government is consulting on how this would operate and who would make decisions. Further detail is yet to be exhibited.

The SEPP would be supported by a more detailed DCP. Together these would replace local tree preservation orders (and associated clauses in Standard Instrument LEPs, clauses 5.9-9A) which aim to preserve amenity and biodiversity. Any new SEPP and DCP on urban and e-zone clearing must incorporate state-wide and LLS biodiversity objectives and priorities as per the Review Panel’s recommendation 15.

EDO NSW often receives calls from residents across NSW concerned about tree removal by local councils or other public authorities, such as Roads and Maritime Services. The proposed SEPP may be a way to update community engagement and manage public expectations to a best-practice standard. To improve public consultation, any urban SEPP should set standard consultation requirements for Local Council and other Part 5 activities that involve clearing trees and consider standardising a best-practice approach to significant tree protection.

Table: EDO NSW understanding of proposed urban/e-zone tree-clearing reforms

| Urban/E-zone: Uses permitted <i>without</i> consent | Urban/E-zone: Uses <i>requiring</i> consent |
|--|--|
| <ul style="list-style-type: none"> • Clearing assessed under new SEPP and DCP (not yet drafted). • SEPP and DCP would replace Tree Preservation Orders in existing LEPs/DCPs. • SEPP to set out 3 pathways: <ol style="list-style-type: none"> 1. Exempt tree-clearing (no permit needed). 2. Permits from Local Council (or from LLS in non-urban Local Government Areas – comment sought) 3. BAM assessment and consideration – discretionary approval by LLS (proposed). Applies if clearing size exceeds BAM threshold. | <ul style="list-style-type: none"> • Development Application required (as now). Assessment depends on scale and impact. • If tree-clearing exceeds BAM threshold* – Biodiversity Development Assessment Report (BDAR) must be submitted with Development Application. • If tree-clearing is below ‘BAM threshold’ – smaller-scale ‘Statement of Environmental Effects’ (SEE) submitted with Development Application (as now). • Consent authority considers BDAR or SEE and approves or refuses under Planning Act, section 79C. |

E-zone Review & Planning Reforms

EDO NSW is concerned at the precedent set by the Northern Councils Environmental Zoning Review (2015). The Government has adopted new, restrictive criteria for permitted Environmental Conservation (E2) and Environmental Management (E3) zoning across five northern councils.³⁵ We oppose these criteria applying to the northern region and elsewhere.

We are concerned that the new restrictive criteria will undermine the objectives of E-zones and unduly narrow the application of E-zones. The recommended criteria fail to ensure adequate protection for certain high conservation values, such as any types of rainforest which are not listed under SEPP 26 (Littoral Rainforest); coastal wetlands which are not listed under SEPP14 (Coastal Wetlands); or important wildlife corridors.

‘E-zones’ provide fundamental protection for thousands of hectares of forests, wetlands and wildlife habitats – including in the most biologically diverse regions in NSW like the Far North

³⁵ The new E-zone process for northern councils involves the following (see further [EDO NSW briefing note](#)):

- 1) Primary use of the land over the last two years must be environmental conservation (E2) or environmental management (E3);
- 2) The land must meet the various E-zone criteria and this must be verified by additional studies (scenic values have been excluded from eligibility);
- 3) The proposal to apply an E-zone is included in a planning proposal through the planning Gateway process (EPA Act, Part 3).

Coast.³⁶ They do this by setting core objectives for the purpose of the land and restricting land uses in the zone. The importance of E-zones has been acknowledged in the Courts.³⁷

At the same time, the North Coast E-Zone review suggests that Government may seek to allow extensive agriculture (cropping, grazing, dairy pasture etc) in E-zones by default – either with consent (in E2) or without consent (in E3) depending on zoning. It would be inappropriate for the State Government to impose this approach on Councils that currently exclude extensive agriculture in E-zones (or require consent for it) to limit incompatible uses. We also note that zoning permissions allow for *existing uses* such as agriculture to continue.

