A legal assessment of NSW biodiversity legislation

A report prepared for the Independent Biodiversity Legislation Review Panel

EDO NSW
September 2014

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:

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Executive Summary

This report comprises a legal analysis of the key biodiversity legislation in NSW, as identified in the terms of reference for the Independent Biodiversity Legislation Review.

The analysis shows that current laws contain a vast number of regulatory tools to address different aspects of biodiversity conservation and management. We find that failure to achieve legislative objectives is largely due to lack of resourcing and coordination for implementation, rather than inadequate legislation.

Importantly, this report also assesses other legislation that adversely affects biodiversity. In order to establish best practice biodiversity legislation, it is essential to examine the broader legislative context to understand current failings and reform opportunities.

The legislative approach to biodiversity conservation has been described as falling into three categories:[1]

> **Category 1**: legislation which is specifically designed to protect biodiversity (for example, threatened species and native vegetation legislation);
>
> **Category 2**: legislation which, although not specifically designed to protect biodiversity, has significant application to biodiversity protection (for example, planning legislation); and,
>
> **Category 3**: legislation that is not designed to protect biodiversity, but the application of which may adversely affect biodiversity and may or may not contain provisions relating to biodiversity (for example, legislation regarding mining, water management, energy or bushfires).

How these three categories currently interact in NSW provides one answer as to why biodiversity is not being effectively protected or managed, and continues to decline. All three categories of legislation have provisions that are relevant to the six themes identified by the Independent Review Panel.

While Category 1 biodiversity specific legislation (the *Threatened Species Conservation Act 1995* and *Native Vegetation Act 2003*) contain positive mechanisms and regulatory tools, implementation is extremely under-resourced and therefore ineffective. In contrast, Category 2 legislation (the *Environmental Planning and Assessment Act 1979*) is having an enormous detrimental impact on threatened species and is being progressively amended to prioritise social and economic interests, and exclude public participation. Furthermore, the lack of overarching strategy and interagency coordination in NSW on the issue of biodiversity conservation has meant that the Category 3 legislation, with some exceptions, is also having an increasing negative impact on threatened species.

Conflicting legislative objectives have prevented positive biodiversity outcomes for many years and continue to do so. This is most vividly illustrated by recent changes to urban tree-clearing rules under the guise of bushfire protection. Other examples include the fact that the dingo can be listed under rural lands protection legislation as a pest whilst a nomination is pending under the TSC Act; and that land subject to a conservation agreement may still be mined.

We note that the current review focuses on the 'Category 1' legislation in NSW:

[1] See Gerry Bates, 2006, *Environmental Law in Australia*, 6th Edition, LexisNexis Butterworths Australia, page 435.

> *The scope of the review will include the Native Vegetation Act 2003, Threatened Species Conservation Act 1995, Nature Conservation Trust Act 2001 and Part 4 Divisions 11 through 13, Part 6A (insofar as it relates to native plants and animals), and Parts 7 through 9 of the National Parks and Wildlife Act 1974. It will include all associated regulations and policies.*

While the Independent Panel does not have a specific mandate to recommend reform of 'Category 2 and 3' laws in and of themselves, there is clear evidence that biodiversity laws cannot be considered in isolation. Categories 2 and 3 are therefore legitimate subjects for Panel inquiry and recommendation, to the extent that they directly impact on Category 1 biodiversity laws, and the direction of whole-of-government law and policy.

To address existing limitations, EDO NSW considers that biodiversity laws must be:

- robust, clearly principled and enforceable;
- science-based and evidence-driven;
- strategic and integrated across the whole of government; and
- supported by good governance, resourcing and accountability.

The laws should be designed to support a positive vision for long-term environmental stewardship in NSW, consistent with the long-standing concept and principles of ecologically sustainable development (ESD).

Whole of government legislative solutions are therefore needed to address the current biodiversity crisis in NSW. This report identifies strengths and weaknesses of current laws and makes recommendations for comprehensive reform of the legislative landscape.

Introduction

As an independent community legal centre specialising in public interest environmental law, EDO NSW welcomes the opportunity to provide legal analysis of current laws that affect biodiversity, to inform the independent review of biodiversity legislation in NSW. This report draws on the extensive experience of EDO NSW in this area, including our discussion papers and law reform submissions, litigation and advice work, and legal guides and fact sheets on biodiversity and related laws.

EDO NSW has analysed and made detailed recommendations for reform of most environmental legislation in NSW over the last 30 years. This report identifies high level themes and issues and includes some broad recommendations. A list of specific submissions on relevant instruments is set out in **Appendix 1**, as a resource for the Independent Panel. Each submission contains further detailed technical recommendations relating to the Act, regulation, assessment methodology or policy in question.

This report comprises a legal analysis of the primary NSW biodiversity legislation, as identified in the terms of reference for the review. The analysis shows that current laws contain a vast number of regulatory tools to address different aspects of biodiversity conservation and management. We find that **failure to achieve legislative objectives is largely due to lack of resourcing and coordination for implementation, rather than inadequate legislation.**

Importantly, this report also assesses other legislation that adversely affects biodiversity. The *Australia's Biodiversity Conservation Strategy 2010-2030* (prepared in 2010) identified at least 14 pieces of legislation in NSW that are relevant to threatened species, and at least 9 relevant government policies. Many Acts have been amended and further policies have been introduced since this time. **A key finding of this report is that to consider only the primary legislation in isolation will not address the current deficiencies in biodiversity protection in NSW**.

Notwithstanding the current independent review process, incremental changes are currently being made to relevant biodiversity legislation and intersecting laws. These changes have the potential to undermine or pre-empt findings of the Independent Panel. We note five examples.

First, native vegetation laws are being weakened. The *Native Vegetation Regulation 2013* is facilitating a negative shift towards 'self-assessable codes', new exemptions for additional 'routine' clearing, and weaker penalties for breaching the law. This is despite the ongoing listing of land clearing as a key threatening process under the NSW *Threatened Species Conservation Act 1995*, and evidence that the existing native vegetation framework had made significant inroads in preventing broad scale land-clearing across NSW.

Second, changes were anticipated to NSW planning laws in 2013, but these failed to pass Parliament. Broadly, these changes proposed to increase economic emphasis at the expense of ecologically sustainable development (ESD); improved strategic planning in some ways; but also reduced input on local developments; and continued to override biodiversity laws, local zoning and other safeguards via 'major project' provisions.[2] The government is currently considering 'non-legislative' ways to progress these reforms.

[2] See further http://www.edonsw.org.au/planning_reforms (2013).

Third, mining laws have been specially amended to prioritise economic considerations over social or environmental considerations, widely seen as a response to the Land and Environment Court's rejection of a coal mine expansion near Bulga village, Hunter Valley.

Fourth, a new state *Offsets policy for major projects* (September 2014) makes offsetting 'mandatory' for major projects, but weakens certain offset standards in the process.

Finally, recent changes to urban clearing rules under the guise of bushfire protection are prompting significant clearing of vegetation in sensitive urban and coastal areas, with devastating effects for local biodiversity.

Three categories of legal approaches to biodiversity conservation

In order to establish best practice biodiversity legislation, it is essential to examine the broader legislative context to understand current failings and reform opportunities.

Bates (2006)[3] describes the legislative approach to biodiversity conservation as falling into three categories:

> **Category 1**: legislation which is specifically designed to protect biodiversity (for example, threatened species and native vegetation legislation);
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Conflicting legislative objectives have prevented positive biodiversity outcomes for many years and continue to do so. This is most vividly illustrated by recent changes to urban tree-clearing rules under the guise of bushfire protection. Other examples include the fact that the dingo can be listed under rural lands protection legislation as a pest whilst a nomination is pending under the TSC Act; and that land subject to a conservation agreement may still be mined.

[3] See Gerry Bates, 2006, *Environmental Law in Australia*, 6th Edition, LexisNexis Butterworths Australia. Bates *op cit* page 435.

This fundamental problem is not unique to NSW. The Australian Network of EDOs recently updated an audit of threatened species and planning laws in all Australian jurisdictions: *Protect the laws that protect the places you love: An assessment of the adequacy of threatened species & planning laws in all jurisdictions of Australia*. We identify strengths and weaknesses of the regulatory approaches in each State and Territory. A clear trend is that even where biodiversity legislation is in place, planning and mining legislation trumps biodiversity protection measures. The full audit report is **Appendix 2.**

This is of significant concern as the Australian Government is in the process of handing over its project assessment and approval powers to the States. This would effectively make State Planning Ministers, including in NSW, responsible for national biodiversity protections (and in some cases international protections) in place of the federal Environment Minister – including assessment, approvals, monitoring and enforcement.[4] It is therefore essential to consider the complete legislative landscape of laws affecting biodiversity in NSW.

Bates concludes:

> *The significance of such categorization is to confirm that biodiversity protection is affected by, and in fact relies upon, discretionary exercises of power by virtually every statutory or government authority in Australia; and that responsibility for biodiversity protection is legally divided among, or conferred upon, many of these authorities creating a complex regulatory web that is uncertain in its application, inefficient in its approach, and ineffectual in adequately protecting biodiversity. Neither the legislation, nor apparently government policy, displays any coordinated or "whole-of-government" approach to biodiversity protection; legislative functions appear to have been conferred upon government agencies in an ad hoc manner without any clear strategic direction for promoting biodiversity conservation.*

This lack of coordination is by no means unique to NSW or Australia. However, other jurisdictions do reveal different experience and approaches. For example, the United States *Endangered Species Act 1973* provides that all federal agencies must ensure that actions authorised, funded or carried out by them are not likely to jeopardise the continued existence of a listed endangered species or "result in the destruction or modification of habitat" of such species.[5] This provision not only applies to federal government bodies which wish to carry out development, but also restricts a federal government authority from issuing a consent which will result in a species becoming extinct.

In addition, the US *National Environment Policy Act* requires environmental impact assessment of *legislative proposals or policy actions* that may significantly affect the environment.[6] There are also draft guidelines to consider climate change under US law.[7]

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[4] This is being done via 'bilateral accreditation' under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). It includes accrediting NSW major project assessment and approval processes, despite a range of legal exceptions and limited rights that apply under these laws (see 'Category 3' in this submission). Accredited practices will include the discredited former Part 3A of the *Environmental Planning & Assessment Act 1979* (EP&A Act), now repealed and in transitional phase-out; and State Significant Development (SSD) and Infrastructure (SSI) processes under the EP&A Act, introduced in 2011. See further: http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements/nsw.

[5] See Section 7 *Endangered Species Act 1973*; US Fish & Wildlife Service (1996) "History and Evolution of the Endangered Species Act of 1973"; and Christman J and Albrecht V "The Endangered Species Act Overview" 1999, Hunton & Williams.

[6] *National Environmental Policy Act 1969* § 102(C), 42 USC § 4332(C), cited in The Hon Justice B J Preston, 'Internalising Ecocentrism in Environmental Law' (2011), paper to *3rd Wild Law Conference: Earth Jurisprudence – Building Theory and Practice*, 16-18 September, Griffith University, QLD, available at http://www.lec.justice.nsw.gov.au/lec/speeches_papers.html#Justice_Preston,_Chi, at 6.

[7] Sabin Center for Climate Change Law, Columbia University, at http://web.law.columbia.edu/climate-change/resources/nepa-and-state-nepa-eis-resource-center/environmental-assessment-protocols-consideration-climate-change.

These are powerful means of integrating environmental factors into decision-making. Such measures bear serious consideration here, given continual pressures to reduce environmental protections in NSW.

In NSW, none of the 3 categories of legislation involve legislation that adequately addresses the significant impacts that climate change will have on biodiversity in NSW. For this reason, **Appendix 3** is the EDO NSW report: *Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis* (2009).

We note that the current review focuses on the 'Category 1' legislation in NSW:

> *The scope of the review will include the Native Vegetation Act 2003, Threatened Species Conservation Act 1995, Nature Conservation Trust Act 2001 and Part 4 Divisions 11 through 13, Part 6A (insofar as it relates to native plants and animals), and Parts 7 through 9 of the National Parks and Wildlife Act 1974. It will include all associated regulations and policies.*

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This analysis therefore focuses on the legislation identified in the terms of reference for the review, and identifies other relevant legislation that impacts biodiversity in NSW. For each Act we identify strengths and weaknesses and make recommendations for reform relevant to the key themes of the review.

