



Environmental
Defenders Office

**Submission to the Natural Resources Commission review
into options to further protect and restore biodiversity
and ecosystem functions in regional landscapes, and
enhance value and support for landholders
(Protect and Enhance Review)**

28 April 2025

About EDO

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

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

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

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

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Submitted to:

Natural Resources Commission
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Acknowledgement of Country

EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations cultural heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as a person's right to freely determine their own political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the land.

A note on language

We acknowledge there is a legacy of writing about First Nations peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term First Nations. We acknowledge that not all First Nations will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

First Laws is a term used to describe the laws that exist within First Nations. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. The EDO respects all First Laws and values their inherit and immeasurable worth. EDO recognises there are many different terms used throughout First Nations for what is understood in the Western world as First Laws.

Role of EDO

EDO is a non-Indigenous community legal centre that works alongside First Nations peoples around Australia and the Torres Strait Islands in their efforts to protect their Countries and cultural heritage from damage and destruction. EDO has and continues to work with First Nations clients who have interacted with western laws, including litigation and engaging in western law reform processes. Out of respect for First Nations self-determination, EDO has provided high-level key recommendations for western law reform to empower First Nations to protect their Countries and cultural heritage. These high-level recommendations comply with Australia's obligations under international law and provide respectful and effective protection of First Nations' Countries and cultural heritage.

Introduction

Thank you for the opportunity to provide feedback on the Natural Resources Commission's (NRC) review into options to further protect and restore biodiversity and ecosystem functions in regional landscapes and enhance value and support for landholders (**Protect and Enhance Review**).

EDO has also provided feedback into two separate reviews being undertaken by the NRC, known as the CEEC Review and Non-Woody Vegetation Review. That feedback, to the extent it is relevant, should also be considered as part of this Review.

As noted in the Terms of Reference (**ToRs**),¹ this Review was a commitment of the NSW Government in response to the 5-year statutory review of the native vegetation provisions (Part 5A and Schedule 5A and Schedule 5B) of the *Local Land Services Act 2013* (**LLS Act**). While this review is to consider matters on private rural land, with reference to the *Land Management (Native Vegetation) Code 2018* (**the Native Vegetation Code**), the *Local Land Services Regulation 2014* (**LLS Regulation**) and Schedule 5A of the LLS Act, it can also have regard to other matters as set out in the ToRs.

EDO has previously raised concerns that the regulatory framework in Part 5A of the LLS Act should not be considered in isolation, particularly given the impacts of clearing on biodiversity and the climate. Notably, Part 5A of the LLS Act was introduced as part of the 2016 Land Management and Biodiversity Conservation reform package that also included the *Biodiversity Conservation Act 2016* (**BC Act**). Importantly, mechanisms that can support the protection and restoration biodiversity and ecosystem functions in regional landscapes, and enhance value and support for landholders, do not sit solely in the LLS Act; the BC Act and its interaction with the Part 5A of the LLS Act should be considered by the NRC in undertaking this review.

To assist the NRC in undertaking its review, this submission is structured as follows:

- **Background on the regulation of native vegetation clearing in NSW**
- **Summary of previous EDO analysis and recommendations**
- **Key issues for consideration**

EDO has written extensively on the regulation of native vegetation clearing in NSW (and other Australian jurisdictions) and our submission provides links to previous analysis where relevant.

At this stage we have not provided any specific recommendations. Rather **we direct the NRC to previous EDO recommendations for strengthening Part 5A of the LLS Act, and highlight specific key issues that should be considered as part of this Protect and Enhance Review and the implementation of the NSW Plan for Nature more broadly.**

We would be happy to provide further information and comment on specific policy proposals in due course.

¹Terms of Reference: Options to further protect and restore biodiversity and ecosystem functions in regional landscapes, and enhance value and support for landholders - <https://www.nrc.nsw.gov.au/TOR%201%20-%20Options%20to%20further%20protect%20and%20restore%20biodiversity.PDF?downloadable=1>

Background on the regulation of native vegetation clearing in NSW

We refer the NRC to the publication from the NSW Parliamentary Research Service, *Native vegetation clearing in NSW: a regulatory history*, Briefing Paper No 05/2014,² which provides a useful history on the regulation of vegetation clearing in NSW up to its publication in 2014.

In summary:

- The clearing of native vegetation in NSW has been regulated, to varying degrees, since 1881.
- Clearing was initially regulated on Crown land via the *Ringbarking on Crown Lands Regulation Act 1881*, *Crown Lands Act of 1884*, and *Forestry Act 1916*.
- The *Soil Conservation Act 1938* introduced the first native vegetation clearing controls on private land, albeit at first only in an indirect manner.
- Further regulatory controls were progressively introduced in a number of different statutes with regard to particular areas of the State, including, most notably, the *Heritage Act 1977*, *Environmental Planning and Assessment Act 1979*, *Coastal Protection Act 1979* and *Western Lands (Amendment) Act 1985*.
- In the 1990's the Carr Labor Government embarked upon a process to reform native vegetation regulation in NSW, introducing a tighter regulation on clearing. This included, sequentially:
 - *State Environmental Planning Policy No. 46 – Protection and Management of Native Vegetation* (SEPP 46) introduced in 1995;
 - the *Native Vegetation Conservation Act 1997*; and
 - the *Native Vegetation Act 2003 (NV Act)*.
- Upon the election of the Coalition Government in 2011, the new Government announced a review of the *Native Vegetation Regulation 2005* which led to new *Native Vegetation Regulation 2013*. Those changes involved an increase in the categories of activities where approvals were not required, changes to key definitions, and paved the way for self-assessable clearing codes.
- In 2014, the Coalition government appointed an independent Biodiversity Legislation Review Panel to conduct a comprehensive review of biodiversity conservation legislation in NSW including the NV Act and *Threatened Species Conservation Act 1995 (TSC Act)*.

Off the back of the Biodiversity Legislation Review, in 2016, the Coalition Government introduced the current Land Management and Biodiversity Conservation Framework (herein also referred to as the land management framework, particularly when referring to Part 5A of the LLS Act), which repealed the NV Act and TSC Act, and introduced the BC Act and Part 5A of the LLS Act.

Five-year statutory reviews of the BC Act and Part 5A of the LLS Act were conducted in 2022 - 2023, and in 2024 the newly elected Labor government responded with its *NSW Plan for Nature*.³ This Protect and Enhance review was a commitment in the *NSW Plan for Nature*.

² <https://www.parliament.nsw.gov.au/researchpapers/Documents/native-vegetation-clearing-in-nsw-a-regulatory-h/Native%20vegetation%20clearing%20in%20NSW%20-%20A%20regulatory%20history.pdf>

³ <https://www.nsw.gov.au/departments-and-agencies/cabinet-office/resources/nsw-plan-for-nature>

Summary of previous EDO analysis and recommendations

EDO has written extensively on the regulation of native vegetation clearing in NSW. For the purpose of providing background context and highlighting key areas of ongoing concern, in this section we summarise a number of our key submissions and reports from the previous decade and the key issues discussed in each:

- **A legal assessment of NSW biodiversity legislation - A report prepared for the Independent Biodiversity Legislation Review Panel, September 2014⁴**

In 2014, EDO prepared a detailed report for the Independent Biodiversity Legislation Review Panel appointed to conduct a comprehensive review of biodiversity conservation legislation.