Further public consultation is needed on the Government's E-Zone Review, including its implications for maintaining and improving biodiversity protection in NSW

Biodiversity Assessment of Part 5 projects

The BC Bill does not apply the BAM to 'Part 5 activities' under the Planning Act (for example, local infrastructure, roads, utilities and mining and gas exploration). This is a significant omission which undermines the intent of a 'single robust biodiversity assessment method' and creates unnecessary complexity in the BC Bill.

The Review Panel called for a single, scientifically robust biodiversity assessment method for development proposals with substantial impacts in urban and rural areas. In general, the draft BAM attempts to implement this recommendation (albeit unsuccessfully) by setting a standard assessment pathway for certain proposals under the Planning Act and LLS Amendment Bill (rural land-clearing).

While we have previously expressed concerns about how the 7 part test is applied,³⁸ given the BAM's inability to properly consider impacts on some threatened species, it is important to maintain the test and improve consistency in its application.

Mining/gas exploration should be assessed under Part 4 (with consent), not Part 5.

Consultation and concurrences

The BC Bill (Part 7, Division 3) carries over concurrence and consultation requirements in limited circumstances. A consultation note states that 'provision may be made' to *assume* (i.e. waive) consultation and concurrence – where a BDAR is submitted and any approval requires the retirement of biodiversity credits set out in the report – unless other significant impacts haven't been assessed under the BAM (e.g. pollution impacts).

The combination of BAM assessment and the (now largely subsumed) concurrence process, as drafted in the BC Bill, is confusing. Clauses 7.11 and 7.12 have so many categories and exclusions (such as SSD), that it makes the policy intent and legal effect of these clauses uncertain and obscure.

In principle, EDO NSW supports environmental consultation and concurrence requirements. A well-resourced and supported concurrence process provides effective expert-agency oversight of development decisions, and can reduce or avoid significant impacts on biodiversity.

³⁶ Office of Environment & Heritage: www.environment.nsw.gov.au/biodiversity/regconsplans.htm.

³⁷ See for example, *Ryan v The Minister for Planning* [2015] NSWLEC 88 at 150.

³⁸ EDO NSW, *A legal assessment of NSW biodiversity legislation: report prepared for the Independent Biodiversity Legislation Review Panel* (September 2014), p. 51. at edonsw.org.au. [Download PDF](#).

In practice, unfortunately, the trigger for consultation or concurrence in the current Planning Act is the discretionary 7-part test or ‘assessment of significance’ for threatened species. As our Review Panel submission noted, this test is applied inconsistently, poorly, or not at all. Local authorities (and private consultants) often lack expertise and resources to properly evaluate an impact’s significance, and may face pressure from developers or the Planning Department for rapid decisions.

Departmental reporting on concurrences has become less transparent in recent years. However, as we understand it, the opportunity for OEH oversight of Part 4 and Part 5 development (via consultation and concurrences) remains limited due to the factors above.

The consultation and concurrence role of OEH, specifically for biodiversity impacts, may be even narrower if concurrence is assumed (waived) when a BDAR is completed and its results applied (as per the consultation note). The policy intent needs to be clearer in the BC Bill.

For example, there may be a greater role for OEH consultation or concurrences in situations:

- where the BAM applies – for example:
 - assessing whether a proposal may have *serious or irreversible impacts*;
 - assessing whether a Biocertification meets the ‘maintain or improve’ standard (which should be reinstated under the BC Bill, Part 8) at a bioregional scale; or
 - assisting local authorities (councils or LLS) to interrogate BAM/BDAR results.
- during strategic planning under Part 3 of the Planning Act (e.g. assessing whether a Local Environmental Plan or State Environmental Planning Policy sufficiently protects, or ‘maintains or improves’, biodiversity).

Part 8 – Biodiversity certification of land

Biocertification is the proposed tool to do landscape scale assessments. This part of the submission raises concerns about the specific provisions proposed but also highlights the missed opportunity of ensuring biodiversity conservation actually integrates with strategic planning.