Category 1 Legislation

Native Vegetation Act 2003
- Strengths
- Weaknesses
- Recommendations

Threatened Species Conservation Act 1995
- Strengths
- Weaknesses
- Recommendations

Nature Conservation Trust Act 2001
- Strengths
- Weaknesses
- Recommendations

National Parks & Wildlife Act 1974, Part 4 (Divisions 11-13), Part 6A, Parts 7-9.
- Strengths
- Weaknesses
- Recommendations

Category 2 Legislation

- *Environmental Planning and Assessment Act 1979*

<u>Category 3</u> Legislation

- *Fisheries Management Act*
- *Rural Fires Act*
- *Noxious Weeds Act*
- *Crown Lands legislation*
- *Mining legislation*
- *Marine Parks Act 1997*
- *Forestry legislation*
- *Special legislation*

An integrated vision

To address existing limitations, EDO NSW considers that biodiversity laws must be:

- **robust, clearly principled and enforceable;**
- **science-based and evidence-driven;**
- **strategic and integrated across the whole of government; and**
- **supported by good governance, resourcing and accountability.**

The laws should be designed to support a positive vision for long-term environmental stewardship in NSW, consistent with the long-standing concept and principles of ecologically sustainable development (ESD).[8]

The regulatory framework should include, for example, strategies and tools to **maintain and improve defined environmental outcomes**, including biodiversity values; as well as monitoring, evaluation and reporting mechanisms to track and calibrate progress.

ESD's aim of properly *integrating environmental considerations* into decision-making, and principles to achieve this, have been articulated in NSW laws for over 20 years.[9] Beyond this, there is limited emphasis and few specific legislative requirements to actually implement ESD. The NSW Land and Environment Court has been vital in developing ESD jurisprudence and practice, but there has been recent proposals to remove ESD altogether.[10] ESD remains relevant to the NSW context, as recognised in submissions to the 2012-13 planning review.[11]

Biodiversity protection must be **integrated** across all decision making processes. Biodiversity considerations must be supported and integrated in other regulatory frameworks such as planning laws, fisheries management, native vegetation protection, public and private forestry, noxious weed control and bushfire management.

To assist this integration, an independent, statutory **Biodiversity Commission** or similar body should be created.[12] This focus of the Commission should be on identifying, developing

[8] For example, ESD has been defined nationally as: *using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.* See *National Strategy for ESD* (1992), at www.environment.gov.au/about-us/esd/publications/national-esd-strategy-part1.

[9] Including in 'objects' of biodiversity, planning, pollution and other environmental management laws. See for example, *Protection of the Environment Administration Act 1991* (NSW), s 6; and *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 3-3A.

[10] Nevertheless, in assessing the ongoing validity of ESD aims, the 10-year review of the EPBC Act (Cth) (Hawke et al., 2009) acknowledged that there is no other credible, integrative policy framework.

[11] More than half of public submissions supported ESD as the overarching planning law objective (See NSW Department of Planning & Infrastructure, *Planning White Paper* submissions analysis, 2013).

[12] See for example the Biodiversity Commissions in Austria, Mexico and Costa Rica; New Zealand's Parliamentary Commissioner for the Environment; and the UK Natural Capital Committee. Although the

and implementing a whole of government approach which ensures biodiversity protection is genuinely a *fundamental consideration* in planning and conservation decisions.[13]

Comprehensive **strategic environmental assessments** should be legislated, resourced and prioritised, to maximise the clear advantages of 'landscape scale' biodiversity conservation. Assessment at a broad scale can better take into account cumulative impacts of a number of developments, better plan for strategic biodiversity corridors and enhance connectivity.

Our top 20 general recommendations are summarised below.

Summary of general recommendations

Robust, principled and enforceable legislation

1. **Strong, enforceable legislation** designed to protect biodiversity, including native vegetation and threatened species, is crucial in ensuring adequate environmental protections in NSW. Core provisions must be clear in legislation, not relegated to unenforceable policy documents.
2. Discussion about 'achieving balance' and 'triple bottom line' outcomes must be evidence-based and make any value judgements explicit, and be guided by the concept of **ecologically sustainable development** (ESD).
3. Legislation must clearly state that NSW has an obligation to **maintain or improve environmental outcomes**, including facilitating the recovery of threatened species. Recent proposals would significantly weaken protections for native vegetation. EDO NSW supports a continued ban on broadscale clearing unless it maintains or improves environmental values in the *Native Vegetation Act 2003*. The same standard should apply to vegetation clearing across all land tenures and uses, both urban and rural.
4. The current **objectives** of the *Threatened Species Conservation Act* must remain paramount and be **operationalised** by decision-makers. This includes the aspirational goal of protecting all species and populations in NSW. Legislative objectives should specify the need to recover species and populations, not just maintain them.
5. Any activity-based **exemptions must be strictly limited**, for example Routine Agriculture Management Activities (RAMAs) should be clearly circumscribed; and any clearing undertaken through RAMAs should be recorded to enable monitoring, evaluation and reporting.
6. Biodiversity laws must have **open standing provisions** for third parties to enforce breaches.
7. Financial incentives to encourage **private land conservation** need to be legislated, for example, Nature Conservation Trust agreements should to have equal access to tax relief, as for Voluntary Conservation Agreements.

Science-based and evidence driven

8. Biodiversity decision making processes must be robust, transparent and science-driven, and be underpinned by **objective scientific assessment methodologies**.
9. The largest developments with the most significant potential impacts must be subject to **rigorous and comprehensive assessment,** and not exempted from environmental assessment requirements. Safeguards must ensure that development in sensitive environmental and heritage areas is not exempt from proper assessment.
10. **Listing of categories** of threatened species and communities must be based on **scientific** reasons. Scientific expert committees must continue to be independent.

Australian Government recently established a Biodiversity Commissioner, the role is limited and non-statutory. See further ANEDO (including EDO NSW), *Submission on Draft Terms of Reference for a Threatened Species Commissioner (Commonwealth)*, April 2014..

[13] ESD principles include 'that conservation of biological diversity and ecological integrity should be a fundamental consideration' in decision-making.

11. Any framework for **prioritisation between listed species** should be based on scientific considerations and also involve public consultation over what we try to protect and why. Any such Priority Action Statements must be a mandatory consideration in strategic planning and development assessment.
12. Biodiversity **offsets** must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts. Any use of offsets must be based on a national standard that is legally enforceable and uses transparent and sound ecological studies and principles, such as 'like for like' and the avoidance of the use of indirect offsets. Environmental 'red flag' areas must be maintained, recognising that some values cannot be offset. Offsets must be maintained in **perpetuity**, not subject to perpetual trade-offs.
13. Biodiversity laws and related decisions must explicitly **consider and plan for climate change** impacts, using adaptation plans, buffers and adaptive management to enhance ecosystem resilience.

Strategic and integrated across government

14. Biodiversity protection must be **integrated** across all decision making processes. Biodiversity considerations must be supported and integrated in other regulatory frameworks such as planning laws, fisheries management, native vegetation protection, public and private forestry, noxious weed control and bushfire management.
15. To assist this integration, an independent, statutory **Biodiversity Commission** or similar body should be created. This focus of the Commission should be on identifying, developing and implementing a whole of government approach which ensures biodiversity protection is genuinely a *fundamental consideration* in planning and conservation decisions.
16. Comprehensive **strategic environmental assessments** should be legislated, resourced and prioritised, to maximise the clear advantages of 'landscape scale' biodiversity conservation. Assessment at a broad scale can better take into account cumulative impacts of a number of developments, better plan for strategic biodiversity corridors and enhance connectivity. For example, the **Strategic Regional Land Use Policy** needs to be strengthened and expanded to include assessment and protection of high conservation value land, as was first intended.
17. **Protected areas** (both terrestrial and marine) must be managed for conservation and only allow activities that are consistent with conservation goals. For example, activities must not be exempted in marine sanctuary zones; conservation areas should not be logged; and recreational shooting should not be permitted within the national park estate.

Good governance, resourcing and accountability

18. **Ecological consultants** that perform environmental impact assessments (EIA) should be professionally accredited under a recognised industry or government scheme.
19. NSW needs **strong, well-resourced, environment-focussed agencies** that are responsible for ensuring that biodiversity and conservation laws are implemented as intended. EDO NSW has consistently argued that it is incompatible to rely on agencies charged with facilitating resource use resource-use to achieve conservation outcomes. A biodiversity levy (applied to all development requiring clearing) should be used for funding the institutional reforms addressed in this paper, as well as in providing ongoing financial incentives for on-ground conservation work.
20. Systematic **monitoring, evaluating and reporting** will aid long-term effectiveness and adaptive biodiversity management. NSW agencies should lead and collaborate on a system of **environmental accounts**, and reinvigorate more comprehensive, accurate and genuine **State of the Environment** reporting.

'CATEGORY 1' legislation

This section examines the *Native Vegetation Act 2003*, *Threatened Species Conservation Act 1995*, *Nature Conservation Trust Act 2001* and parts of the *National Parks & Wildlife Act 1974*.

Native Vegetation Act 2003

The *Native Vegetation Act 2003* (**NV Act**) and *Native Vegetation Regulation 2005* and 2013 (**NV Regulation**) have been vital in reducing broadscale land clearing in rural NSW,[14] and therefore are an essential element of biodiversity conservation legislation.

EDO NSW has been involved in the development of the native vegetation legislation, regulation and assessment methodology since 2003.[15] We provided legal advice to environment groups negotiating the legislation and regulation, presented workshops across NSW to obtain community feedback about the proposed laws, and have worked constructively with the NSW Government to provide ongoing feedback through a range of formal and informal consultation processes and expert technical workshops.

Strengths of the NV Act

The Act was brought in to address regulatory failure. The NV Act was introduced in 2003 to address serious problems associated with the previous *Native Vegetation Conservation Act 1997* and 'SEPP 46', particularly in terms of the exemptions that were allowed for clearing, for example of 2 hectares (ha) and 7 trees per year.

It is clear that the NV Act has been an improvement on previous regimes, especially in its overarching commitment to prohibit broadscale clearing unless it *improves or maintains environmental outcomes*. Moreover, the introduction of a scientific methodology - the Environmental Outcomes Assessment Methodology (**EOAM**) - to assess applications was a quantum leap forward as it instituted a rigorous process predicated on science, not based on subjective opinion and ad hoc decision-making. EDO NSW submits that these foundational tenets of the Act must be retained – and their application resourced – especially in the context of burgeoning climate change and increased biodiversity loss and decline in NSW.

We therefore recommend that a strong legislative ban on broadscale clearing is continued, and that any changes to the regulation or methodology must be justified ecologically, rather than in terms of administrative streamlining. Any weakening of environmental outcomes in the regulation or EOAM cannot be supported as it would be inconsistent with the objective of the Act (discussed below). Improving or maintaining environmental outcomes is consistent with long-term sustainability and resilience of NSW communities, economy and environment.

[14] See M.F. Taylor & C. Dickman, *NSW Native Vegetation Act saves Australian Wildlife*, WWF (2014).

[15] Previous submissions on native vegetation are available at: http://www.edo.org.au/edonsw/site/policy_submissions.php#3. For example, see: Submission on the Environmental Outcomes Assessment Methodology under the Native Vegetation Act 2003, 4 February 2011; Draft Ecological Harvesting Plan Guideline for Endangered Ecological Communities 16 August 2010; ANEDO Submission on Australia's Native Vegetation Framework - Consultation Draft 31 March 2010; Review of the Native Vegetation Act 2003 02 October 2009; Submission on the review of the Environmental Outcomes Assessment Methodology 29 April 2009; Submission on the Draft Native Vegetation Regulation 2004 and the Environmental Outcomes Assessment Methodology, January 2005; Productivity Commission Draft Report into the impacts of native vegetation and biodiversity regulations January 2004; and Productivity Commission Inquiry into Impacts on Native Vegetation July 2003

Clear legal standard and objective

A key strength of the Act is the clear legislative objective "to prevent broadscale clearing unless it improves or maintains environmental outcomes." This sets a clear legal test that is applied objectively through the use of a scientific methodology – the EOAM.

The objectives of the NV Act in section 3 remain valid and should be retained. Moreover, EDO NSW strongly supports the retention of the overarching requirement that the objects of the Act must be exercised 'in accordance with the principles of ecologically sustainable development' (**ESD**). This appropriately accords ESD a higher status than the *Environmental Planning and Assessment Act 1979* (**EP&A Act),** which regulates approvals for clearing native vegetation in urban areas not covered by the NV Act. The EP&A Act merely lists ESD as one factor to be balanced against other considerations.