The submission highlighted strengths of the now repealed NV Act, including:

- An overarching commitment to prohibit broadscale clearing unless it improves or maintains environmental outcomes;
- The establishment of a scientific methodology, Environmental Outcomes Assessment Methodology (**EOAM**), which provided a rigorous and objective method for assessing clearing applications, moving away from ad hoc decision-making and subjective opinion;
- Red lights - the EOAM was designed to identify 'red lights' or clearing that was unacceptable because it would not meet the test of maintaining or improving environmental outcomes; and
- Property vegetation plans - legally enforceable agreements that enabled landholders to conduct clearing activities on their properties in clearly defined circumstances, while at the same time ensuring the retention of high conservation value native vegetation. This mechanism was able to provide certainty for farmers and included incentives such as financial and technical support for farmers to maintain key 'offset' areas as determined by the EOAM.

The submission also flagged concerns about changes that had been made or were proposed to be made to the framework that would result in:

- An expansion of routine agricultural management activities (**RAMAs**);
- The introduction of self-assessable codes; and
- Disparity in the regulation of clearing on rural and urban land.

Notably, many of the elements that EDO identified as strengths of the NV Act were removed in the 2016 reforms, and elements flagged as concerns (such as self-assessable codes) were expanded in the new framework.

- **Submissions on the 2016 land management and biodiversity conservation reform package and associated regulations⁵**

In 2016 and 2017 EDO made numerous submissions on the various elements of the land management and biodiversity conservation reform package, including:

- Submission on the draft Local Land Services Amendment Bill 2016;⁶

⁴ See

<https://d3n8a8pro7vhm.cloudfront.net/edonsw/pages/1712/attachments/original/1412815355/ELOLegalAssmntNSWBiodivLgEDO.pdf?1412815355>

⁵ All of EDO's submissions relating to the 2016/2017 reforms are available online at:

<https://www.edo.org.au/publication/submissions-on-the-nsw-biodiversity-law-reform-package-2016/>

⁶ [https://www.edo.org.au/wp-](https://www.edo.org.au/wp-content/uploads/2020/08/160628_EDO_NSW_Submission_on_the_draft_Local_Land_Services_Amendment_Bill_2016-1.pdf)

[content/uploads/2020/08/160628_EDO_NSW_Submission_on_the_draft_Local_Land_Services_Amendment_Bill_2016-1.pdf](https://www.edo.org.au/wp-content/uploads/2020/08/160628_EDO_NSW_Submission_on_the_draft_Local_Land_Services_Amendment_Bill_2016-1.pdf)

- Submission on the draft Biodiversity Conservation Bill 2016;⁷ and
- Submission on the NSW biodiversity and land management reforms: Draft regulations and products on public exhibition.⁸

EDO raised substantial concerns with the proposed new land management and conservation framework, including:

- The removal of the ban on broadscale clearing;
- The introduction of new self-assessable codes, that would allow significant amounts of clearing with reduced oversight;
- An expanded range of 'Allowable Activities' (an expanded version of RAMAs);
- The introduction of 'set asides' (essentially quasi-offsets) that side-step any qualitative evidence-based ecological assessment and simply apply arbitrary area based ratios; and
- Discretionary clearing approvals administered by a new Native Vegetation Panel (**NVP**) (and removal of the science-based, objective EOAM).

Ultimately, EDO did not support the reform package as proposed, concluding that the proposed laws were a retrograde step for NSW biodiversity conservation and land management. At the time EDO said *"(w)e believe the proposed reforms are likely to lead to a significant increase in land clearing, and consequently a reduction in native vegetation and biodiversity in NSW. No one can perfectly predict the future, but Queensland provides clear evidence of what can happen when clearing laws are relaxed"*.⁹

While a few minor changes were made to the Bills following public exhibition, the reform package that passed the NSW Parliament was essentially the same as proposed.

- **EDO report: *Restoring the balance in NSW native vegetation law - Solutions for healthy, resilient and productive landscapes***¹⁰

Concerningly, EDO's predictions were correct, and clearing did increase in NSW following the introduction of the new laws. Prior to legislation being passed, a policy review trigger was set for when clearing approvals reached an annualised threshold figure of 20,000 hectares, measured in any six-month period. This policy review trigger was reached in October 2018, just over 12 months after the new laws commenced. The NRC was commissioned to review the appropriateness of the trigger (but not the actual framework itself).¹¹

⁷ https://www.edo.org.au/wp-content/uploads/2020/08/160628_EDO_NSW_Submission_on_the_draft_Biodiversity_Conservation_Bill_2016-2.pdf

⁸ <https://www.edo.org.au/wp-content/uploads/2021/08/Combined-%E2%80%93-Submissions-on-the-NSW-biodiversity-and-land-management-reforms-1.pdf>. This includes submissions on

- Draft Biodiversity Conservation Regulation 2017
- Draft Local Land Services Amendment Regulation 2017,
- Draft Environmental Planning and Assessment Amendment (Biodiversity Conservation) Regulation 2017,
- Explanation of Intended Effect for the State Environmental Planning Policy (Vegetation) 2017,
- Land Management (Native Vegetation) Code,
- Biodiversity Assessment Method (BAM),
- Accreditation Scheme for the Application of the Biodiversity Assessment Method,
- Serious and irreversible impacts guidance, and
- Offsets payment calculator.

⁹ https://www.edo.org.au/wp-content/uploads/2020/08/160628_EDO_NSW_Submission_on_the_draft_Local_Land_Services_Amendment_Bill_2016-1.pdf,

¹⁰ <https://www.edo.org.au/wp-content/uploads/2020/08/EDO-LC-report-2-spreads.pdf>

¹¹ <https://www.nrc.nsw.gov.au/Final%20Report%20-%20Biodiversity%20Reform%20Trigger%20Assessment%20-%20July%202019.pdf>

Other reporting showed elevated clearing rates, compared to before 2016,¹² and ineffective regulation and management of clearing under the framework;¹³ yet no substantial reforms to the framework were proposed in response.

In anticipation of a commitment to review the framework after three years,¹⁴ EDO published its report *Restoring the balance in NSW native vegetation law - Solutions for healthy, resilient and productive landscapes*.¹⁵ The report examined key failings of the framework and made specific recommendations for urgent law reform under the following key themes:

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

However, the previous Government's commitment to undertake a review of the new laws within three years of implementation, went unfulfilled.

• **Submission to the Statutory Review of the native vegetation provisions (Part 5A and Schedule 5A and Schedule 5B) of the Local Land Services Act 2013¹⁶**

The 5-year review of Part 5A of the LLS Act provided another opportunity to raise concerns with the land management and biodiversity framework in place in NSW since 2016. Unsurprisingly, EDO's submission repeated key issues flagged by EDO since 2014.

In particular, our submission highlighted the following key issues:

- Overarching concerns with the land management and biodiversity conservation framework and statutory review process, and in particular:
 - o Part 5A of the LLS Act facilitates broad-scale land clearing

¹² For example, the 2021 NSW State of the Environment reported the rate of permanent clearing of woody vegetation on average from 2017 to 2019 as 35,000 ha each year, compared to 13,000 ha on average each year from 2009 to 2015, see <https://www.soe.epa.nsw.gov.au/all-themes/land/native-vegetation#clearing-rate>

¹³ See, for example, Audit Office of New South Wales, *Managing native vegetation*, 27 June 2019, https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/Final%20report_Managing%20native%20vegetation_WEB%20version.pdf

¹⁴ In the second reading speech for the 2016 Bills, the Hon. Mark Speakman said: "In addition to these standard five-yearly reviews, this Government will also conduct a review of the new laws, supporting policies, programs and funding within three years of implementation. This review will assess the balance in the new system, including the effectiveness of the policy settings and legislative framework, the awareness and acceptance of the community, the native vegetation extent and condition, the uptake of incentives for conservation and other biodiversity conservation actions, as well as the level of development and increased farm productivity. The outcomes of this review will inform Government to make sure that we are delivering balanced development and conservation outcomes as expected". New South Wales, Parliamentary Debates, Legislative Assembly, 16 November 2016 (Mr Mark Speakman, Minister for the Environment, Minister for Heritage, and Assistant Minister for Planning), <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-95278>