Biocertification

Part 8 of the BC Bill establishes an expanded Biocertification scheme to allow higher-level biodiversity assessment of large land areas using the BAM.

The major changes to the current Biocertification scheme are:

- removal of the important ‘maintain or improve’ test for environmental outcomes;
- expanding the scheme to proponents other than planning authorities (such as land developers, pastoralists);
- financial incentives for local authorities to use the scheme;
- a new category of ‘strategic’ biocertification which further loosens offsetting rules.

Lower environmental standards for ‘Biocertification’ at the landscape scale

We are very concerned that the revised Biocertification scheme removes the requirement to ‘maintain or improve environmental outcomes’. Instead, it requires a use of the BAM to

produce a Biodiversity Certification Assessment Report (**BCAR**) and gives the NSW Environment Minister a series of broad discretions:

- to impose conditions, whether or not in accordance with the BCAR (clause 8.7);
- to identify 'serious and irreversible impacts' and any measures to minimise them (clause 8.8) (i.e. there is no requirement to refuse Biocertification that would cause serious and irreversible impacts)
- to 'equivalent conservation measures' (clause 8.14), and to later vary them (clause 8.22).

We are particularly concerned at these weak standards and lack of clear environmental criteria to guide the use of Biocertification. Part 8 replaces the positive minimum standard ('maintain or improve') with a negative one (*consider* avoiding 'serious and irreversible' environmental outcomes as a result of biocertification). Removing the current test contradicts the aim to conserve biodiversity and ecological integrity at regional and State scales (BC Bill objects, clause 1.3).

An appropriate model for Biocertification (i.e. strategic environmental assessment) must have the following additional safeguards:³⁹

- *Mandatory required information standards* for strategic assessment (including verified site data and consideration of alternative development scenarios).
- Comprehensive requirements for *public participation* in both the assessment and accreditation process.
- Clear mechanisms (such as zoning) to provide for *adaptive management* and deal with *impacts at a fine scale* that may not be foreseeable at the time of the assessment.
- *Monitoring, auditing, and reporting* to ensure policy outcomes are being achieved.

We also note the Review Panel recommended the NSW Government seek a 'strategic assessment' of Biocertification under Part 10 of the EPBC Act. In 2009, the independent review of the EPBC Act recommended reforms to strengthen and improve strategic assessments. Those recommendations included a minimum standard to 'maintain or improve' environmental outcomes (Hawke et al. 2009,⁴⁰ recommendation 4(2)(b)(ii)). This is the very standard that the NSW Government is now seeking to remove from its own scheme. The 'strategic' Biocertification option should be removed in the absence of clear criteria and environmental standards.

Finally, to ensure transparency and accountability, we submit that clause 8.6 be amended to require the Minister to consider the public submissions lodged regarding an application for biodiversity certification, and not just a summary of these submissions prepared by the proponent. This should be a requirement for a valid exercise the power to confer certification. Clause 8.6(3)(c) should also be amended to explicitly require that the application materials to be made available on the applicant's website include a copy of the biodiversity certification assessment report prepared for the purposes of clause 8.5(4). Biocertification decisions should also be subject to third party review.

³⁹ See EDO NSW report to Review Panel (Sept. 2014), at http://www.edonsw.org.au/biodiversity_legislation_review pp 55-56.

⁴⁰ *Independent Review of the Environment Protection & Biodiversity Conservation Act 1999*, chaired by Allan Hawke, 2009.