Environmental Outcomes Assessment Methodology

The EOAM gives the regulatory regime for native vegetation management in NSW integrity, credibility, objectivity and transparency. It is a fundamental strength of the scheme. It is comprehensive in that it assesses four impacts of clearing (ie, soil, salinity, water and biodiversity). It ensures decision-making is based on science and is objective. This addresses significant concerns with the previous system where decisions depended on subjective opinions of regional officers rather than a consistent, science-based standard.

Red lights

A key function of the EOAM is that it was originally designed to identify 'red lights' or clearing that will not meet the test of maintaining or improving environmental outcomes. Unlike later iterations of the tool (developed for biobanking, biocertification, and most recently offsetting for major projects – discussed further below), the EOAM under the Native Vegetation Regulation identifies actual red lights that mean the clearing is unacceptable. The other tools allow for red lights to be undermined and negotiated (for example by altering definitions of vegetation condition, and significantly broadening permissible offsets by not requiring 'like for like' offsetting), and do not therefore represent true 'red lights' that provide adequate or certain protection.

Use of incentives – Property Vegetation Plans

Property Vegetation Plans (**PVPs**) are a key mechanism under the Act. These legally enforceable agreements enable 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. The promotion of private conservation measures is crucial to protecting remnant vegetation as it is estimated that 35-40% of all remaining forests in NSW occur on private land.[16] Due to the limited availability of public land for habitat protection, private landholders often hold the key to the survival of many vegetation types.

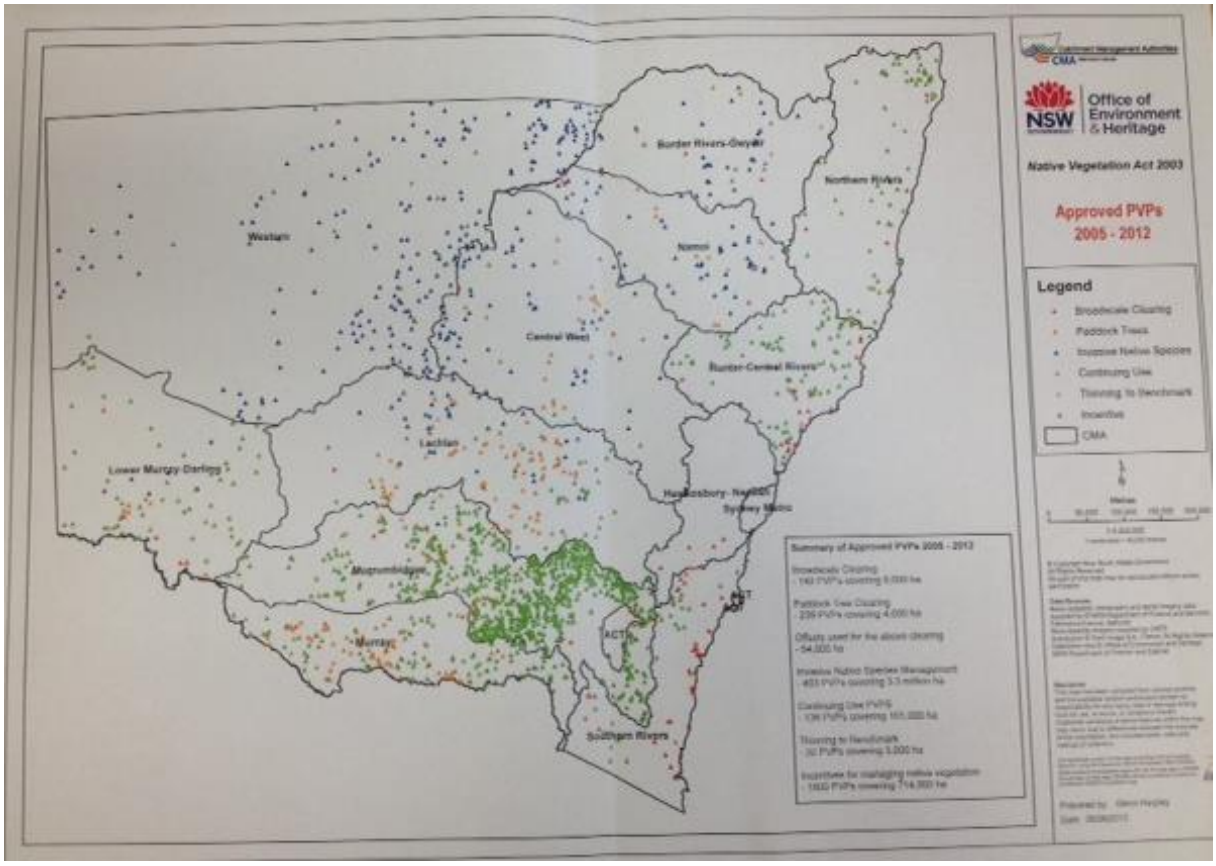
The PVP process has been criticised by some for being too slow and complicated. However, if this is indeed the case, this is a result of implementation issues rather than the tool itself.[17] There is clear evidence that incentive PVPs can be efficiently established, where the

[16] Prest, James. 2004. The forgotten forests: the regulation of forestry on private land in New South Wales 1997-2002. In Conservation of Australia's Forest Fauna, second edition 2004 Ed D Lunney, Royal Zoological Society of New South Wales.

[17] We note however that feedback from CMAs during 2013 government consultations does not indicate a significant backlog of PVPs awaiting action (see 'Other reform proposals' below).

appropriate regional body has the will, resources and expertise. As indicated by the following map, the Murrumbidgee CMA for example worked successfully with landholders to put in place a number of incentive PVPs (indicated by the dense cluster of green dots in the south).

Figure 1



Practical Flexibility

In addition to providing different types of PVP options for farmers, the NV Act and regulations provide flexibility for landholders. This is a strength that has not been communicated well to landholders.

The approval requirements of the NV Act only apply to the clearing of remnant or protected regrowth vegetation. This means a landholder is free to clear any other regrowth vegetation on their property without needing an approval. Furthermore, the Act was designed to give farmers the freedom to continue carrying out legitimate day to day routine agricultural management activities (RAMAs), without the need for any approval. The Act has also always contained a practical list of activities that are exempt from the need for approval. It was never the intention that the Act would restrict clearing of all native vegetation, and it has not done so. Local Land Services (formerly CMAs) must be properly resourced and trained to assist landholders to understand this practical flexibility.

Satellite monitoring

A further strength of the NV regime is the monitoring of clearing by satellite. Far more detailed information about clearing and landscape change is now available, albeit with some time delay. As shown in the recently released Native Vegetation Report Card, evidence of

change in vegetation cover over time can be accurately established.[18] EDO NSW is concerned that the capacity to undertake this monitoring may become limited in the future if appropriate agreements to access high resolution satellite data are not developed.

Weaknesses of the NV Act - Implementation

Equity between rural and metropolitan protections

There is a significant disparity between environmental assessment for clearing of native vegetation under the NV Act and other regimes. This is nowhere more telling than in areas where the NV Act does not apply, particularly in metropolitan and 'urban areas'. Regulation of clearing of native vegetation in urban areas has been described as 'disjointed, haphazard and confused, unable to escape the planning system's traditional addiction to unsustainable development'.[19] As noted, urban clearing is not subject to the same 'red lights' as applied by the EOAM to native vegetation clearing in rural areas.

In urban areas (and other areas where the NV Act does not apply), major clearing is primarily assessed through the EP&A Act under the transitional Part 3A, Part 4 or Part 5.[20] These contain procedural requirements that must be followed, including environmental impact assessment and mandatory relevant considerations, but do not mandate prohibitions of approval for clearing of high conservation value remnant native vegetation and Endangered Ecological Communities (**EECs**). Decision-makers are free to give greater weight to economic and social considerations even where clearing will have an adverse impact on native vegetation and endangered species. Furthermore, there is no equivalent to the 'maintain or improve' test.

This is in contrast to the EOAM under the NV Act, which requires that clearing activities are prohibited outright if they are in EEC's of good condition - imposes ie, 'true' red lights, and mandates offsets to counterbalance any clearing that is allowed. EDO NSW submits that this disparity in approaches is not justified, especially where endangered vegetation in urban areas is under more pressure from development and often represents the last pockets of previous vegetation types in the region, such as Cumberland Plain Woodland in Sydney.

As a result, EDO NSW proposes that strong consideration must be given to extending the Act to urban areas of NSW – ie, urban development should be subject to a 'maintain or improve' test. At the very least, the NV Act should be extended in scope to apply to proposed clearing in all EECs and the habitat of threatened species, regardless of which zone they occur in. This will ensure that threats to endangered vegetation types are subject to robust scientific assessment, assisting the maintenance or improvement of environmental values in NSW. All clearing should therefore be subject to a legislative 'maintain or improve environmental outcomes' test. This will improve equity, consistency and coherence.

Expansion of exemptions and exclusions

Under the previous native vegetation regime, it was abuse of the clearing exemptions within the Act that led to excessive broadscale clearing in NSW.[21] For this reason, it is imperative

[18] Available at: http://www.environment.nsw.gov.au/vegetation/index.htm

[19] Farrier, Kelly and Langdon, 'Biodiversity offsets and native vegetation clearance in New South Wales: The rural/urban divide in the pursuit of ecologically sustainable development' (2007) 24 *EPLJ* at 427.

[20] We note that Tree Preservation Orders applied by Local Councils under Local Environment Plans also play a role in regulating urban clearing.

[21] Robyn L Bartel, Compliance and complicity: An assessment of the success of land clearance legislation in NSW, (2003) 20 EPLJ 81.

that the NV Act is structured in a way that avoids previous failures and ensures that the key object of the Act – to 'prevent broadscale clearing' – is achieved.

EDO NSW has major concerns regarding the continued expansion of routine agricultural management activities (RAMAs) under the NV Act. The Wentworth Group Report which preceded the introduction of the NV Act, recommended that the new native vegetation regime contain only three limited exemptions, namely clearing for, 'the construction of a dwelling; carrying out routine farm activities, such as collecting firewood for personal use, fencing material and reducing bushfire hazards; and vegetation management in accordance with a certified PVP.'[22] However, the NV Act as drafted contained 9 very broad categories of RAMAs, some of which go beyond what would reasonably be understood as 'routine' parts of agricultural management, such as infrastructure projects undertaken by councils which are clearly not routine agricultural or management activities.[23] The list of RAMAs was further expanded in 2013, and further exemptions are likely (as discussed further below).

Many of the current RAMA buffer zones are excessive, which allows farmers to incrementally change the land use of their properties. The generous buffer zones for RAMAs in the regulations, effectively allow for clearing to take place in order to facilitate land use *change*, rather than merely to continue or maintain an existing farming practice. In our experience, the (expanding) definitions of RAMAs create significant potential for landowners seeking to gradually transform the use of their land to activities that require an 'open paddock' landscape (such as grazing). It is difficult to review the appropriateness of RAMAs without taking these buffer zones into account. The test that RAMA clearing must be "to the minimum extent necessary" has not be tested, and to our knowledge is not monitored, so there is no way of knowing whether the limit is complied with.

Finally, the difficulties seen in enforcement and compliance under the Act (discussed in further detail below) are inextricably linked to the way in which RAMAs are designed. On the ground, it has been observed that authorised officers responsible for administering the enforcement provisions of the Act, upon entering land, have difficulty determining whether certain clearing that has occurred was in fact undertaken within the exceptions permitted by the definition of RAMAs in section 11.[24] (This is considered further under 'Compliance and Enforcement' below.)

In light of the above, EDO NSW submits that the current operation of the RAMA provisions is not achieving the Act's objectives.