¹⁵ <https://www.edo.org.au/wp-content/uploads/2020/08/EDO-LC-report-2-spreads.pdf>

¹⁶ <https://www.edo.org.au/wp-content/uploads/2022/12/221219-LLS-Act-Review-EDO-submission.pdf>

- Current policy objectives are not ambitious enough to reflect the current environmental context in NSW
- Independent analyses have highlighted significant concerns with the implementation of the framework
- Concerns about inappropriate clearing pathways, with over-reliance on allowable activities and self-assessable codes, to the detriment of robust assessment and oversight, and in particular:
 - Without sufficient oversight and safeguards, the scope of allowable activities is too broad;
 - The Native Vegetation Code is an inappropriate regulatory tool for managing impacts on biodiversity in rural areas. It permits broadscale clearing without any robust environmental assessment or approval requirements (although notification or certification may be required), and purported environmental safeguards in the Native Vegetation Code are inadequate.
 - Since the commencement of Part 5A of the LLS Act, only one application had lodged and determined by the NVP. The assumption therefore is that essentially *all* land clearing that has taken place on rural land since the Framework commenced has been undertaken as an allowable activity or under the Code. This raises serious questions as to whether the NV Panel and the overall Framework and approval pathways are operating as intended.
- Safeguards for environmental and vulnerable land are inadequate, in particular:
 - Category 2 – sensitive regulated land is too narrow, it should capture a broader range of sensitive and high conservation value areas;¹⁷
 - Other safeguards established in the BC Act are not operating effectively and are not providing additional protections for rural vegetation, for example:
 - The Biodiversity Offset Scheme is rarely applied (because clearing is not being assessed under the approval pathway), meaning that ‘serious and irreversible impacts’ are not considered and a no net loss standard¹⁸ is not applied.

¹⁷; For example, EDO has recommended expanding Category 2 – sensitive regulated land to include:

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

¹⁸ We note recent amendments to the BC Act require the Government to transition the Biodiversity Offset Scheme to net positive.

- The provisions for Areas of Outstanding Biodiversity are not being effectively utilised.¹⁹
- Failure to finalise the Native Vegetation Regulatory Map (**NVR Map**). The NVR map is a fundamental component of the framework – it is intended to categorise land in order to determine if and where the rules apply. An incomplete map makes an already confusing regulatory scheme even more difficult to navigate for landholders and members of the public alike. Transitional provisions are open to misuse, with the lack of notification requirements means it is difficult to gauge the accuracy of self-determinations about whether the rules apply.
- Monitoring and reporting, and compliance and enforcement is inadequate, and in particular:
 - There is a lack of publicly available information and transparency on what type of clearing is happening where.
 - The LLS Act only requires reporting on aggregated information for code-based clearing that requires notification or certification,²⁰ or an annual estimate of allowable activities.²¹ Reporting estimates or aggregated totals does not provide a comprehensive picture on impacted species and communities.
 - Local Land Services is required to publicly report every year on the estimated rate of allowable activity clearing and clearing authorised under the Code. However, Local Land Services are currently unable to accurately report on estimated rates as the Local Land Services Act does not require landholders to report on allowable activities.
 - Public registers can be used to monitor any potential ‘stacking’ of clearing actions and cumulative impacts of clearing actions on individual landholdings, or at a regional or landscape scale. Compared to the previous regime under the NV Act, there is a significant reduction in information included in public registers under the new framework.²² This is essentially due to the fact that most clearing is now undertaken as code-based clearing, or via allowable activities provisions.
 - While any person is able to commence civil enforcement proceeding in the NSW Land and Environment Court to enforce the law, it is the regulator that has the power to enter premises for the purpose of investigating whether the law has been breached and gathering evidence to support criminal or civil legal action. It can be extremely difficult for a member of the public to determine whether observed clearing is lawful

¹⁹ See EDO’s analysis of AOBV provisions in its 2024 report *Bushfire, Bureaucracy and Barriers - How poorly implemented critical habitat frameworks risk failing the survival and recovery of threatened species and ecological communities*, <https://www.edo.org.au/wp-content/uploads/2024/05/240508-WWF-EDO-Critical-habitat-report-FINAL.pdf>

²⁰ Section 60ZO of the LLS Act provides that Local Land Services is to maintain and make publicly available registers of the following: (a) aggregate information about notices given under section 60X (Notice to Local Land Services of clearing), (b) aggregate information about certificates under section 60Y (Certification by Local Land Services prior to clearing—general), (c) aggregate information about certificates under Schedule 5A to which section 60Y applies, (d) approvals (and any modification of approvals) granted under Division 6, (e) applications for approval (or for modifications of approvals) that have been refused and the reasons for the refusal. Aggregate information about notices or certificates is to be compiled on a regional basis and is not to identify the particular landholder who gave the notice or to whom the certificate was issued (or the address of the landholding concerned).

²¹ *Local Land Service Act 2013*, section 60ZN.

²² Public registers on land clearing maintained by the LLS are available at <https://www.lls.nsw.gov.au/sustainable-land-management/public-registers>

because the NVR Map is still not complete and the public registers that record authorised clearing do not, for the most part, identify the relevant property.

- There is a lack of information on compliance and enforcement activities that have been undertaken. There is no information provided about what penalties have actually been imposed. A lack of public information on effective compliance and enforcement, and the imposing of sufficient penalties to establish deterrence, reduces confidence in the implementation of the scheme.

- **Submission to the Statutory Review of the Biodiversity Conservation Act 2016²³**

For completeness, we also refer the NRC to EDO's submission to the 5-year statutory review of the BC Act. As highlighted in both our submission to the 5-year statutory review of Part 5A of the LLS Act and the 5-year statutory review of the BC Act, it does not make sense to consider each in isolation. Both the BC Act and Part 5A of the LLS Act were introduced as part of the 2016 Land Management and Biodiversity Conservation reform package. Importantly, mechanisms that can support the protection and restoration biodiversity and ecosystem functions in regional landscapes, and enhance value and support for landholders, do not sit solely in the LLS Act; the BC Act and its interaction with the Part 5A of the LLS Act must also be considered by the NRC in undertaking this review.

To that end, it is disappointing that the timing of this Protect and Enhance Review is not better aligned to the BC Act reform process, so that findings and recommendations arising here, can inform a comprehensive suite of reforms that will address systemic challenges across both frameworks.

Key issues for consideration

EDO's previous submissions and reports (summarised above) provide useful analysis of changes made to the regulation of land clearing over the past decade and the current regulatory framework. We acknowledge those submissions were written for specific purposes and recommendations tailored accordingly, however many of the recommendations are relevant to this current Protect and Enhance Review, and should be considered by the NRC.

Additionally, **we wish to draw out the following key issues for specific consideration by the NRC** for the purpose of this Protect and Enhance Review and in considering options to further protect and restore biodiversity and ecosystem functions in regional landscapes, and enhance value and support for landholders:

- **Reinstating a ban on broadscale land clearing**
- **Achieving net positive outcomes**
- **Setting appropriate assessment pathways**
- **Protecting areas of high conservation value**
- **Recognising the biodiversity value of regrowth vegetation**
- **Providing incentives for landholders to conserve and restore landscapes**
- **Finalising the Native Vegetation Regulatory Map**
- **Addressing cumulative impacts**
- **Better embedding climate change considerations into decision-making**

Comments on each of these key issues is provided below.