Part 9 – Public consultation and public registers

Public consultation

EDO NSW has written extensively about the importance of transparent, iterative community consultation.⁴¹ We are therefore concerned about the community consultation provisions outlined in Part 9, Division 1 of the BC Bill, in particular the following elements:

- There is no requirement to place complete drafts of the documents in question on public exhibition. Rather, the BC Bill allows summaries to be exhibited for consultation purposes.⁴²
- Failure to comply with the community consultation provisions does not invalidate a decision to make or amend the document in question.⁴³
- The regulations may vary the minimum exhibition period of four weeks (that is, reduce this period).⁴⁴
- The community consultation provisions do not extend to a number of important matters including: the creation of the offsets payment calculator;⁴⁵ the determination of 'significant and irreversible impact' (for the purposes of the biodiversity offsets scheme);⁴⁶ or the drafting of the sensitive (threshold) values map.⁴⁷

We further note that, as with much of the BC Bill, additional details regarding community consultation may be prescribed in the regulations. This not only increases uncertainty regarding the likely long-term impact of the new framework, it relegates a core component of the BC Bill to delegated legislation.

Public registers

EDO NSW has compared the existing suite of public registers with those that are proposed under the proposed regime. We wish to raise the following concerns:

- While certain registers will carry over under the new system, the relevant provisions in the BC Bill are lacking in detail.⁴⁸ In the absence of a specific statutory requirement that a register include certain information, we cannot assume that this information will be made public.
- Several of the native vegetation public registers provided for in the LLS Bill are only required to include 'aggregate information'.⁴⁹
- Certain registers that are provided for under the current legislative framework are omitted from the BC Bill, such as the register of licence applications.⁵⁰
- The Environment Agency Head has broad discretion to restrict access to information in a public register if they are satisfied that it is in the public interest to do so or is

⁴¹ See for e.g.: Nature Conservation Council of NSW, Total Environment Centre and EDO NSW (2012), *Our Environment, Our Communities: Integrating environmental outcomes and community engagement in the NSW planning system*. Available online at: http://d3n8a8pro7vnm.cloudfront.net/edonsw/pages/287/attachments/original/1380667224/120824Our_Environment_Our_Communities.pdf?1380667224

⁴² BC Bill, clause. 9.1, 9.2.

⁴³ BC Bill, clause. 9.5. Note that this will also be addressed in the section below dealing with privative clauses.

⁴⁴ BC Bill, clause. 9.2(2).

⁴⁵ The creation of the calculator is provided for in clause 6.32 of the BC Bill.

⁴⁶ The regulations may make provision for or with respect to the determination of serious and irreversible impacts on biodiversity values for the purposes of the biodiversity offsets scheme: BC Bill, clause 6.50.

⁴⁷ We have been instructed by the Government that this map is currently under development.

⁴⁸ BC Bill, clause. 9.7.

⁴⁹ LLS Bill, clause 60VV(1).

⁵⁰ TSC Act, section 96.

authorised by the regulations to do so.⁵¹ This is likely to be challenged which is both costly and time consuming.

EDO NSW submits that these changes undermine transparency, access to information and the community's capacity to enforce the law.

Provision relating to public registers should be strengthened as follows:

- Clause 9.2(4) should be deleted from the Bill;
- Clause 9.5 should be deleted from the Bill;
- Public registers provided for in the BC Bill should include:⁵²
 - a. A register of applications for biodiversity conservation licences.
 - b. For a Conservation Agreement or Wildlife Refuge, copies of the agreements themselves.
 - c. Full BDARs and BCARs.
 - d. For a Biodiversity Stewardship Agreement, copies of the agreements themselves and the location of each Biodiversity Stewardship Agreement site.
 - e. For declarations of areas of outstanding biodiversity value, copies of the declarations and any amendment or revocation of the declaration, as well as maps of these areas.
 - f. When funds are paid to the BCT for the purpose of achieving offsets.
- Broad discretion to restrict access to information on public registers should be removed. Rather, public registers must not to include information the disclosure of which would contravene the *Privacy and Personal Information Protection Act 1998*.

Part 10 – Biodiversity Conservation Trust

As noted, we strongly support investment in private land conservation for biodiversity outcomes. The source and administration of such investment must be transparent, accountable and strategic. We therefore support the establishment of a BCT, but we have concerns about the rules that will govern how the money is spent for offsetting purposes, and how the BCT might finance 'strategic' biocertification.