Self-assessable codes

The legislative ban on broadscale clearing unless it maintains or improves environmental outcomes is the fundamental test in the NV Act and we view recent proposed reforms as weakening this test. The proposed self-assessable codes for clearing paddock trees, invasive native scrub and for thinning represent a significant departure from the Act. The proposed self-assessable codes are not capable of being effectively applied, monitored and enforced, and therefore are not capable of adequately implementing the "maintain or improve environmental outcomes" test as required by the Act.[25]

The potential scale of clearing under the codes goes far beyond what was originally envisaged to be covered by RAMAs. The *Regulatory Impact Statement* (**RIS**) produced for

[22] 'A new model for landscape conservation in NSW', Wentworth Group of Concerned Scientists, 2 February 2003, p 5.
[23] Section 1(1)(i), NV Act 2003.
[24] Source: EDO Community legal advice line and CMA interviews.
[25] See EDO NSW, *Submission on the Draft Landholder Guides and Draft Orders to implement self-assessable codes under the Native Vegetation Regulation 2013*, May 2014.

the *Review of the Native Vegetation Regulation* in 2012 stated that "*it is very difficult to determine the number of times that clearing is undertaken under a RAMA. The Native Vegetation Report card does not report on activities exempted or excluded from the Act*".[26] Notwithstanding this fact, there is no limit to the number of notifications allowed under each clearing type under the proposed codes, and the proposed notification requirements lack critical details. The implication of this is that significant areas can be progressively cleared simply by submitting multiple notifications. Misuse of the codes would potentially be a reintroduction of broadscale clearing in NSW. This would also undermine the confidence of landholders seeking to be responsible stewards of their land.

The potential for misapplication of the codes is high in the absence of technical input. The effective implementation of the codes requires a high degree of technical knowledge that many landholders may not possess. This applies to the level of species and vegetation community identification required, the best practice management approaches for invasive native species and the identification of habitat features in paddock trees, to use some examples. We understand that a number of issues arose during the field trials of the proposed codes, for example, in relation to accurately identifying tree species on site.[27] We understand a report of the trials has been drafted. We recommend that the Panel consider this report, and that the report be made public.

The draft Thinning Guidelines currently state that "*if threatened tree species or woody shrubs are present you **may** need to apply to the LLS*" (emphasis added) for a PVP. This is inappropriate and landholders should not be permitted to thin threatened species without specialist advice. This approach also highlights EDO NSW's concern about the potential impacts on threatened species that would arise from landholders being unable to accurately identify these species. By removing the need for external assessment, the risk of threatened species being cleared is greatly increased. Even training offered by the LLS is not a prerequisite to self-assessed clearing. The suggestion that providing photographs of threatened species will address this problem is impractical and high risk. Without a genetic analysis, many species can only be identified at certain times of year, for example when they are in flower, and many species consist of individuals with differing morphology. Comparing a tree or shrub to a single image of species is an inadequate identification technique.

The proposed codes will be difficult, if not impossible, to enforce due to the inadequate requirements for expert input, record keeping and notification, combined with the vague nature of many provisions.

There is inadequate evidence to justify the need for codes. For example, in relation to INS clearing EDO NSW noted in 2012:

> *The management of INS under the current scheme has permitted the clearing of a significant amount of woody vegetation in NSW. This is supported by the map of PVPs provided by OEH, which shows 3.3m ha of INS clearing out of a total of 4.2m ha under PVP (including 714,000ha under incentive PVPs). The mean annual loss of woody native vegetation in NSW from 2006-2010 was 87,740ha. Comparison of the five years before the implementation of the NV Act (2000-2004) with the five years post the implementation of the NV Act (2006-2010) shows there has been a 20% increase in the total loss of total native woody vegetation in NSW AND a 5% drop in the total amount of native vegetation cleared for the first time.* [28]

[26] Regulatory Impact Statement, 2012, p11.
[27] Feedback received from a community representative who attended a field trial.
[28] Analysis of the Land clearing rates from the Commonwealth Department of Climate Change and Energy Efficiency by Dr Phil Gibbons. See: National Greenhouse Gas Inventory - Kyoto Protocol Accounting Framework: http://ageis.climatechange.gov.au/QueryAppendixTable.aspx. The full EDO NSW submission is available at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/349/attachments/original/1380680437/120824native_vegetation_regulation.pdf?1380680437 (24th August 2012).

The current system has therefore permitted extensive clearing of INS. The need for an INS self-assessable code is therefore unclear. If lack of awareness or understanding is the issue, this can obviously be addressed in other ways.

In order to ensure that the Act continues to effectively prevent broadscale clearing unless it maintains or improves environmental outcomes, EDO NSW submits that instead of experimenting with self-assessable codes, the NSW Government should improve the current PVP process, applying the EOAM. This involves providing better resources and staff for Local Land Services (**LLS**) so that PVPs can be drawn up with expert advice in a timely manner. It was never intended that PVPs would take months to negotiate. Increasing resources to better administer the Act would mean that thinning and INS PVPs could be put in place much faster, whilst not compromising the environmental objectives of the regulatory regime.

Other reform proposals – weakening the Regulation

During the *Review of the Native Vegetation Regulation 2012*, a number of reforms were proposed that signal an intention to weaken of the Act. Proposed changes to the regulation - such as the proposed measures to increase the use of RAMAs and facilitate the clearing of small clumps and paddock trees - signal a return to a weakened system that permits incremental loss of native vegetation. The fact that the data shows that small patches on the coast and paddock trees further west require approval[29] (whereas previously could be cleared by 'stacking' exemptions) is what differentiates the current scheme from previous schemes that failed to protect native vegetation.[30]

Generally speaking, the changes that are intended to improve efficiency involve:

- relaxing of monitoring criteria and reporting processes,
- a significant shift from protecting remnant vegetation to allowing increased clearing with revegetation options, and
- providing fast-track assessment pathways.

EDO NSW is concerned that first, the evidence base to justify these specific changes is unclear (for example, feedback from CMAs during the consultation does not indicate that there is a significant backlog of PVPs awaiting action); and second, evidence has not been presented to guarantee that the same level of environmental protection will be maintained.

Case study - NV Regulation changes

The changes (proposed in 2012) to the NV Regulation focussed on expanding the scope of clearing that can be done without requiring formal approval, ie, clearing under routine agricultural management activities (RAMAs). Key proposed changes included:

- A new definition of landholding (cl 3)
- Extension of private native forestry (**PNF**) to certain Crown land (cl 3)
- Replacement of the requirement to consult with the Natural Resources Commission (NRC) on changes to the assessment methodology with a broad public consultation requirement (cl 17)

[29] In the OEH Sydney workshop (2012), data was presented indicating that a high number of applications related to areas of less than 2ha or to single paddock trees. For example, it was indicated that 42% of applications in Central CMAs and 67% of applications in Coastal CMAs were for areas less than 2ha; and in the Lachlan and Murray CMAs the most prevalent type of PVP was for paddock trees. EOAM Review. PADACS Data Analysis, OEH workshop, 31st July 2012.

[30] See: *Performance audit: regulating the clearing of native vegetation,* Audit Office of New South Wales, 2002 for a summary of the failures of the previous regime.

- New exemption for broadscale clearing for conservation purposes (cl 19)
- Changes to process for amending PNF code of practice (cl 23)
- A suite of new routine agricultural management activities (RAMAs):
  - New meaning of rural infrastructure (cl 20)
  - Reference to clearing to the "minimum extent necessary" under RAMAs (cl25)
  - Slight rewording of infrastructure buffer distances (cl 26)
  - Changes to obtaining construction timber – removal of requirement to use timber within 18 months and undertake restoration (cl 27)
  - New RAMA for any permanent boundary fence (cl 28)
  - New RAMA for construction of a shed (cl 29)
  - Telecommunications RAMA applies to all land (cl 32)
- A new group of RAMAs that allows clearing without approval if the clearing is done in accordance with a code of practice (made by publicly exhibited Ministerial orders – cl 37) in relation to:
  - Clearing of feral native plant species (cl 33)
  - Clearing of invasive plant species (cl 34)
  - Clearing for environmental works (cl 35)
  - Thinning of native vegetation (cl 36)
- Amendments to activities on PNF PVP land (Division 4)
- RAMAs have also been extended in relation to clearing for:
  - 'dwellings' (cl 42)
  - conservation purposes (cl 43)
  - scientific licences (cl 44)
  - pest animals (cl 45)
  - planted native vegetation (cl 46)
- New mechanism for the Minister to make natural resource management plans for protected regrowth (instead of using interim protection orders); and removal of requirement to register a PVP on title (cl 53) which aided certainty and transparency.
- Clarification of land use zones that are excluded from the Act (schedule 2).

The changes to the regulation focussed on expanding the categories of clearing where a formal approval is not required – ie, clearing that can be done under a RAMA. The changes envisage that a greatly increased range of clearing activities will be done under RAMAs, however, it will be difficult to know how much clearing will be done under the new RAMAs. It will be impossible to know whether the new Codes of Practice are being complied with for clearing in relation to invasive native species, thinning and environmental works. In addition, there is no provision for assessing cumulative impacts of clearing under RAMAs and/or clearing under new fast-track clearing rules. Instead of building-in monitoring and evaluation mechanisms, these changes compound existing gaps and failures. (See 'Compliance and enforcement' below.)

Key changes proposed to the EOAM in 2012[31] focussed on 'streamlining' assessment in certain areas.

Case study - Proposed changes to the *Environmental Outcomes Assessment Methodology*

Changes proposed to the *Environmental Outcomes Assessment Methodology* (**EOAM**) in 2012[32] focussed on 'streamlining' assessment in certain areas. Key changes included:

- A simplified fast-track assessment option is proposed for the clearing of:
  - 'Very small' areas of native vegetation – up to 10 ha
  - Clearing scattered paddock trees and small clumps of native vegetation (less than 2ha) in paddocks used for cultivation

[31] Note – the EOAM is "still under review" – see: http://www.environment.nsw.gov.au/vegetation/.
[32] See: http://www.environment.nsw.gov.au/vegetation/eoam/index.htm.

- Certain treatments of invasive native species (INS)
- Thinning to benchmark stem densities
- Pasture cropping
- Changed definition of "low condition" vegetation to allow more clearing and offsetting
- Increased discretion for CMA officers to vary limits to clearing under the fast-track assessment
- Simplified threatened species (by increasing assessment based on vegetation type rather than individual species)
- Changes to zones of riparian areas
- Alignment of the EOAM with the Biobanking assessment methodology by proposing a biodiversity credit system being made available to rural landholders
- Amended assessment of grasslands with low conservation value
- It is proposed that the process for amending the EOAM be included in the tool rather than the Regulation.

According to the OEH website, the EOAM is still under review and these changes are still being considered.

The changes to the methodology focussed on reducing assessment requirements in order to (1) speed up assessment times, and (2) to align the methodology with other tools such as for Biobanking. Both changes have the potential to significantly weaken the EOAM's integrity.

On the first issue, the assessment short-cuts and fast-track options are potentially a retrograde step in native vegetation management. As noted, the NV Act was introduced in 2003 to address serious problems associated with the previous schemes – particularly in terms of exemptions that were allowed for clearing – for example: 2 ha per year and 7 trees etc. The proposed changes that are intended to facilitate clearing of small clumps and scattered paddock trees signal a return to a weakened system that permits incremental loss of native vegetation, undermining landscape scale conservation efforts.

On the second issue, proposed changes to potentially allow trading of Biobanking credits, and change the definition of 'low condition' vegetation to facilitate more clearing and more offsetting, weaken the EOAM – including one of its foundation strengths, 'red light' protection of key vegetation. This is fundamental to the ecological integrity of the scheme and this integrity will be severely eroded if the tool is brought into line with proposed changes to Biobanking tool – for example, allowing offset trading not only between vegetation *types*, but trading broadly within vegetation *formations*. There are also concerns about mechanisms for amending the methodology being included in the tool itself, rather than the regulation (making them easier to change).

The review of the NV Regulation and the concurrent review of the Biobanking scheme presented an opportunity for revising both assessment methodologies. There is an opportunity to put in place a best practice robust methodology to objectively assess whether actions maintain or improve environmental outcomes. Unfortunately, the proposed EOAM reforms represent a *lowest common denominator* approach, whereby the controls in the NV tool are being weakened to match Biobanking standards, instead of Biobanking standards being improved to meet the native vegetation scheme standard. For example, the proposed EOAM removes true 'red lights' for anything more than 90% cleared and not in low condition, and replaces it with Biobanking 'red flags' for High Biodiversity Value areas which gives an accredited expert the discretion to form a view of whether the areas can be cleared.