²³ <https://www.edo.org.au/wp-content/uploads/2023/04/230421-Biodiversity-Conservation-Act-Review-EDO-submission.pdf>

- **Reinstating a ban on broadscale land clearing**

The objects of the former NV Act were as follows:

The objects of this Act are:

- a) *to provide for, encourage and promote the management of native vegetation on a regional basis in the social, economic and environmental interests of the State, and*
- b) *to prevent broadscale clearing unless it improves or maintains environmental outcomes, and*
- c) *to protect native vegetation of high conservation value having regard to its contribution to such matters as water quality, biodiversity, or the prevention of salinity or land degradation, and*
- d) *to improve the condition of existing native vegetation, particularly where it has high conservation value, and*
- e) *to encourage the revegetation of land, and the rehabilitation of land, with appropriate native vegetation,*

in accordance with the principles of ecologically sustainable development.

These objects set a clear intention regarding the regulation of clearing and protection of native vegetation in NSW, including preventing broadscale land clearing, a requirement to improve or maintain environmental outcomes and protection and improvement in condition of native vegetation.

On repeal of the NV Act, these objects were replaced with a single object inserted into the LLS Act, as follows:

“to ensure the proper management of natural resources in the social, economic and environmental interests of the State, consistently with the principles of ecologically sustainable development (described in section 6 (2) of the Protection of the Environment Administration Act 1991)”.

This was a clear backwards step, which removed specific objects to prevent broadscale clearing and protect and improve native vegetation. Further, given that habitat loss from clearing is one of the biggest threats to biodiversity, the misalignment between the objects of the LLS Act and the purpose of the BC Act (set out in s1.3 of the BC Act), and the otherwise poor interaction between those two Acts, has been problematic.

Ahead of the 2023 election, **the NSW Labor government committed to end excess land clearing and strengthen environmental protections.²⁴ That intention must be clear in the objects of any legal framework intended to regulate land clearing.** Objects should also align with international and domestic commitments to conserve and restore biodiversity and ecosystems, including those made

²⁴ These election commitments were highlighted by the NSW Government when it released the *NSW Plan for Nature*, <https://www.nsw.gov.au/departments-and-agencies/dpird/local-land-services/news/nsw-plan-for-nature>

under the Glasgow Leaders Declaration on Forests and Land Use,²⁵ and the Kunming-Montreal Global Biodiversity Framework.²⁶

Further information is provided in the extract from EDO's *Submission to the Statutory Review of the native vegetation provisions (Part 5A and Schedule 5A and Schedule 5B) of the Local Land Services Act 2013* in **Box 1 - Objects**.

Box 1 - Objects: Extract from EDO's *Submission to the Statutory Review of the native vegetation provisions (Part 5A and Schedule 5A and Schedule 5B) of the Local Land Services Act 2013*

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

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

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

- The 2021 NSW State of the Environment report has confirmed that the number of species considered at risk of extinction continues to rise and permanent clearing of native woody vegetation in NSW has increased about three-fold since 2015 and stands at an average of 35,000 ha cleared each year.²⁷
- Severe drought, followed by catastrophic fires and unprecedented floods have greatly impacted the NSW landscape.

The more appropriate policy objective for the LLS Act would be a clear objective to reduce broadscale land clearing and commitment to *improve* biodiversity outcomes. This would also have benefits for climate.

Current policy objectives do not align with other NSW government policies. For example, the NSW Koala Strategy aims to double koala numbers in NSW by 2050,²⁸ yet Part 5A continue to facilitate the clearing of koala habitat (despite some safeguards for 'core koala habitat' identified in an approved Koala Plan of Management).

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

²⁵ <https://webarchive.nationalarchives.gov.uk/ukgwa/20230418175226/https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/>

²⁶ <https://www.cbd.int/gbf>

²⁷ See <https://www.soe.epa.nsw.gov.au/all-themes>

²⁸ NSW Koala Strategy, available at <https://www.environment.nsw.gov.au/topics/animals-and-plants/threatened-species/programs-legislation-and-framework/nsw-koala-strategy#:~:text=Under%20the%20NSW%20Koala%20Strategy%2C%20%2423.2%20million%20is%20being%20invested,fires%2C%20drought%2C%20and%20heatwaves.>

- **Achieving net positive outcomes**

The repeal of the NV Act saw the removal of the legislative requirement that clearing improve or maintain environmental outcomes. There is no equivalent overarching requirement in the LLS Act, particularly for clearing undertaken as an allowable activity or under the Native Vegetation Code (noting, as highlighted in EDO's submission to the 5-year statutory review of Part 5A of the LLS Act almost all clearing is undertaken under these pathways).

We do note however that:

- Clearing assessed by the NVP under Part 5A, Division 6 of the LLS Act does have to apply the Biodiversity Offsets Scheme (**BOS**) which currently requires a 'no net loss' outcome (although recent amendments to the BC Act will require the Environment Minister to transition the BOS to achieve 'net positive' outcomes).
- The Code allows for LLS to specify allowable activities that are permitted in a set aside area, where reasonably necessary to facilitate management of the set aside area and those activities would have no material impact on, or would lead to an improvement in, the biodiversity value of the set aside area. However, we note that there are no requirements for set asides to maintain or improve environmental outcomes in the first place.

Reinstating an overarching requirement for clearing to maintain or improve environmental outcomes (or alternatively, to achieve net positive outcomes, consistent with the BOS) is needed to protect and restore biodiversity and ecosystem functions in regional landscapes. The requirement would need to apply to the framework as a whole, including allowable activities and code-based clearing, and relevant changes would be made to ensure the operative provisions of the framework achieve this requirement.

This would be consistent with recommendations made by the NSW Parliamentary Upper House inquiry into koala populations and habitat in NSW, which recommended that "the NSW Government amend the Local Land Services Act 2013 to reinstate legal thresholds so that its application improves or maintains environmental outcomes and protects native vegetation of high conservation value (Recommendation 33).²⁹

- **Setting appropriate assessment pathways**

EDO is concerned that Part 5A of the LLS Act does not direct clearing into appropriate assessment pathways. Under current policy settings almost all clearing is being carried out as either an allowable activity or under the Native Vegetation Code (or is unexplained); under these pathways there is no assessment of impacts, limited environmental safeguards (e.g. no requirement to achieve net positive outcomes, reliance on set-asides that have no ecological integrity etc.) and inadequate monitoring and reporting. **Allowable activities and code-based clearing should be restricted to genuinely low impact clearing, with clearing otherwise requiring robust environmental assessment and**

²⁹ Legislative Council, Portfolio Committee No .7- Planning and Environment, *Koala populations and habitat in New South Wales*, June 2020, <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2536/Koala%20populations%20and%20habitat%20in%20New%20South%20Wales%20-%20Report%203.pdf>

approval (e.g. by the NVP). By directing more clearing into the approval pathway, clearing would be subject to more robust environmental standards (including the requirement to achieve net positive outcomes via the BOS) and more rigorous monitoring and reporting. Our concerns with each of the current assessment pathways is set in our submission to the 5-year statutory review of the LLS Act, and extracted in **Box 2 – Approval pathways** below.

One other issue that should be considered by this Protect and Enhance Review, is whether the framework should reintroduce an approval pathway providing for landholders to develop property vegetation plans (or similar).

Property Vegetation Plans (**PVPs**) were a key mechanism under the now repealed NV Act. These legally enforceable agreements enabled landholders to conduct clearing activities on their properties in clearly defined circumstances, which provides certainty for farmers; while at the same time ensuring the retention of high conservation value native vegetation; and also facilitating financial and technical support for farmers to maintain key ‘offset’ areas as determined by the EOAM made under that Act (known at the time as ‘incentive PVPs’). Other jurisdictions, such as South Australia and Queensland, retain a pathway for management plans.

Further consideration would need to be given to how the reintroduction of site-specific (or multi-landholder) management plans would interact with and differ from the approval pathway in Part 5A, Division 6 of the LLS Act (including the role of LLS, the role of the NVP, and the application of the BOS).