As noted, EDO NSW does not support the ability to pay into the BCT in lieu of offsets. However, if this approach does proceed, the BCT must be required to follow strict like for like offset obligations and the BCT must demonstrate that the offset requirements can be met before the obligation of the proponent is fulfilled.

The fact that under the BC Bill, the BCT can use the modified like for like rules and the proposed variation rules means that significant clearing of threatened ecological communities and threatened species habitat could be undertaken with no true like for like offsetting. The fact that a proponent can discharge all offsetting obligations before the BCT has even identified whether like for like offsets are available, means that the BCT may be committing to identify offsets for which like for like offsets simply do not exist. This has the potential to lead to significant misapplication of planning laws as the decision makers cannot make properly informed decisions about a project's likely environmental impact when the outcome of any offsetting arrangements remains unknown. This situation is increasingly likely the longer the BCT is in operation.

⁵¹ BC Bill, s. 9.10.

⁵² In addition to the information provided for under s. 9.7 of the BC Bill.

The use of the BCT also creates a very strong potential for unassessed cumulative impacts to drive certain ecological communities and species that are in areas of development pressure to extinction. These problems are compounded by the fact that there is no timeline in which the BCT must obtain offsets. While this may allow for greater flexibility to achieve strategic conservation outcomes, it also has the potential to create a significant time lag between impacts occurring and any offsets being protected. Given the intrinsic problem of lag before offsets provide any environmental benefit, this approach has the potential to lead to significant degradation of the natural environment.

Part 11 – Regulatory compliance mechanisms

We support strong compliance and enforcement provisions. We welcome the inclusion of orders (Divisions 2, 3, 4 and 5) and investigation powers (Part 12) in the BC Bill.

We note that a number of compliance and enforcement provisions from the existing legislative framework have been carried over into the BC Bill. We are also pleased to see that some new provisions have been adopted, including new court orders,⁵³ a tiered criminal penalty scheme⁵⁴ and larger penalties for certain criminal offences.⁵⁵

However, we are concerned about the following:

- The BC Bill makes actual knowledge a requirement 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.⁵⁶ This should be a strict liability offence.
- As noted above, only the Minister or ‘a person acting with the written consent of the Minister’ may commence proceedings to remedy or restrain a breach of a Conservation Agreement or Wildlife Refuge.⁵⁷
- Only the Minister or ‘a person acting with the written consent of the Minister’ may commence proceedings to remedy or restrain a breach of a biodiversity certification agreement.⁵⁸
- While we support the introduction of a tiered penalty system, it is unclear why there are 5 rather than 3 tiers⁵⁹ (as is the case under analogous legislation in NSW).⁶⁰
- Under the current framework, stop work orders prevail over any other approval, notice or order that requires or permits the environment in question to be significantly affected.⁶¹ The BC Bill and LLS Bill do not include comparable provisions, which may undermine the efficacy of these orders.
- The BC Bill introduces new criteria that the court is to ‘have regard to’ when considering an appeal by a landholder against an interim protection order, including ‘any hardship caused to the landholder caused by making of the order or any of its

⁵³ For e.g. BC Bill, clause.13.24(1)(a) (which empowers the Court to order the offender to take a specified action to publicise the offence. This reflects s. 250 of the *Protection of the Environment Operations Act 1997* (NSW)).

⁵⁴ BC Bill, clause. 13.1.

⁵⁵ See for example: BC Bill, ss. 11.12 (interim protection orders); 11.22 (remediation order);

⁵⁶ BC Bill, clause. 2.1(2).

⁵⁷ BC Bill, clause. 3.14(2).

⁵⁸ BC Bill, clause. 13.15(1).

⁵⁹ BC Bill, Division 1, Part 13.

⁶⁰ See for example the *Protection of the Environment Operations Act 1997* (NSW), s. 114. The three tiered system in NSW is based on the High Court case of *He Kaw Teh v R* (1985) 157 CLR 523 (with the three tiers generally corresponding to intentional, strict liability and absolute liability offences).