EDO NSW has made a detailed submission relating to the weaknesses of the proposed Biobanking assessment methodology.[33] If the proposed changes are made to the EOAM, weakening the native vegetation methodology to bring it in line with the Biobanking

[33] See Submission the Review of the NSW Biodiversity Banking and Offsets Scheme 9 July 2012, available at: http://www.edo.org.au/edonsw/site/policy_submissions.php#2.

assessment methodology, then the EOAM will no longer be consistent with the objective of the NV Act to "ban broadscale clearing unless it maintains or improves biodiversity values."

Compliance and enforcement

In 2002, the Auditor-General undertook an audit of compliance and enforcement of native vegetation laws in NSW. Two pertinent findings were:

- *information on clearing of native vegetation was inadequate to regulate effectively*
- *no system was in place to monitor and report on regulation of native vegetation.*[34]

In 2006, the Auditor General undertook a follow up audit of compliance and enforcement of native vegetation laws in NSW. It concluded that the relevant department had made progress, but that the department then had to "establish a record of enforcement actions that are numerous, visible and successful" in order to implement the ban on broadscale clearing introduced by the NV Act.[35] Further, the report concluded that if adequate monitoring and reporting is not put in place, it will be impossible to regulate effectively.

The emphasis of the compliance approach has been on 'extension' work by CMAs (now Local Land Services, **LLSs**), rather than on strict enforcement of the Act. We recognise that the vast majority of landholders do the right thing and do not deliberately breach legislation. We also recognise that there is a need to improve communication with landholders to ensure there is a better understanding of the purpose and ambit of the laws.

However, we have an overarching concern that the trend of recent and proposed reforms greatly expand the clearing activities that can be done without any assessment, reporting or monitoring or process for measuring outcomes. Overall, compliance activities will be made more difficult with the new RAMAs and codes, for example, it will be harder to determine exempt paddock scale clearing using satellites. It will be difficult to tell whether the new laws are better understood and whether they are being complied with.

EDO NSW recommends that given the significant expansion of clearing activities that do not require assessment, the trade-off must be that some simple but effective record keeping requirements are imposed on landholders. This is essential in order to determine if the revised scheme actually meets the objective of the NV Act.

Landholders could be assisted in this task so that it is not onerous. OEH should develop user-friendly 1 page forms that could be filled out by landholders that record basic information. The information required should include: date, location, type of clearing activity, relevant RAMA etc. Where a Code of Practice is being followed, landholders could fill in an additional page to indicate how their activity accorded with the relevant Code. It is in the interest of landholders to keep a basic record to assist them in responding to any compliance inquiries, and it is essential for the functioning and ongoing implementation and review of the Act.

In relation to enforcement where assessment has taken place, we are concerned about the current enforcement of existing PVPs. At the time of responding to the regulation review, EDO NSW has received feedback that in one CMA it was estimated that 60% of farmers had not implemented their PVP requirements. A more relaxed approach to compliance will exacerbate this existing problem and mean that the Act will not be maintaining or improving environmental outcomes on the ground.

[34] *Performance audit: regulating the clearing of native vegetation .* The Audit Office of New South Wales, 2002.
[35] *Performance audit: regulating the clearing of native vegetation: Follow-up of 2002 performance audit* The Audit Office of New South Wales, July 2006, p3.

We submit that there are two critical issues that need to be addressed:

First, to do "extension" and education work properly, LLSs will need a significant increase in **resources** and staff with communications expertise. This is in addition to the increased resources needed to train and skill up an increased number of field staff to work with landholders on developing PVPs.

Second, OEH/EPA must maintain a clear compliance role, including a compliance presence in rural communities in order for the native vegetation offence provisions to maintain a deterrence factor.[36] Patchy implementation to date indicates that LLSs officers are put in an extremely difficult position and understandably prefer to focus on cooperative work with landholders in their local community, rather than be required to do compliance work. Yet there is a need for both extension *and* enforcement. We therefore recommend a clearer **separation of duties**, so that OEH/EPA undertakes comprehensive compliance activities and LLSs focus on extension, incentives and cooperative work with farmers.

The issues surrounding enforcement under the NV Act are seemingly related to a lack of political will to support OEH and other delegated authorities to prosecute and initiate proceedings, rather than a reluctance by the Land and Environment Court to impose penalties. However, the absence of a broad range of specific orders available under pollution and planning laws intensifies the failure of the NV Act to deter offenders.[37]

We recommend that the NV Act should be amended to explicitly extend the Land and Environment Court's powers to make orders in civil and criminal proceedings. All of the orders available to the Court under pollution laws (Part 8.3 of the POEO Act) and the power to make orders as the court thinks fit (as available under section 124(1) of the EP & A Act), should be inserted into the NV Act.

In relation to remediation orders, under section 38, the Act makes provision for the Director-General to issue a 'remedial order' if satisfied that clearing has been undertaken on land in contravention of the Act. EDO NSW submits that this provision in its current state is inadequate to achieve effective and timely remediation work where harm to native vegetation has occurred. We suggest the following amendments:

- Providing that remediation orders should run with the land and be recorded on title;[38]
- Mandating that remediation take place on the cleared area;
- Providing that remediation orders are to be for an adequate period of time; and
- Providing that orders pursuant to section 38 are placed on a public register for transparency and accountability purposes.

[36] For a discussion of the importance of deterrence in an effective compliance regime, please see our previous submission: *Submission to the NSW Department of Environment and Climate Change (DECC) on the Draft Native Vegetation Compliance and Enforcement Strategy*, 6th February 2009.

[37] Under Part 8.3 of the POEO Act, various powers are available to the court, including 'penalty-for-profit' orders, where the offender has to pay a penalty amount relative to the profit gained by the commission of an offence under the Act, orders requiring adverse publicity statements regarding the offence to be published, orders requiring restoration work on other affected properties,[37] costs orders for damage caused, or an order requiring a company to provide financial assurance for restoration works directed. See sections 245-250, *Protection of the Environment Operations Act 1997*.

[38] For example, this occurs for carbon maintenance obligations under the Carbon Farming Initiative.

Legislation is not climate ready

EDO NSW supports the retention of the current NV Act objectives. However, we recommend that an additional objective be added to recognise the important interaction between vegetation management and climate change.

EDO NSW, in its discussion paper, '*Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis'* (see **Appendix 2**), commented on the emergence of climate change as 'a key additional threat to biodiversity [and] a further major challenge to biodiversity conservation in NSW.'[39] There are essentially two arguments for the inclusion of climate change in the objects of the NV Act, both of which stem from the inextricable link between the retention of native vegetation and the ability to mitigate and adapt to the impacts and effects of climate change.

First, climate change is predicted to have an irreversible and potentially devastating effect on Australia's biodiversity.[40] Impacts are likely to include reductions in the geographic range of species, changes to the timing of species' lifecycle events, changes in the location of species' habitats, increased risk of extinction for species that are already vulnerable, and changes in the structure and composition of ecosystems and communities.[41] More broadly, it is expected that climate change will become the first or second greatest driver of global biodiversity loss over the next century.[42] EDO NSW submits that climate change must now be incorporated into all environmental management decisions, particularly those regarding the retention of native vegetation under the *NV Act*.

Second, native vegetation serves the crucial function of carbon storage. Deforestation causes the emission of a significant percentage of NSW's total greenhouse gas emissions. Reports have demonstrated that intact natural forests constitute a significant standing stock of carbon that should be protected from carbon emitting land-use activities'[43]. Moreover, Australia's intact natural forests have been found to have a larger carbon storage capacity than has been previously recognised.[44] The NV Act must therefore recognise this important role. Inserting a climate change objective into the Act – and giving effect to it in key decision-making processes – would improve educative and practical functions. It would highlight upfront the importance of conserving native vegetation as a means of mitigating climate change impacts.

As a result of the above, EDO NSW submits that a new object should be inserted into section 3 of the *NV Act*, to expressly recognise climate change. A potential iteration of the new object is:

[39] 'Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis', June 2009, Environmental Defender's Office (NSW), p 6.
[40] See for example, Australia's *State of the Environment 2011*, 'Headlines', which include:
• *Earth is warming, and it is likely that we are already seeing the effects of climate change in Australia. As the driest inhabitable continent, Australia is particularly vulnerable to climate change.*
• *Our unique biodiversity is in decline, and new approaches will be needed to prevent accelerating decline in many species.*
[41] 'Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis', June 2009, Environmental Defender's Office (NSW), p 9.
[42] Heller & Zavaleta (2009) 'Biodiversity management in the face of climate change: A review of 22 years of recommendations' Biological Conservation 142 14-32, in 'Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis', June 2009, Environmental Defender's Office (NSW), p 8.
[43] Mackey et al (2008) 'Green Carbon: The role of natural forests in carbon storage', produced by the Australian National University, Fenner School of Environment and Society, p 7.
[44] Ibid, p 6.

In making decisions under the Act, the contribution of broadscale clearing to NSW's emissions of greenhouse gases should be recognised and considered, as well as the important role played by native vegetation as carbon sinks

Recommendations for strengthening native vegetation provisions

- Retain the ban on broadscale clearing unless it maintains or improves environmental values in the *Native Vegetation Act 2003*.
- The legal test of "maintain or improve environmental outcomes" should be retained, and applied more broadly across land tenures, ie, in planning legislation.
- The "maintain or improve test" should be applied using objective scientific assessment methodologies.
- Appropriately limit the use of RAMAs and balance any expansion of RAMAs with notification and practical record-keeping requirements.
- Put in place processes for monitoring and data collection in relation to the proposed changes in order to assess whether activities continue to meet objectives of the NV Act, and cumulative impacts are assessed.
- Establish a best practice standard for biodiversity assessment by maintaining core protections provided by the EOAM, and by bringing the biobanking assessment methodology up to meet the higher standard.
- Ensure the EOAM protects the most valuable remnant and threatened vegetation.
- Ensure any offsets are ecologically rigorous and justifiable.
- Ensure that there is public consultation and requirements for expert scientific input into any changes of the Regulation, EOAM or Codes of Practice.
- Provide LLSs with additional resources and training to increase capacity to make PVPs in a more timely manner.
- Provide LLSs with additional resources and staff with expertise in communications.
- Have a clearer separation of roles with OEH/EPA undertaking compliance activities and LLSs focussing on extension, incentives and cooperative work with farmers.
- A new object should be inserted into the Act to expressly recognise the contribution of broadscale clearing to climate change as well as the important role played by native vegetation as carbon sinks.
- Improve monitoring of illegal clearing and exempt clearing. The latter could be assisted by minimal record keeping requirements for RAMA and code clearing.
- Strengthen innovative court order provisions and remediation orders.

Threatened Species Conservation Act 1995

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.*[45]

Over 1000 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.[46]

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.

A summary of the key elements of how the TSC Act currently operates is set out in **Appendix 2** – see NSW analysis at 5.1 (pp 20-23).

Strengths of the TSC Act

Listing

There are considerable benefits and strengths of the current listing process under the TSC Act.

First, a key strength is the ability of any community member to make a nomination to the Scientific Committee for listing. This acknowledges the community's valuable role in identifying impacts and promoting the stewardship of biodiversity. Once the Committee has made a preliminary determination, the public is consulted generally to determine whether the species or population should be finally listed in the Act.

A second strength is the independence of the Scientific Committee in making listing decisions under the Act, and the requirement that the Committee take into account only scientific considerations when deciding on listings. Furthermore, there is no ministerial veto

[45] 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.
[46] *Ibid* (2012).

right available in relation to listings. There are ample opportunities for social and economic considerations to be taken into account in decisions subsequent to listing, but in order to maintain integrity of the Act, listing decisions must be purely scientific. Removal of these elements would undermine the scientific credibility of listings, and could be misused politically to delay or refuse a listing.

Another strong element of the Act's listing processes is that it allows for the listing of endangered ecological communities (EECs) and critical habitat in addition to single species and populations. This is consistent with the *ecosystems approach* endorsed internationally and nationally, as there are a number of problems associated with focusing on threatened species alone as the basis for biodiversity protection.[47] Protecting communities and critical habitat has considerable benefit for a number of species, whether threatened or not.

Case study – listing populations

As noted, a *population* is eligible to be listed if it is facing a very high risk of extinction in New South Wales in the near future. The population cannot be listed if the *species* is already listed as endangered, critically endangered or presumed extinct. This is a strength in comparison with other jurisdictions – for example, individual populations cannot be listed under the EPBC Act (Cth). Examples of endangered populations in NSW include:

- the Emu population in the NSW North Coast bioregion and the Port Stephens area,
- the Gang-gang Cockatoo population in the Hornsby and Ku-ring-gai areas,
- the Little Penguin in the Manly Point Area,
- the Long-nosed Bandicoot at North Head,
- Koalas at Hawks Nest and Tea Gardens, and
- Koalas at Pittwater Local Government Area.