Box 2 – Approval pathways: Extract from EDO *Submission to the Statutory Review of the native vegetation provisions (Part 5A and Schedule 5A and Schedule 5B) of the Local Land Services Act 2013*

3. Key concerns with approval pathways under the LLS Act

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

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

Allowable activities

Discussion Paper Questions

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

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

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

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

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

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

Other safeguards (for example, the provision that firewood collection, construction timber, public works and gravel pit allowable activities, must not be used where the native vegetation comprises, or is likely to comprise, a threatened species (including their habitat) or ecological community³⁰) depend on the landholder having the requisite ecological knowledge of threatened species and communities.

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

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

Lack of notification requirements and inadequate reporting makes it difficult to determine what percentage of 'unallocated clearing'³¹ is carried out under allowable activity rules.

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

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

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

Discussion Questions

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

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

³⁰ See clauses 14-15, 20-21, Schedule 5A, Local Land Services Act.

³¹ Unallocated clearing can include:

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

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

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

As noted, since the Code was introduced there has been a significant increase in land clearing in NSW, and no commensurate applications for full assessment and approval. Significant clearing is therefore likely occurring under the Code. While the Discussion Paper notes “Invasive native species management is not broadscale clearing” (p17), EDO has serious concerns about the sheer scale of clearing permitted under the INS, Equity and Farm Plan sections of the Code.³²

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

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

- **The Native Vegetation Code is an inappropriate regulatory tool for managing impacts on biodiversity in rural areas.** It permits broadscale clearing without any robust environmental assessment or approval requirements (although notification or certification may be required). There is limited ability for LLS to refuse certification and prevent unacceptable and cumulative impacts on threatened species.³³ The most recent figures (31 October 2022) indicate that total hectares approved for clearing under the Codes is more than 780,000 ha,³⁴ (but not all approved clearing has been carried out).
- **Purported environmental safeguards in the Native Vegetation Code are inadequate,** for the reasons set out below, meaning that the Native Vegetation Code does not adequately manage the environmental risk associated with substantial amounts of clearing undertaken with limited environmental assessment and oversight.
- **The scope of category 2 sensitive land is too narrow.** Code-based clearing cannot be undertaken on category 2 sensitive land.³⁵ While this provides some protection for environmentally sensitive areas, the scope of category 2 sensitive land is limited. For example, currently only ‘core koala habitat’ is categorised as category 2 sensitive land. In practice, ‘core koala habitat’ is limited in scope; any other koala habitat outside of this definition may be able to be cleared under the Native Vegetation Code.
- **Only critically endangered ecological communities are off-limits to code based clearing.**³⁶ Other categories of threatened ecological communities (e.g. vulnerable and endangered) may be able to be cleared under the Native Vegetation Code. For a species to be listed as vulnerable or endangered, it means that the law has recognised the entity to be

³² The Discussion Paper (p18) notes: For the period August 2017 to December 2020 21,364 hectares of authorised native vegetation clearing was carried out on rural regulated land. 60% (13,109 hectares) of this clearing was to manage invasive native species. Clearing under Equity (5,825 hectares) and Pasture Expansion (2,121 hectares) are the second and third most implemented parts of the Code, respectively.

³³ The Auditor-General has raised similar concerns regarding the limited ability for LLS to refuse an application for a certificate even if LLS is concerned about the level of impact of the clearing and how well it will be managed. See Audit Office of NSW, *Managing Native Vegetation*, 27 June 2019, p16.

³⁴ See *Public Information Register - Certificates Under Section 60Y*. The report for the period 09/03/2018 - 31/10/2022 shows the total treatment area for certificates issues section 60Y of the Local Land Services Act 2013 to be 782701.67 hectares, https://www.lls.nsw.gov.au/_data/assets/pdf_file/0004/747031/Public-Information-Register-Certificates-Under-Section-60Y-LMC2018-31102022.pdf

³⁵ LLS Regulation, cl 124(1)(a)

³⁶ *Land Management (Native Vegetation) Code 2018*, clause 7.

at risk of decline and potential extinction. According to best practice regulatory theory, self-assessable pathways such as the Code are appropriate for genuinely low risk activities only – therefore not appropriate for high risk species. The biodiversity implications of this internal risk contradiction must be comprehensively reviewed and addressed to be consistent with the principles of ESD.

- **Set asides are arbitrary and have little ecological basis.** The use of an arbitrary set ratio for determining set asides requirements under the Native Vegetation Code is not ecologically sound. The Discussion paper notes “in most cases set asides are established at a ratio of 1:2” (p17). The Native Vegetation Code does not specify that the vegetation to be set aside should be the same (or of ecological equivalence) and what condition the vegetation should be in.³⁷
- **Protections for threatened species are not stringent enough:** The Native Vegetation Code states that clearing is not authorised under the Code if the person who carries out the clearing harms an animal that is a threatened species, and that person knew that the clearing was likely to harm the animal.³⁸ Framed in this way, ignorance can provide an excuse; a person could claim they did not know clearing was likely to harm the animal. This safeguard could be strengthened by requiring that a landholder ‘ought reasonably to know’ that the clearing would harm a threatened animal species, such as the koala.
- **Maximum clearing caps have expired:** The Native Vegetation Code includes maximum limits on the amount of clearing that can be undertaken under Part 5 – Equity Code in the initial three-year period immediately following publication of the Code.³⁹ This was included as a safeguard to prevent excessive clearing. However, the cap on maximum clearing was not revised once the initial three-year period expired, meaning there is currently no cap on clearing under the equity code.

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

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

Native Vegetation Panel

Discussion Questions

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

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

The Native Vegetation Panel (NVP) is not operating as intended. The NVP is established under the LLS Act. The primary function of the NVP is to assess and determine clearing applications for

³⁷ These types of deficiencies have been identified by the Auditor-General, Audit Office of NSW, *Managing Native Vegetation*, 27 June 2019, p, 21.

³⁸ *Land Management (Native Vegetation) Code 2018*, clause 9.

³⁹ *Land Management (Native Vegetation) Code 2018*, clause 82.

clearing on rural land that cannot be carried out as an allowable activity or under the Native Vegetation Code.⁴⁰ Since the commencement of Part 5A of the LLS Act, only one application had lodged and determined by the NVP.

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

The assumption therefore is that essentially *all* land clearing that has taken place on rural land since the Framework commenced has been undertaken as an allowable activity or under the Code. This casts significant doubt as to whether the NV Panel and the overall Framework and approval pathways are operating as intended, consistent with the stated objectives.

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

- **Protecting areas of high conservation value**

The land management framework can do more to protect areas of high conservation value.

As highlighted elsewhere in our submission:

- We are concerned that policy settings in the framework are not directing high impact clearing into the appropriate assessment pathways.
- The Native Vegetation Code is an inappropriate regulatory tool for managing impacts on biodiversity in rural areas. It permits broadscale clearing without any robust environmental assessment or approval requirements (although notification or certification may be required). There is limited ability for LLS to refuse certification and prevent unacceptable and cumulative impacts on threatened species.⁴¹
- Purported environmental safeguards in the Native Vegetation Code are inadequate, meaning that the Native Vegetation Code does not adequately manage the environmental risk associated with substantial amounts of clearing undertaken with limited environmental assessment and oversight. Again, we refer the Commission to EDO’s submission to the 5-year review of Part 5A of the *Local Land Services Act 2013* (**LLS Act**), including the extract in **Box 1** above.⁴²

⁴⁰ LLS Act, s 60ZF(6).

⁴¹ The Auditor-General has raised similar concerns regarding the limited ability for LLS to refuse an application for a certificate even if LLS is concerned about the level of impact of the clearing and how well it will be managed. See Audit Office of NSW, *Managing Native Vegetation*, 27 June 2019, p16.