⁶¹ *National Parks and Wildlife Act 1974*(NSW), s. 91FF; *Threatened Species Conservation Act 1995* (NSW), s. 120.

terms...'.⁶² The purpose of an interim protection order is to prevent the contravention of a provision concerning land of natural scientific significance, threatened species or ecological communities, or declared areas of outstanding biodiversity value.⁶³ As such, there is no real justification for requiring the Court to consider 'any hardship caused to the landholder' when making an order seeking to enforce any such provision.

Appeal rights - Third party standing

We note that the BC Bill includes a general right for any person to commence proceedings in the LEC to seek an order to 'remedy and restrain' a breach of any BC Act or regulations (clause 13.13).

EDO NSW is strongly supportive of third party standing. However, we are concerned that the statutory limitation period has been reduced from 3 months to 30 days. This reduction is prejudicial to prospective appellants, who arguably require considerably longer than 30 days to properly assess whether there are legitimate grounds for seeking review. It is also inconsistent with the general statutory judicial review period set out in the NSW Civil Procedure Rules (which applies to appeals brought under the EPA Act).⁶⁴

We are also concerned the broad discretion afforded decision-makers and proponents undermines the community's capacity to exercise this right. For example:

- There are numerous instances where the Minister⁶⁵ or Agency Head⁶⁶ may make a decision on the basis of an 'opinion' (as opposed to making a decision based on objective criteria).
- The BAM frequently states that certain matters 'should' (rather than must) be addressed in the assessment.⁶⁷

EDO NSW submits that decisions by the Minister or Agency head should be made with reference to a set of objective criteria, rather than on the basis of 'opinion'. This would not only improve the quality of decision-making, but ensure that the community has meaningful appeal and enforcement rights.

Privative clauses

EDO NSW is of the view several sections in the BC Bill amount to privative clauses. These sections concern:

⁶² BC Bill, clause 11.13(4). By way of contrast, under the current framework, the Court may make 'any such order as it sees fit': *National Parks and Wildlife Act 1974*(NSW), s. 91H; *Threatened Species Conservation Act 1995* (NSW), s. 119.

⁶³ BC Bill, clause 11.8.

⁶⁴ *Uniform Civil Procedure Rules 2005*(NSW), cl. 59.10(1).

⁶⁵ See for example: BC Bill, s. 3.2(1) (declaration of area of outstanding biodiversity value); s. 3.5(2) (amendment or revocation of declaration of area of outstanding biodiversity value); s. 5.16(2)(a) (development by public authorities on a BSA site); s. 5.18(1) (termination of BSA where mining or petroleum activities will have a negative impact); 5.23(7) (termination of a CA where mining or petroleum activities will have an impact); 7.17(2)(3) (refusing development that will have a serious or irreversible impact on biodiversity values).

⁶⁶ See for example: BC Bill, s. 6.23(1) (grounds for cancelling or suspending a biodiversity credit).

⁶⁷ The following list is not exhaustive: cl. 4.1.1.3 ('The following features should be shown on both the Site Map and Location Map...'); cl. 5.3.1.5 ('The assessor should review any existing data and information that is currently available on native vegetation that is relevant to the subject land and land within the 1500 m buffer area.');

cl. 5.3.1.11 ('Following completion of the plot-based vegetation survey, the map of PCTs should be amended to reflect the outcomes of the vegetation survey.');

cl. 6.8.1.2 ('A threatened species survey should be undertaken and recorded using a method that can be replicated for repeat surveys.').