Emergency listings

The Scientific Committee may list a species on an emergency basis by giving it a provisional listing. A species may be provisionally listed as endangered or critically endangered if, although not previously known to have existed in New South Wales, it is believed on current knowledge to be indigenous to New South Wales, or if it was presumed extinct but has been rediscovered. Anyone may nominate a species to be listed provisionally.

Actions after listing

Once a species, population or ecological community has been listed, it may trigger the following actions:

- the Director-General *may* prepare a recovery plan for it;
- the National Parks and Wildlife Service (**NPWS**, part of OEH) *must* identify critical habitat if the species, population or ecological community is endangered or critically endangered, which may then be declared as such by the Environment Minister;
- A person who harms (animals) or picks (plants) the threatened species will commit an offence unless they have a licence or other form or authorisation;

[47] Possingham, H. P., Andelman, S. J., Burgman, M. A., Medellin, R. A., Master, L. L., Keith, D. (2002) Limits to the use of threatened species lists *TRENDS in Ecology & Evolution* 17(11), 503-507, Rohlf D (1991) 'Six Biological Reasons Why the Endangered Species Act Doesn't Work – And What to Do About It' *Conservation Biology* 5 273-282.

- Developments which are likely to significantly affect the threatened species or its habitat will require a species impact statement. (However certain major projects are exempt from this requirement.[48])

Key threatening processes and threat abatement planning

Key threatening processes (**KTPs**) are processes that may adversely affect threatened species, populations or ecological communities, or could cause species, populations, or ecological communities that are not threatened to become threatened.[49] A threat abatement plan (**TAP**) is a plan to abate, ameliorate or eliminate the adverse effects of KTPs.[50] A TAP must include actions necessary to reduce the impact of a KTP on threatened species, etc.[51] Priorities for TAPs are now determined in accordance with the Priority Action Statement (**PAS**), as are recovery plans (see below).[52] The PAS identifies that TAPs will continue to be prepared for each KTP where it poses a significant impact on biodiversity or is the main threat to many species, where its impact varies depending on location, or where management requires coordination of several public authorities and stakeholders.[53]

Threat abatement planning will remain a key mechanism to protect biodiversity under climate change. A key impact of climate change will be the exacerbation of existing threats. Reducing existing threats through threat abatement is therefore one of the most widely advocated strategies to combat the impacts of climate change and build resilience.[54] In the context of a limited conservation budget, TAPs must be made shorter, simpler and focus more readily on threat abatement actions and outcomes.

Nevertheless, more resources also need to be focused on threat abatement planning. This is because threat abatement planning addresses the drivers of biodiversity decline and is likely to benefit multiple species in a cost-effective way.[55] TAPs are likely to work particularly well in cases where one threat is causing the primary impact on many species and the control of that threat is feasible at a large-scale. Finally, as many of the key threats to biodiversity operate at a landscape scale, a focus on TAPs is a strength as they provide a good mechanism to co-ordinate threat abatement actions across regions and targeted to priority areas.[56] Therefore, it is likely to be most cost effective to identify and focus threat abatement efforts on sets of overlapping threats that affect large numbers of species, to allow the NSW Government to identify and target priority areas or regions.

Recognition of Critical Habitat

Once a species, population or ecological community is listed as endangered or critically endangered, the NPWS must take steps to identify the habitat that is critical to its survival. The Environment Minister is responsible for declaring critical habitat, on advice from the

[48] *Environmental Planning and Assessment Act 1979* (NSW), s 78A(8)-(8A).
[49] (NSW) *Threatened Species Conservation Act 1995 s 13.*
[50] (NSW) *Threatened Species Conservation Act 1995 s 74.*
[51] (NSW) *Threatened Species Conservation Act 1995 s 77.*
[52] (NSW) *Threatened Species Conservation Act 1995 s 76.*
[53] DECC (2008) 'Statement of Intent 1: Infection of native plants by *Phytophthora cinnamomi*', Sydney; www.threatenedspecies.environment.nsw.gov.au/tsprofile/pas_abatement_strategies.aspx
[54] Heller N and Zavaleta E (2009) 'Biodiversity management in the face of climate change: A review of 22 years of recommendations *Biological Conservation* 142 14-32; Reaser JK, Pomerance R and Thomas PO (2000) "Coral Bleaching and Global Climate Change: Scientific Findings and Policy Recommendations" *Conservation Biology* 14(5) at pp 1500-1511.
[55] Caughley G and Gunn A (1996) *Conservation Biology in Theory and Practice* Blackweel Science, Cambridge, Massachusetts; McIntyre S, Barrett G, Kitching R and Recher H. (1992) 'Species triage – seeing beyond wounded rhinos' *Conservation Biology* 6(4): 604-606;
[56] Downey P, Williams M, Whiffen L, Turner P, Burley A, and Hamilton M (2009) 'Weeds and biodiversity conservation: A review of managing weeds under the New South Wales Threatened Species Conservation Act 1995' *Ecological Management and Restoration* 10 S53-58.

Director-General. A declaration of critical habitat and a map showing its location must be published in the NSW Government Gazette and copies given to all affected landholders, public authorities and mortgagees. The Director-General must keep a public register of all critical habitat. If an area of land is declared as critical habitat, it means that:

- The Environment Minister may not confer biodiversity certification over those areas of land in a Local Environment Plan (LEP) or State Environmental Planning Policy (SEPP);
- Planning authorities (such as local councils) must have regard to the register of critical habitat when deciding whether to grant development consent;
- Public authorities must consider the habitat when using land that it owns or controls;
- An application for a licence to carry out an activity on the land must be accompanied by a species impact statement; and
- A development application relating to that land must be accompanied by a species impact statement (planning laws exempt major projects from this requirement).

Interim protection orders

The Environment Minister may make an interim protection order over land containing threatened species, populations or ecological communities, or critical habitat, but only after receiving a recommendation to do so from the Director-General (now Secretary). An interim protection order may contain terms relating to the preservation, protection and maintenance of the land, its fauna, plants, threatened species, populations, ecological communities and critical habitat as well as any Aboriginal object or places subject to the order.

The Minister does not need to give anyone notice before making an interim protection order.[57] It is an offence not to comply with an interim protection order.[58] An order has effect for the period it specifies (up to 2 years), unless revoked. The Director-General must keep a public register of all interim protection orders.

Legal standing, injunctions and orders

A key strength of the TSC Act is that any person may bring proceedings to remedy or restrain a breach of the Act. This is a fundamental accountability mechanism and should be a provision of any biodiversity legislation. The NSW Land and Environment Court may grant an injunction to stop an activity that is causing harm to a threatened species or its habitat. It may also make an order to remedy or restrain a breach of the *TSC Act* or a declaration that a provision has been breached.

Facilitating biodiversity conservation on Biobank sites

When the Biobanking Scheme was enacted, it was underpinned by a relatively strong set of principles and a science-based methodology. However, its original intent as a mandatory scheme did not pass Parliament. Ad hoc offsetting, negotiated between the Planning Department and developers, created a parallel process that has undermined the Scheme ever since. Related to this, over time, increasing pressure to water down scientific standards has threatened to turn what some considered a strength into an environmental weakness.

Notwithstanding the significant concerns with biodiversity offsetting discussed elsewhere in this report, we recognise the necessity for legislative tools to provide incentive payments to landholders for biodiversity management. Biobanking agreements are one form of this. We note that biobanking is subject to a separate review process and refer the panel to separate

[57] An owner or occupier of land subject to an interim protection order may appeal against the order to the Land and Environment Court within 60 days of receiving the order.
[58] The maximum penalty for a corporation is $1.1 million, or for an individual, $110,000.

submissions noting potential benefits but also outlining significant concerns with the scheme (see **Appendix 1**). (Other private land conservation tools are discussed below in relation to the *Nature Conservation Trust Act* (NCT Act) and in **Appendix 4**).

Weaknesses of the TSC Act

Listing process deficient

Despite the positive elements of the listing process, there are three key deficiencies of the NSW listing process. These relate to representativeness, fragmentation and coordination.

First, the current lists are not truly representative of the flora and fauna that is vulnerable or endangered in NSW. The TSC Act listing process generally shows considerable bias towards mammals, birds, and other iconic species. Consequently, there are substantial gaps in representation on lists under the Act, particularly in relation to insects, invertebrates and fungi.[59] Due to this bias, as well as time lags and lack of knowledge, many species at risk of extinction may not be currently listed.[60]

Related to this issue is the problem of data and skills deficiencies. In many cases, the data required to make a proper assessment of whether a species or population should be listed does not exist, in large part due to consistent under-funding of relevant State agencies. Severe under-resourcing means that even when limited data indicates that further research is required which would likely support the listing or upgrading of threatened biota, the required work rarely takes place. In addition, there are too few people with the technical skills required within government to support the listing of species by the Scientific Committee. The fact that the 2012 *State of the Environment* report largely relied on data from the 2009 report is a further symptom of a lack of priority for environmental values.

Second, there is currently a separate process for the listing of marine species under the *Fisheries Management Act 1997* (**FM Act**). (This is discussed further below in relation to 'category 3 legislation'). Marine threatened fish, invertebrates and plants are protected under a separate Act and by a separate agency, namely NSW Department of Primary Industries.

There is no logical reason for maintaining threatened species lists for marine species in a separate Act. The FM Act is not an appropriate place for biodiversity protection mechanisms as it is essentially resource-use legislation that facilitates commercial and recreational use of fish species, including those that are threatened. There is a clear conflict of interest with the Minister and department responsible for exploitation of the marine environment also responsible for conservation of these species. 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.

There is also 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.[61]

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[59] Possingham HP, Andelman SJ, Burgman MA, Medellin RA, Master LL and Keith DA (2002) "Limits to the use of threatened species lists" *Trends in Ecology and Evolution* 17(11) at pp 503–7.

[60] See Department of Environment and Climate Change *NSW State of the Environment Report 2006* at: http://www.environment.nsw.gov.au/soe/soe2006/chapter6/chp_6.3.htm#6.3.22

[61] For example, under the *Environment Protection & Biodiversity Conservation Act 1999.*

Third, the TSC Act could better coordinate with the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). There is significant scope for improving parity between the lists under the two Acts. Species or ecological communities listed under the EPBC Act are not automatically listed under the TSC Act if found in NSW. Similarly, where there is a decision to list a species endemic to NSW under the TSC Act that species is not automatically listed under the EPBC Act.

Failure to adequately address impacts of climate change on threatened species

The current listing process under the TSC Act is not designed to address future climate change impacts effectively. Relevant problems with the current listing process include:[62]

- There is a mismatch between current threatened species lists and what needs to be done to protect biodiversity under climate change. For example, areas important for connectivity may not be considered in decision-making without a link to threatened species. This hinders long-term planning;
- Strategies to protect biodiversity under climate change are not adequately resourced;[63]
- The current listing process under the Act does not protect 'key functional groups' (species that play an important role in maintaining ecosystem functions);
- Decisions to list species are made on the basis on *current* conservation status. Species are not eligible to be listed if they are not currently threatened, even if they are likely to become threatened in the future under climate change;
- The current identification, definition and listing process for ecological communities and populations may become problematic as these may expand and contract in response to climate change;
- For a species to be eligible for listing under the TSC Act, it must be 'indigenous' to NSW, which may become problematic under climate change. For example, a species from Queensland may move into NSW in response to climate change and establish small populations but would not be eligible for listing under the TSC Act; and
- Climate change is likely to increase the extinction risk of many species, which will further exacerbate the problem of limited conservation budgets, making prioritisation of listing processes a necessity.

Listing of critical habitat rarely used

While recognising the need to protect critical habitat is a strength of the Act as noted above, critical habitat is a rarely used conservation tool in NSW. There are currently only four areas declared as critical habitat under the TSC Act: for the Wollemi Pine, the Gould's Petrel, Little Penguin population in Sydney Harbour, and the Mitchell's Rainforest Snail.[64] The area declared as critical habitat ranges from tens of ha (Little Penguin and Gould's Petrel) to 5,000 ha (the Wollemi Pine). In all cases except for the Little Penguin, areas of critical habitat have been declared entirely within existing protected areas.[65]

[62] For further assessment of the climate readiness of NSW and Commonwealth laws, see: *Climate change and the legal framework for biodiversity protection in Australia: a legal and scientific analysis,* June 2009, EDO NSW and *Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis*, June 2009, EDO NSW.