⁴² <https://www.edo.org.au/wp-content/uploads/2022/12/221219-LLS-Act-Review-EDO-submission.pdf>

Additionally, other safeguards intended to provide protection to high value land are not operating as intended, including in regional landscapes. For example:

- **Areas of Outstanding Biodiversity Value**

Under the BC Act, the Minister can declare an area as an Area of Outstanding Biodiversity Value (**AOBV**). This mechanism is intended to identify and provide additional protection to areas that:

- are important at a state, national or global scale, and
- make a significant contribution to the persistence of at least one of the following—
 - multiple species or at least one threatened species or ecological community,
 - irreplaceable biological distinctiveness,
 - ecological processes or ecological integrity,
 - outstanding ecological value for education or scientific research.

There is no absolute protection for AOBVs. While it is an offence to damage an AOBV, obtaining a relevant approval is a defence⁴³ (i.e. AOBVs can be cleared with approval). Certain assessment and determination pathways cannot be used in an AOBV,⁴⁴ and development proposals within an AOBV are deemed likely to significantly affect threatened species for the purpose of determining whether a biodiversity development assessment report (**BDAR**) is required.⁴⁵ Notably, AOBVs are categorised as category 2 sensitive land under Part 5A of the LLS Act and therefore the Native Vegetation Code does not apply (clearing of an AOBV on rural land requires approval of the NVP). Under the *Biodiversity Conservation Investment Strategy 2018* AOBVs are prioritised for conservation funding.⁴⁶

However, only four areas are listed as an AOBV in NSW. These areas were originally listed as critical habitat under the now repealed *Threatened Species Conservation Act 1995*. No new areas have been added under new AOBV provisions introduced in 2017. This means that intended safeguards in the land management framework, such as categorising AOBVs as category 2 sensitive land, have limited application due to the limited number of AOBV declarations (and we understand none of the four declared AOBVs occur on rural land, to which the LLS Act applies). That is, the failure to declare AOBVs, including on rural land, is a missed opportunity to use an existing mechanism to provide increased protection for high conservation land (with commensurate financial support for landholders).

We understand the Government is considering the BC Act's AOBV provisions as part of its broader BC Act reforms, and we encourage the NRC and Government to consider how any changes to those provisions could further protect and restore biodiversity and ecosystem functions in regional landscapes.

⁴³ BC Act, s 2.3.

⁴⁴ For example, exempt development must not be carried out on land that is a declared AOBV – per State Environmental Planning Policy (Exempt and Complying Development Codes) 2008, cl 1.16(1)(b1).

⁴⁵ BC Act, s 7.2.

⁴⁶ <https://www.environment.nsw.gov.au/sites/default/files/biodiversity-conservation-investment-strategy-2018-180080.pdf>

- **Serious and irreversible impacts**

The concept of ‘serious and irreversible impacts on biodiversity values’ is a mechanism used to assess the severity of impacts on biodiversity that would be caused by a proposed development or clearing activity. It is embedded in the NSW BOS; that is, the provisions only apply to applications that are required to apply to the BOS and prepare a BDAR. Under the current framework, this could only be triggered in the case of clearing applications made to the NVP under Part 5A, Division 6 of the LLS Act.

Specific provisions create obligations on decision makers once serious and irreversible impacts (**SII**) are identified. For example:

- *Part 4 development under the EP&A Act*: If proposed Part 4 development will have SII on threatened species, it must be refused.⁴⁷
- *Vegetation clearing that requires approval by the NVP*: If vegetation clearing that requires approval by the NVP will have SII on threatened species, it must be refused.⁴⁸
- *Major projects (State significant development (SSD) and State Significant Infrastructure (SSI))*: If a development proposal for a major project will have SII on threatened species, the consent authority must take those impacts into consideration, and is required to determine whether there are any additional and appropriate measures that will minimise those impacts if consent or approval is to be granted.⁴⁹

To date, this safeguard has had limited application on rural land, because, as noted above, the vast majority of clearing is occurring under allowable activities or the Native Vegetation Code. As noted above, there has still only been one application determined by the NVP.⁵⁰

This Protect and Enhance Review should consider options for strengthening these safeguards and ensuring they are properly applied under Part 5A of the LLS Act to deliver the environmental outcomes intended. The Review should also consider options for additional or alternative mechanisms that could provide further protect and restore biodiversity and ecosystem functions in regional landscapes and enhance value and support for landholders.

• **Recognising the biodiversity value of regrowth vegetation**

Part 4 of the Native Vegetation Code provides for the clearing of regrowth vegetation in the following ways:

- **General authorised clearing of regrowth**

Part 4, Division 1 of the Native Vegetation Code generally allows for the clearing of regrowth vegetation (except in the case of trees and shrubs that have (a) regrown following unlawful clearing, (b) have regrown following clearing caused by bushfire, flood, drought or other natural cause, or (c) have regrown after clearing under Part 2 or Part 3 of the Code).

Regrowth includes native trees and shrubs that have regrown since 1 January 1990.

⁴⁷ BC Act, s 7.16(2).

⁴⁸ LLS Act, s 60ZF; State Environmental Planning Policy (Biodiversity and Conservation) 2021, cl 2.14(6).

⁴⁹ BC Act, s 7.16(3) and (4).

⁵⁰ <https://www.nvp.nsw.gov.au/applications/public-register>

The Division does provide some restrictions:

- Clearing of regrowth native vegetation is not authorised on land that is a treatment area under Part 3 (Pasture Expansion) of this Code.
- Clearing of regrowth carried out on Category 2 - vulnerable regulated land or within the buffer distance from a water body may only be carried out only by clearing individual plants and with nil disturbance to soil and groundcover.

Additionally, the Native Vegetation Code does not permit clearing of critically endangered ecological communities or clearing on category 2 sensitive land, so to the extent there is any regrowth in these areas, Part 4 of the Native Vegetation Code would not apply.

- ***Continuation of land management activities***

Part 4, Division 2 of the Native Vegetation Code authorises clearing of native vegetation consistent with a land management activity lawfully undertaken at any time between 1 January 1990 and commencement of the Act (i.e. a continuing use). Land management activity means any management of or impacts on native vegetation, including clearing, undertaken for an agricultural purpose.

The Division requires that:

- Clearing of native vegetation must not exceed clearing consistent with the land management activity.
- Clearing may only be carried out on the area on which clearing consistent with the land management activity was carried out.
- Clearing may cause no more than minimal disturbance to soil and groundcover, unless a greater level of disturbance is consistent with the land management activity.

- ***Continuation of rotational activity***

Part 4, Division 3 of the Native Vegetation Code authorises the clearing of native vegetation that is associated with a rotational land management activity.

Clearing of native vegetation may only be undertaken to an extent consistent with clearing associated with previous implementation of the specified rotational land management activity. Unlike other Divisions in Part 4, there is no requirement that clearing does not disturb soil and groundcover.

We note that, unlike the former NV Act, the current framework does not adopt the concept of ‘protected regrowth’, which allowed regrowth vegetation to be identified and protected.⁵¹

⁵¹ Under the NV Act, protected regrowth was native vegetation identified as protected regrowth:

- in a Property Vegetation Plan
- in an environmental planning instrument
- in a natural resource management (NRM) plan
- in an interim protection order under the NV Act

and any native vegetation grown or preserved with the assistance of public funds granted for biodiversity conservation purposes.

While the framework does provide some restrictions on the clearing of regrowth vegetation, it generally fails to recognise the potential biodiversity and carbon value of regrowth vegetation, particularly where, based on the (arbitrary) 1 January 1990 date, regrowth of 35 years may have significant conservation significance and habitat value equal to that of remnant vegetation.⁵²

This Review should consider how the framework can provide better protection for high value regrowth as a way of protecting and restoring biodiversity and ecosystem functions in regional landscapes.