- declarations of AOBV. Specifically, clause 3.3(3) provides that a declaration is not invalid even if the procedural requirements outlined in clause 3.3(1) (concerning notification and public consultation, amongst other matters) are not followed;
- Biocertification. Specifically, clause 8.26(1) provides that a failure to adhere to any procedural requirements concerning Biocertification does not affect the validity of an order conferring, modifying or extending Biocertification of a particular site.
- community consultation. Specifically, clause 9.5 provides that a failure to comply with the community consultation provisions outlined in Division 1 of Part 9 do not invalidate a decision to amend or make a document;

These clauses purport to prevent the Court from *invalidating* the administrative decision in question even where it finds that a jurisdictional error had been made.⁶⁸ In other words, they seek to circumscribe the Court's capacity to grant relief.⁶⁹

The High Court has found that 'privative clauses' are unconstitutional (pursuant to s. 75(v) of the Australian Constitution). Specifically, a State Parliament may not deprive a Supreme Court of its capacity to grant relief for jurisdictional error: *Kirk v Industrial Court of NSW*.⁷⁰ The decision in *Kirk* was reaffirmed by the NSW Land and Environment Court in *Haughton v Minister for Planning*.⁷¹

This means that an applicant could commence legal proceedings and seek relief on the basis that a jurisdictional error had been made notwithstanding clauses 3.3(3), 8.26(1) and 9.5.

The presence privative clauses in the BC Bill is nonetheless concerning. First, they may mislead decision-makers into assuming that they do not need to follow the procedural/community consultation provisions referred to above. Second, this in turn places an undue burden on the community to ensure that these provisions are being complied with. Third, there is no policy or legal justification for including unconstitutional provisions in State legislation.

Monitoring

Monitoring is an essential component of any effective compliance and enforcement regime. It also provides the Government and community alike with vital data regarding the overall efficacy (or otherwise) of the law, which may in turn inform evidence-based legislative amendments.

While the purpose and objects of the BC Bill are to be achieved by 'collating and sharing data, and monitoring and reporting on the status of biodiversity and ecosystem services and the effectiveness of conservation actions...',⁷² this high-level goal is not supported by substantive provisions in the either the BC Bill or LLS Bill. For example:

- The new framework does not require LLLs to monitor native vegetation clearance undertaken pursuant to the proposed codes and to maintain a public register of this information.

⁶⁸ As per the principles outlined in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, [1998] HCA 28.

⁶⁹ 'A privative provision purports to remove the authority of a court to review a decision for alleged invalidity': Baston J, *Jurisdictional Error after Kirk: Has it a Future?* Supreme and Federal Court Judges' Conference, Melbourne, 21-25 January 2012, p. 11. See also *Kirk*, below.

⁷⁰ *Kirk v Industrial Court of NSW* [2010] HCA 1.

⁷¹ *Haughton v Minister for Planning and Macquarie Generation; Haughton v Minister for Planning and TRUenergy Pty Ltd* [2011] NSWLEC 217.

⁷² BC Bill, s. 1.3(h).

- There is no mandatory requirement for monitoring to be included in a Biodiversity Stewardship Agreements, Conservation Agreements or Wildlife Refuges.⁷³
- There is no mandatory requirement that monitoring be included in a Biocertification agreement.⁷⁴
- The BC Bill states that the Biodiversity Conservation Program is to include ‘a process for monitoring and reporting on the overall outcomes and effectiveness of the Program.’⁷⁵ However (and by way of example), if LLSs are not required to monitor land clearing undertaken pursuant to the proposed codes, it is highly unlikely that non-statutory monitoring can or will be undertaken for the purposes of the Program. Accordingly, for Program to be effective it should arguably be informed by data collected pursuant to mandatory monitoring provisions in the legislation itself.

Resourcing

Compliance and enforcement provisions are entirely toothless in the absence of adequate resourcing. We are therefore deeply concerned that the NSW Government is yet to outline how the OEH and LLSs in particular will be properly resourced to enforce the new legislative framework.

The NSW Government should engage a suitably qualified third party to undertake a costing of compliance and enforcement under the new legislative framework. The Government should commit to funding the OEH and LLSs in accordance with this costing.

⁷³ Inclusion of monitoring or auditing requirements in the contents of a BSA is discretionary: BC Bill, s. 5.6(h). No such provision exists in relation to CAs or WRs.

⁷⁴ BC Bill, clause 8.16(2)(h).

⁷⁵ BC Bill, clause 4.36(1)(c).