[63] Possingham HP, Andelman SJ, Burgman MA, Medellin RA, Master LL and Keith DA (2002) "Limits to the use of threatened species lists" *Trends in Ecology and Evolution* 17(11) at pp 503–7.

[64] See Department of Environment and Climate Change at: http://www.environment.nsw.gov.au/criticalhabitat/CriticalHabitatProtectionByDoctype.htm

[65] For example, nature reserves declared under the *NPW Act 1974*. Part of the Little Penguin critical habitat occurs within Sydney Harbour National Park, and the remaining areas also appear to be public land.

The reason that there are very few critical habitats listed relates to the method of listing critical habitat under the Act which differs from the listing process for threatened species, and which allows economic considerations to be taken into account. The Director-General is responsible for identifying critical habitat, and must consult with the NSW Scientific Committee and have regard to any advice received.[66] However, the decision to list critical habitat is made by the Minister, who must have regard to the likely social and economic consequences of a declaration and the likely consequences for landholders.[67] As a result, economic considerations have served to thwart the listing of critical habitat even in situations in which the declaration is scientifically sound.

Furthermore, under the Act, the definition of critical habitat implies that for habitat to be declared critical, it must be *current* habitat for a threatened species. This may mean that critical habitat cannot be declared on land that is not current habitat for a threatened species, but that is likely to be required by a threatened species in the future under climate change (for example, as a habitat corridors, climate refuge, or suitable habitat types within the likely future distribution of a species). We noted that the Queensland *Nature Conservation Act 1992* provides greater certainty about this by defining critical habitat as including 'an area of land that is considered essential for the conservation of protected wildlife, even though the area is not presently occupied by the wildlife'.[68]

Problems with Recovery Planning and the Priorities Action Statement

In early 2014, OEH consulted publicly on its internal review of the PAS (PAS Review). The eight recommendations of the PAS Review are to be carried forward under OEH's new *Saving our Species* conservation program. The PAS Review recommendations attempt to address some concerns noted above:

1. *Establish six new management streams to better target the management of each threatened species.*
2. *Enhance uptake of the PAS and raise community awareness.*
3. *Make PAS actions, and their timing, more specific.*
4. *Provide a framework for local actions to contribute to statewide outcomes for species.*
5. *Target investment at the minimum set of actions that are crucial for securing a species.*
6. *Develop a sound, repeatable and transparent process for prioritising effort between species statewide.*
7. *Develop a process for monitoring and reporting on the outcomes of projects and actions for threatened species.*
8. *Develop a simple, user-friendly database to support program delivery.*

While these recommendations are generally positive, in its 2014 submission to the PAS Review, EDO NSW made 27 recommendations to improve threatened species protections under the PAS and more broadly.[69] These included three overarching issues which the NSW biodiversity protection framework (including the PAS) must better integrate and improve on to deliver lasting positive outcomes. First and foremost, until fundamental issues of *interaction between planning and biodiversity laws* are addressed, it is difficult to have confidence in the ability of State laws to protect threatened species over the long term. Second, the regulatory framework must prioritise attention to the current and accelerating

[66] (NSW) *Threatened Species Conservation Act 1995* ss 38, 39.
[67] (NSW) *Threatened Species Conservation Act 1995* s 44.
[68] (Qld) *Nature Conservation Act 1992* s13(2). Although we note biodiversity laws in Queensland are currently being amended.
[69] EDO NSW Submission on amendments to the NSW threatened species Priorities Action Statement (February 2014), at: http://www.edonsw.org.au/native_plants_animals_policy.

impacts of climate change. Third, there is a need to *increase funding* to OEH to provide meaningful, integrated protection for biodiversity and sensitive habitats.[70] Among other recommendations, there is also a need for an integrated habitat or 'ecosystem functioning' approach to managing threatened species, including identification of keystone species and regional habitats important to maintaining and improving ecosystem services.

Compliance and enforcement

A number of issues with enforcement and compliance in relation to threatened species are discussed below as the relevant offence provisions are contained in the *National Parks & Wildlife Act 1974*.

Recommendations to strengthen threatened species provisions

- **Strong, enforceable legislation** designed to protect biodiversity, including native vegetation and threatened species, is crucial in ensuring adequate environmental protections in NSW. Core provisions must be clear in legislation, not relegated to unenforceable policy documents.
- Legislation must clearly state that NSW has an obligation to **maintain or improve environmental outcomes**, including facilitating the recovery of threatened species.
- The current **objectives** of the *Threatened Species Conservation Act* must remain paramount and be **operationalised** by decision-makers. This includes the aspirational goal of protecting all species and populations in NSW. Legislative objectives should specify the need to recover species and populations, not just maintain them.
- Biodiversity laws must have **open standing provisions** for third parties to enforce breaches.
- Financial incentives to encourage **private land conservation** need to be legislated, for example, Nature Conservation Trust agreements should to have equal access to tax relief, as for Voluntary Conservation Agreements.
- Biodiversity decision making processes must be robust, transparent and science-driven, and be underpinned by **objective scientific assessment methodologies**.
- The largest developments with the most significant potential impacts must be subject to **rigorous and comprehensive assessment,** and not exempted from environmental assessment requirements. Safeguards must ensure that development in sensitive environmental and heritage areas is not exempt from proper assessment.
- **Listing of categories** of threatened species and communities must be based on **scientific** reasons. Scientific expert committees must continue to be independent.
- Any framework for **prioritisation between listed species** should be based on scientific considerations and also involve public consultation over what we try to protect and why. Any such Priority Action Statements must be a mandatory consideration in strategic planning and development assessment.
- Biodiversity **offsets** must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts. Any use of offsets must be based on a national standard that is legally enforceable and uses transparent and sound ecological studies and principles, such as 'like for like' and the avoidance of the use of indirect offsets. Environmental 'red flag' areas must be maintained, recognising that some values cannot be offset. Offsets must be maintained in **perpetuity**, not subject to perpetual trade-offs.
- Biodiversity laws and related decisions must explicitly **consider and plan for climate change** impacts, using adaptation plans, buffers and adaptive management to enhance ecosystem resilience.
- Biodiversity protection must be **integrated** across all decision making processes. Biodiversity considerations must be supported and integrated in other regulatory frameworks such as planning laws, fisheries management, native vegetation protection, public and private forestry, noxious weed control and bushfire management.
- To assist this integration, an independent, statutory **Biodiversity Commission** or similar body should be created. This focus of the Commission should be on identifying, developing

[70] Cf OEH, *Introduction to Saving our Species* (2013), 'Summary'. $4.8 million has been allocated to 'kick start' 87 SOS projects over four years (2013-16). See: http://www.environment.nsw.gov.au/SavingOurSpecies/projects.htm.

and implementing a whole of government approach which ensures biodiversity protection is genuinely a *fundamental consideration* in planning and conservation decisions.

- **Protected areas** (both terrestrial and marine) must be managed for conservation and only allow activities that are consistent with conservation goals. For example, activities must not be exempted in marine sanctuary zones; conservation areas should not be logged; and recreational shooting should not be permitted within the national park estate.
- **Ecological consultants** that perform environmental impact assessments (EIA) should be professionally accredited under a recognised industry or government scheme.
- NSW needs **strong, well-resourced, environment-focussed agencies** that are responsible for ensuring that biodiversity and conservation laws are implemented as intended. EDO NSW has consistently argued that it is incompatible to rely on agencies charged with facilitating resource use resource-use to achieve conservation outcomes. A biodiversity levy (applied to all development requiring clearing) should be used for funding the institutional reforms addressed in this paper, as well as in providing ongoing financial incentives for on-ground conservation work.
- Systematic **monitoring, evaluating and reporting** will aid long-term effectiveness and adaptive biodiversity management. NSW agencies should lead and collaborate on a system of **environmental accounts**, and reinvigorate more comprehensive, accurate and genuine **State of the Environment** reporting.

Nature Conservation Trust Act 2001

Conservation on private land is an important element of biodiversity protection. In NSW, just under 9% of land is held in protected areas, such as national parks,[71] however many of the major threats to biodiversity take place on private land, such as agricultural practices, grazing and land clearing. Relying on protected areas alone will therefore not stem the tide of biodiversity loss.

Landholders in NSW can voluntarily conserve areas of ecological or cultural value on their properties. The options range from non-binding agreements (such as wildlife refuges) to binding agreements that attach to the land title (such as conservation agreements). These include:

- Conservation agreements
- Nature Conservation Trust agreements
- Property Vegetation Plans
- Wildlife refuges
- Biobanking agreements
- Privately owned reserves and land acquisition organisations

For more detailed information on these mechanisms, as we as other private conservation options, please refer to the EDO NSW publication *'A Guide to Private Conservation in NSW'*.[72]

The Independent Panel has been asked specifically to review the *Nature Conservation Trust Act* (**NCT Act**), but the Issues Paper seeks feedback on the incentives and barriers to private land management more broadly. This part of the report assesses the NCT Act, but in order to provide evidence of how the tools work in practice, we provide detailed assessment of different private land conservation tools in **Appendix 4**.

Case study - ***Assessment and Evaluation of NSW Conservation Mechanisms. A report for the Hunter & Central Coast Regional Environmental Management Strategy* (HCCREMS)**

Hunter Councils Inc. engaged the EDO NSW to assess and evaluate key conservation mechanisms in terms of:

- the name and details of which legislative instrument empowers each mechanism, and general information regarding the objective(s) and operation of the mechanism
- the comparative strength of each mechanism as a conservation tool - that is, the degree to which each mechanism can provide genuine and lasting biodiversity conservation outcomes
- an assessment of the level of complexity and/or difficulty for land owners/managers to understand and access
- an evaluation of their relative "cost" and "cost/benefit" (for example, the cost of maintenance and management obligations etc.) and the degree to which landowner incentives and support are provided.

Drawing on our previous research in developing the EDO NSW *Guide to Private Conservation in NSW*, we updated our assessment of the following 14 conservation mechanisms in NSW according to the project criteria.

1) Nature Conservation Trust Agreements

[71] *NSW State of the Environment Report 2012*, Table 5.8 Extent and types of terrestrial protected areas in NSW and changes since 2009.
[72] Available at: www.edonsw.org.au.

2) Conservation Agreements – NSW
3) Biobanking Agreements
4) Property Vegetation Plans
5) Voluntary Planning Agreements
6) Public Positive Covenants
7) Landholder Management Agreements
8) Biodiversity Certification
9) Wildlife Refuges
10) Wildlife Land Trusts
11) Land for Wildlife
12) Federal Conservation Agreements
13) Carbon Farming Initiative
14) Indigenous Protected Areas and Aboriginal Places

The mechanisms were ranked in this way largely based on the extent to which the particular mechanism provides for the protection of biodiversity values. This, in turn, is closely based not only on the objective, internal integrity and structure of the mechanism, but also the degree of legal protection and enforceability, and financial and other incentives offered.

The full report is **Appendix 4.**

Conservation agreements and wildlife refuges are discussed below under the *National Parks & Wildlife Act* section of the report. Biobanking agreements are discussed under the TSC Act section of the report.

Strengths of Nature Conservation Trust Agreements

The various private conservation mechanisms differ in the level of legal commitment required of the landholder and the targeted ecological outcomes. Trust Agreements with the Nature Conservation Trust offer strong legal commitment and high protection.

A landowner can choose to manage and protect their land (or part of their land) through an agreement with the Nature Conservation Trust.[73] By entering into a trust agreement, a person can permanently protect the conservation values of their land beyond their lifetime.[74] A trust agreement is accompanied by a plan of management that sets out the obligations of the landholder with regard to the conservation area.

The Nature Conservation Trust

The Nature Conservation Trust is a non-profit, non-government organisation.[75] One of the major roles of the Trust is to enter into agreements with landowners in order to secure the long term protection of private lands of high conservation value.

The Trust is particularly interested in land which has significant environmental values, such as land containing habitat for endangered species or ecological communities, wetlands, and land which forms a wildlife corridor or buffer to other conservation areas.

The Trust also receives government grants, private donations of money and land, and bequests of money and land.[76] Land which is bought or bequeathed to the Trust is protected with a trust agreement and then resold. In this way, the Trust operates a Revolving Fund[77] to increase conservation protection on private land.