Below, we highlight examples of how other jurisdictions approach the regulation of regrowth:

- **Queensland**

In Queensland, high-value regrowth vegetation (defined as vegetation not cleared in the last 15 years⁵³) is categorised as Category C land, and is subject to specific clearing controls, including those set out in the *Accepted development vegetation clearing code - Managing category C regrowth vegetation*. Clearing of Category C land that does not comply with the Code is likely to require development approval.

- **South Australia**

In South Australia, clearing of regrowth vegetation is permitted without approval (under Schedule 1, Part 1, clause 9 of the *Native Vegetation Regulation 2017*), where:

- the land on which the vegetation is growing or is situated has been cleared lawfully within 5 years immediately before the proposed clearance occurs; and
- the clearance is necessary to maintain the land so that it can continue to be used for the purpose for which, and to the extent to which, it had been used for that purpose within the immediately preceding 5 years; and
- the vegetation to be cleared consists only of plants or parts of plants that have grown or have regrown in the immediately preceding 5 years.

The proposed Biodiversity Bill intends to retain this provision, with an additional sub-clause that provides that this provision does not apply to native plants that are growing or situated on land that is subject to a biodiversity agreement or conservation agreement.

- **Victoria**

Clause 52.17 of the Victoria Planning Provisions provides that a permit is not required to clear native vegetation that has naturally established or regenerated on land lawfully cleared of naturally established native vegetation, and is:

- less than 10 years old; or
- bracken (*Pteridium esculentum*); or

⁵² See, for example, Hannah Thomas, Jeremy S. Simmonds, Michelle Ward, Teresa J. Eyre, Martine Maron, *The value of regrowth forests and woodlands for threatened fauna species*, Biological Conservation, 2025, <https://www.sciencedirect.com/science/article/pii/S0006320725001685?via%3Dihub>

⁵³ Prior to changes made in 2018, high value regrowth vegetation was defined as native woody vegetation that has not been cleared since 31 December 1989.

- within the boundary of a timber production plantation, as indicated on a Plantation Development Notice or other documented record, and has established after the plantation; or
- less than ten years old at the time of a property vegetation plan being signed by the Secretary to the Department of Environment, Land, Water and Planning (as constituted under Part 2 of the *Conservation, Forests and Lands Act 1987*), and is:
 - shown on that plan as being ‘certified regrowth’; and
 - on land that is to be used or maintained for cultivation or pasture during the term of that plan.

This exemption does not apply to land where native vegetation has been destroyed or otherwise damaged as a result of flood, fire or other natural disaster.

- **Commonwealth**

In general, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) does not explicitly regulate the clearing of regrowth. This is because the EPBC Act does not regulate land clearing in its own right. In the absence of any specific legislative provisions to the contrary, clearing of regrowth is regulated under the EPBC Act if it is has, will have or is likely to have a significant impact on MNES.

Policy guidance can assist in determining whether an action (i.e. clearing of regrowth) has, will have or is likely to have a significant impact on MNES.⁵⁴ Ultimately, whether clearing of regrowth is required to be referred and assessed under the EPBC Act needs to be determined on a case-by-case basis, based on relevant expert scientific assessment.

⁵⁴ Notably:

- The [Matters of National Environmental Significance - Significant impact guidelines 1.1](#) provide no guidance on regrowth.
- Conservation advices for listed ecological communities provide guidance for when a patch of a threatened ecological community retains sufficient conservation values to be considered as a MNES. A number of Conservation Advices for ecological communities include specific statements that revegetated or replanted sites, or areas of vegetation regeneration (regrowth), are included in the nationally listed ecological community if they meet the key diagnostic characteristics or conditions thresholds outlined in the advice. Several examples include:
 - [Conservation Advice - Central Hunter Valley eucalypt forest and woodland ecological community](#)
 - [Coastal Swamp Sclerophyll Forest of New South Wales and South East Queensland ecological community Conservation Advice](#)
 - [Conservation Advice for the Tasmanian white gum \(*Eucalyptus viminalis*\) wet forest](#)

There are two other policy documents that address clearing of regrowth directly:

- [Continuing use - cyclical clearing: Guidance on Agricultural actions exempt from approval under national environmental law](#),⁵⁴ published in March 2020, suggests that ‘continuation of native regrowth clearance at a regular, uninterrupted interval’ (i.e. cyclical clearing) may be a continuous use that is permitted under the continuing use provisions (s 43B) of the EPBC Act (see discussion on exemptions below). In these limited circumstances, regrowth may be able to cleared without triggering the EPBC Act.
- *Brigalow regrowth*: A ‘fact sheet’ titled ‘[Brigalow Regrowth and the EPBC Act](#)’ provides further guidance on Brigalow Regrowth, noting that the listing of the Brigalow ecological community did not distinguish between remnant and regrowth Brigalow. It clarifies that a proposal to clear regrowth Brigalow should be referred for approval under the EPBC Act where: (a) clearing of the regrowth Brigalow requires a permit under Queensland legislation (for example, because it is in a declared area of high conservation); or (b) the regrowth Brigalow is more than 15 years old.

Issues that this Protect and Enhance Review should also consider include:

- The risk of ‘panic clearing’ ahead of any changes to the regulation of regrowth (i.e. landholders clearing high-value regrowth so as not to be captured within any new definition of regrowth)
- The risk of pre-emptive clearing if setting a ‘rolling’ definition of regrowth (i.e. e.g. immediate past 10 years). Landholders may undertake clearing ahead of the specified time period (whether required or not) to avoid becoming protected regrowth.

- **Providing incentives for landholders to conserve and restore landscapes**

EDO strongly supports incentives for landholders for environmental stewardship to help support conservation outcomes (noting, however, that this should complement, and not replace, robust environmental laws that protect biodiversity, natural ecosystems and landscapes).

We refer the NRC to EDO’s 2022 Discussion Paper *Defending the Unburnt: Discussion Paper - Opportunities to expand and enhance environmental stewardship*, which explores opportunities to expand and enhance environmental stewardship.⁵⁵ While written in the context of protecting unburnt areas after the 2019-2020 bushfires, the report provides useful analysis and recommendations for improving environmental stewardship opportunities generally.

The report highlights the following key opportunities:

- Opportunity 1: Utilise existing private land conservation frameworks to protect priority unburnt areas, including by:
 - a) Providing new funding and capacity to drive an uptake in private land conservation, targeted at protecting priority unburnt areas; and
 - b) Aligning private land conservation priorities with bushfire recovery strategies.
- Opportunity 2: Enhance opportunities for First Nations involvement in caring for Country, by:
 - a) Building capacity for First Nations to engage in existing private land conservation schemes;
 - b) Building capacity for First Nations Peoples to engage in existing carbon farming programs;
 - c) Enabling First Nations to lead the design and implementation of new environmental stewardship programs;
 - d) Using shared governance models to enable cooperative decision-making between First Nations and Commonwealth, State and local-level government in the management of protected areas;
 - e) Respecting the contribution that First Nations’ knowledges are making to address environmental challenges in unburnt areas;
 - f) Recognising First Nations benefits as part of co-benefit schemes; and
 - g) Enabling land to be returned to First Nations ownership and management.

⁵⁵ <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Opportunities...-environmental-stewardship.pdf>

- Opportunity 3: Align opportunities for environmental stewardship with broader, global initiatives and goals, including:
 - a) The protection of at least 30 percent of the world's land and ocean by 2030 (High Ambition Coalition for People and Nature 30 x 30 goal);
 - b) Halting and reversing forest loss and land degradation by 2030 (Glasgow Leaders' Declaration on Forests and Land Use); and
 - c) Reversing biodiversity loss by 2030 (Leaders' Pledge for Nature).
- Opportunity 4: Ensure market-based stewardship mechanisms deliver genuine environmental outcomes. In particular market-based mechanisms must include:
 - a) Integrity standards based on best-available science;
 - b) Robust and effective provisions for monitoring, reporting, auditing, compliance and enforcement; and
 - c) Strict limits on offsets: Offsets should only be used in limited circumstances and only after all other mitigation measures in the mitigation hierarchy have been exhausted. There should be clear guidance on what impacts are so unacceptable that they should not be allowed and cannot be offset.

EDO generally supports commitments made in the *NSW Plan for Nature* to expand private land conservation initiatives (Government Action 15), build landholder capability to embed practice change and boost participation (Government Action 20), diversify and expand access to conservation and natural capital investments (Government Action 21), and support growth of robust natural capital markets (Government Action 22), subject to robust integrity standards and effective provisions for monitoring, reporting, auditing, compliance and enforcement. Incentives for landholders should sit alongside a strong regulatory framework (and should not be used as a trade-off for weak environmental regulation).

• **Finalising the Native Vegetation Regulatory Map**

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

However, almost eight years since the commencement of the framework, the NVR Map still has not been finalised, despite numerous independent reports recommending its immediate finalisation.⁵⁶

Currently, transitional arrangements are in place. The published Transitional NVR Map only shows excluded land and the sensitive and vulnerable areas of regulated land (Category 2). The mapping for the vast majority of the state, which is supposed to be categorised as either Category 2 (regulated land) or Category 1 (unregulated land) has only recently been rolled out in draft form and does not

⁵⁶ See, for example:

- Natural Resources Commission, *Final Advice on Land Management and Biodiversity Conservation Reforms*, July 2019, available at <https://www.nrc.nsw.gov.au/completed/land-mngt-reforms>
- Audit Office of NSW, *Managing Native Vegetation*, 27 June 2019, available at <https://www.audit.nsw.gov.au/our-work/reports/managing-native-vegetation>

currently have any legal effect.⁵⁷ While transitional arrangements remain in place, landholders are required to ‘self-categorise’ unmapped land in accordance with transitional arrangements.⁵⁸

An obvious (and appropriate) recommendation for the NRC to make as part of this review would be (yet again) a recommendation that the NVR map be finalised, and implemented as intended. However, we also suggest that the NRC is well-placed to interrogate whether there are any final barriers to the map being finalised and address those accordingly to ensure that the recommendation does not languish with earlier recommendations and finalisation of the map remains incomplete. If needed (i.e. the NRC identifies further barriers to the finalisation of the map), the NRC should consider whether the NVR map remains an appropriate part of the framework or whether alternative options should be considered (for example, abandoning the NVR map and requiring all land to which Part 5A of the LLS Act applies to be regulated under that Part (but retaining the elements already finalised (i.e. excluded land and the sensitive and vulnerable areas of regulated land (Category 2)), so that they can continue to play their regulatory role).

- **Addressing cumulative impacts**

Generally, the Land Management and Biodiversity Conservation Framework does not provide for the appropriate consideration and management of cumulative impacts.

In particular, we note:

- As flagged elsewhere, inadequate monitoring and reporting of allowable activity clearing makes understanding and responding to the cumulative impacts from this component of clearing difficult.
- Clause 16 of the Native Vegetation Code does allow for the LLS to refuse to issue a voluntary code compliant certificate or a mandatory code compliant certificate if, in the opinion of Local Land Services, the cumulative impact of all clearing, including the proposed clearing, is more than would be permitted under any single Part of this Code, would undermine the effectiveness of any condition of this Code or would result in excessive or broadscale clearing. This is an important provision that is intended to prevent ‘stacking’ (i.e. inappropriate clearing under multiple clearing events or parts of the Code that would lead to adverse impacts on biodiversity). However, EDO has previously highlighted several concerns with this clause,⁵⁹ namely:
 - We are concerned that, as drafted, the cumulative impact is in the subjective opinion of the LLS. It is unclear how this important safeguard will be consistently and meaningfully applied.
 - Further guidance, including objective criteria and thresholds for applying clause 16, is needed. This will assist in managing landholder expectations and providing confidence to LLS staff in decision-making.

⁵⁷ See <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/native-vegetation-regulatory-map/draft-native-vegetation-regulatory-map>

⁵⁸ *Local Land Services Act 2013*, section 60F.

⁵⁹ See EDO’s *Submission on the NSW biodiversity and land management reforms: Draft regulations and products on public exhibition*, June 2017, p 44 <https://www.edo.org.au/wp-content/uploads/2021/08/Combined-%E2%80%93-Submissions-on-the-NSW-biodiversity-and-land-management-reforms-1.pdf>

- We also recommend this power be amended and extended to notified clearing (for example Part 3 – Pasture expansion, Division 1), to prevent land-clearing by notification where LLS has a reasonable belief that the Code cannot be complied with.
- The approval pathway could also be strengthened to require better consideration of cumulative impacts when assessing and determining clearing applications (and also development applications under the planning framework). Previous recommendations of EDO include:
 - The assessment of serious and irreversible impacts should be strengthened by requiring the precautionary principle to be applied and cumulative impacts to be considered. For example, clause 6.7(2) of the Biodiversity Conservation Regulation 2017 could explicitly require consent authorities to have regard to the precautionary principle and cumulative impacts on the threatened species or community when assessing extinction risk; and
 - 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.⁶⁰

This Review should consider how the framework could better consider and respond to cumulative impacts of clearing. This should include consideration of how robust strategic planning or strategic environmental assessments could be used deliver environmental outcomes across a landscape, including better managing cumulative impacts, identifying and protecting areas of high environmental value and protecting biodiversity corridors and enhancing connectivity.

• **Better embedding climate change considerations into decision making**

The land management framework fails to effectively embed climate change considerations into decision making processes. Native vegetation has an important role to play in maintaining landscape resilience to impacts of climate change. Additionally, native vegetation serves the crucial function of carbon storage.

Previous EDO recommendations for better embedding climate change considerations into the Land Management and Biodiversity Conservation Framework include:⁶¹

- Insert a new object in the framework to expressly recognise climate change.
- Operationalise the new object, by a provisions that require that in making decisions under the Act, the cumulative contribution of broadscale clearing to NSW’s emissions of greenhouse

⁶⁰ See, for example, EDO’s *Submission on the draft Biodiversity Conservation Bill 2016*, https://www.edo.org.au/wp-content/uploads/2020/08/160628_EDO_NSW_Submission_on_the_draft_Biodiversity_Conservation_Bill_2016-2.pdf

⁶¹ See, for example:

- EDO, *Submission on the draft Local Land Services Amendment Bill 2016*, https://www.edo.org.au/wp-content/uploads/2020/08/160628_EDO_NSW_Submission_on_the_draft_Local_Land_Services_Amendment_Bill_2016-1.pdf
- EDO, *Restoring the balance in NSW native vegetation law - Solutions for healthy, resilient and productive landscapes*, <https://www.edo.org.au/wp-content/uploads/2020/08/EDO-LC-report-2-spreads.pdf>

gases should be recognised and considered, as well as the important role played by native vegetation as carbon sink.

- Require decision-makers to take preventative and precautionary measures; consider species adaptation and resilience needs; and track ecosystem services (for example: gain from carbon management, loss from clearing).
- Update the BC Regulation and the BAM to require the assessment of carbon storage and emissions impacts arising from clearing applications assessed under the BAM.
- Explore and incentivise opportunities for achieving co-benefits – i.e., benefits for both carbon sequestration and for biodiversity conservation – through investment in stewardship and conservation management on private land.

This Protect and Enhance Review should consider how the framework could better embed climate change considerations into the framework to further protect and restore biodiversity and ecosystem functions in regional landscapes, and enhance value and support for landholders.