[73] *Nature Conservation Trust Act 2001* (NSW), s. 30.
[74] *Nature Conservation Trust Act 2001* (NSW), s. 34.
[75] The NCT is established under the *Nature Conservation Trust Act 2001* (NSW). The Act is administered by the Environment Minister.
[76] *Nature Conservation Trust 2001* (NSW), ss. 14 and 15.
[77] *Nature Conservation Trust 2001* (NSW), ss. 7.

The 2006 review of the NCT noted that "The existence of the Trust at 'arm's length' from Government will continue to be a significant incentive for private landowners to apply covenants to their land and will be important in securing philanthropic support in future." [78] This statement continues to apply.

Trust agreements are binding and legally enforceable

The Trust agreement is negotiated between the landholder and the Trust. Once it is finalised, it is registered on the title of the property and runs with the land, thereby binding future landholders.[79] The Trust has the obligation to uphold the agreement, particularly in the case where a subsequent owner may not be complying with the agreement. The Trust supports, monitors and defends all of its agreements through a long term Stewardship Program.

Trust agreements generally last forever, although their term can be fixed under the agreement.[80] Trust agreements are binding on the parties,[81] and can be enforced by either party in the Land and Environment Court.[82] All Trust agreements are available on a public register.[83]

In return for entering into an agreement, a landowner can receive financial assistance and technical advice from the Trust on things such as flora and fauna management, and weed and vermin control.[84] The Trust can also direct landowners to opportunities to apply for grants and subsidies.

As noted, access to funds for biodiversity management on private land is essential, and EDO strongly supports robust legislative mechanisms to facilitate this.

Weaknesses of Nature Conservation Trust agreements

A key deterrent for landholders who are interested in an agreement to protect the biodiversity values of their property is that even with an agreement in place, their land could still be mined.

Some types of native vegetation clearing (such as clearing for Routine Agricultural Management Activities (RAMAs) permitted under the *Native Vegetation Act 2003)* can still occur on land under an agreement, even though this may impact on the biodiversity.

Landholders with agreements are not currently eligible for rate relief, unlike for some other agreements. This has deterred some landholders from entering into agreements (see for example, **Appendix 4**).

There is a lack of data on biodiversity outcomes on land under agreement.

[78] See: *Statutory Review of the Nature Conservation Trust Act 2001 – Report*. NSW Government Review Group, December 2006.
[79] *Nature Conservation Trust Act 2001* (NSW), ss. 36 and 37.
[80] *Nature Conservation Trust 2001* (NSW), s. 34.
[81] *Nature Conservation Trust 2001* (NSW), s. 32.
[82] *Nature Conservation Trust 2001* (NSW), s. 38.
[83] *Nature Conservation Trust 2001* (NSW), s. 39.
[84] *Nature Conservation Trust 2001* (NSW), s. 33.

Recommendations to strengthen private conservation agreement provisions

- It is crucial that areas that are nominated as private conservation areas, or that are used as offsets for agricultural or development activity, are protected in-perpetuity. This may reduce the number of agreements entered into but it ensures that the protection is genuine.
- A clear distinction needs to be maintained between biobanking (a market mechanisms designed to facilitate exploitation of the environment) and private conservation programs (genuine attempts to protect the natural environment).
- It may be possible for NCT to play a role in programs such as biobanking but the distinctions between programs must be maintained as the different programs are likely to attract people with different motivations.
- The legislation should be changed to make an area that has been registered under a recognised private conservation mechanism (Trust agreements or VCAs) protected from mining activity.
- To ensure equality in choice between private conservation agreements signatories to Nature Conservation Trust agreements should also be eligible for rate relief (the current system only allows relief with the permission of local government).
- Private conservation data should be collected. The mechanism will depend on the conservation agreement – incentive based and offset mechanism can require such data collection, voluntary agreements will need voluntary recording but could follow the same mechanism.
- As recommended in the 2006 review the issue of native vegetation clearing and Routine Agricultural Management Activities (RAMAs) permitted under the Native Vegetation Act 2003 be clarified and, if necessary the Act be amended to ensure that such activities do not apply to land under a Trust Agreement.

National Parks & Wildlife Act, Part 4 (Divisions 11-13), Part 6A, Parts 7-9.

The Independent Panel's Issues Paper identifies nine parts of the *National Parks & Wildlife Act 1974* (**NPW Act**) as relevant to the review. We assess each in turn.

- **Part 4 Division 11 – Wildlife refuges:** Under this part the Governor may declare land to be a wildlife refuge.
- **Part 4 Division 12 – Conservation agreements:** Under this part the Minister may enter into a conservation agreement relating to land with the owner of the land.
- **Part 4 Division 13 – Offences relating to wildlife refuges and conservation areas:** Contains prohibitions relating to the harm of fauna and picking or possession of native plants in wildlife refuges, conservation areas, wilderness areas or areas subject to a wilderness protection agreement.
- **Part 6A – Stop work orders, interim protection orders and remediation orders:** Contains powers for the making of stop work orders, interim protection orders and remediation directions.
- **Part 7 – Fauna:** Contains provisions relating to the protection and care of fauna including offence provisions relating to the harm, trade and sale of fauna.
- **Part 7A – Marine mammals, special provisions:** Establishes the Marine Mammals Advisory Committee (MMA) and contains provisions relating to the MMA's functions, plans of management for marine mammals and an offence provision for approaching a marine mammal in certain circumstances.
- **Part 8 – Native plants:** Contains provisions relating to the protection and management of native plants including offence provisions relating to picking and selling of native plants.
- **Part 8A – Threatened species, populations and ecological communities and their habitats, and critical habitat:** Contains offence provisions relating to threatened species, endangered populations, endangered ecological communities and their habitat and critical habitat.
- **Part 9 – Licensing in respect of fauna, native plants and threatened species:** Contains provisions allowing for licensing of specified activities in respect of fauna, native plants and threatened species.

Part 4 Division 11 – Wildlife refuges

Under the NPW Act, private landowners, public land managers and lessees of Crown land can nominate the whole or part of their property to be declared a wildlife refuge. If the nomination is accepted, the NSW Governor then declares the land to be wildlife refuge by making a proclamation in the NSW Government Gazette.[85]

Strengths

Wildlife refuges are voluntary and are binding while they are in place. Once the declaration is gazetted, it is noted on the property title.

Wildlife refuges are usually used by landowners who wish to improve their capacity to manage parts of their land for local wildlife species. Once an area has been declared as a wildlife refuge, the landowner can receive technical assistance and advice about how they can manage that area for wildlife.

The OEH can assist with identifying land which is suitable for a wildlife refuge, and can help to prepare a property report and management plan.

[85] See *National Parks and Wildlife Act 1974* (NSW), s. 68.

Case study: Half Moon Flat Wildlife Refuge, Mongarlowe

Half Moon Flat, located between Braidwood and Morton National Park on the Mongarlowe River in NSW, has been a wildlife refuge with multiple owners for many years. The area was used for grazing until 1972, when environmentalist Stewart Harris decided to claim the land as the wildlife refuge. He was concerned about the threat of possible damage caused by trespassers to such a pristine wildlife habitat.

In 1985, much of the land was divided into parts and sold, but with the condition that each purchaser sign onto the wildlife refuge agreement. Nearly all new owners since that time have pledged to carry on and continue to keep the wildlife refuge. Despite several attempts to develop the area for mining, as well as some bush fires during those years, private owners have fought to maintain the refuge for conservation purposes. They have established 'Friends of the Mongarlowe River Inc.' which aims to protect the Mongarlowe River and its surrounding habitats.

The area is habitat for a wide diversity of birds, animals and some rare plants. Swamp and red necked wallabies, quolls, echidnas, wombats, platypus, gang gang cockatoos, Rufous Wistler, *Eucalyptus recurva* and *Boronia rhomboidea* can all be found in the refuge area, which measures approximately 2500 acres.

Weakness

However, unlike conservation agreements or trust agreements, a landholder can easily revoke a wildlife refuge declaration and future landholders do not have to be bound by the wildlife refuge agreement if they do not wish to be.[86] Any biodiversity conservation benefits are therefore not protected in perpetuity.

For further detail on how wildlife refuges have worked in practice, please refer to the Hunter region case study in **Appendix 4.**

Recommendation: Wildlife refuge provisions should be retained and strengthened.

Part 4 Division 12 – Conservation agreements

In NSW, a landowner can enter into a permanent conservation agreement with the Environment Minister.[87]

Strengths

Conservation agreements are entered into voluntarily. However, once signed they are binding. Although the land remains in the ownership of the landholder under the agreement, the landowner and future landowners are all bound by the agreement. Conservation agreements are used to permanently protect land which has special features, such as high quality vegetation, habitat, scenery, Aboriginal objects or places, threatened species habitat or threatened vegetation. They may also be entered into for the purpose of protecting areas of scientific interest for study.

A management plan is attached to the conservation agreement and it sets out the things the landholder must do, or not do, to conserve the land. Typical obligations include controlling invasive species and leaving fallen timber. Each management plan is different and is negotiated between the landholder and the Environment Minister through the OEH.

[86] *National Parks and Wildlife Act 1974* (NSW), s. 68(3)(b).
[87] See *National Parks and Wildlife Act 1974* (NSW), Division 12, s. 69 A – KA.

Draft conservation agreements between the Environment Minister and a statutory authority or another Minister must be publicly exhibited before they can be entered into. During this period, any person may make a written submission to the Minister about the draft agreement. The Minister must consider any submissions made before entering into the agreement.[88]

Conservation agreements are entered on a public register which is available for public inspection.[89]

Agreement runs with the land

A conservation agreement is registered on the title of the land, runs with the land, and therefore binds future owners of the land.[90] Agreements operate forever, unless the agreement says otherwise or it is terminated with the agreement of all parties.[91] The Environment Minister can also terminate an agreement if it is no longer effective.[92]

Enforcement of Agreements

Conservation agreements are legally binding and can be enforced in the Land and Environment Court.[93] In certain circumstances, damages may be awarded against an owner of a conservation area for breach of a conservation agreement.[94]

Financial and technical assistance

In return for protecting their land, a landowner may receive financial and technical assistance from the government. This might include financial assistance with fencing materials, plant and animal surveys, and stabilisation works.[95]

Land which is covered by a conservation agreement is exempt from local council rates,[96] or if only part of a property is covered by the agreement, then the landowner is entitled to a rate reduction.[97] Other tax concessions also apply.

Case Study: Bow Wow Creek Gorge Conservation Agreement

Colin and Pamela Fitzsimmons entered into a conservation agreement to protect the vulnerable and endangered plants and animals of 65 hectares of bushland at Mount Vincent, south west of Cessnock.

More than 150 species of bird are found in the area, including species such as the powerful owl, grey goshawk, raven, kingfishers, gerygone, brown treecreeper, as well as certain rare plants and other flora, including ferns, orchids, *Callistemon shiressii, Macrozamia flexuosa* and cycads. The objectives of the agreement include more effective and controlled action on weeds, greater control of the spread of possible bush fire and other threats of erosion. There is regular spot spraying in the area.

[88] *National Parks and Wildlife Act 1974* (NSW), s. 69K.
[89] *National Parks and Wildlife Act 1974* (NSW), s. 69H.
[90] *National Parks and Wildlife Act 1974* (NSW), s. 69E and s. 69F.
[91] *National Parks and Wildlife Act 1974* (NSW), s. 69D(3).
[92] *National Parks and Wildlife Act 1974* (NSW), s. 69D(4).
[93] *National Parks and Wildlife Act 1974* (NSW), s. 69G, and *Land and Environment Court Act 1979* (NSW), s. 20(1)(ce).
[94] *National Parks and Wildlife Act 1974* (NSW), s. 69G(3).
[95] *National Parks and Wildlife Act 1974* (NSW), ss. 69C(2) and (3).
[96] *Local Government Act 1993* (NSW), s. 555(1)(b1).
[97] *Local Government Act 1993* (NSW), s. 555(3).

Weaknesses

Mining can occur on land covered by agreement and therefore obliterate any positive biodiversity outcomes.

Statutory authorities such as the Roads and Maritime Services can develop land covered by a conservation agreement with the Environment Minister's agreement.[98]

For further detail on how conservation agreements have worked in practice, please refer to the Hunter region case study in **Appendix 4.**

Recommendation: Retain the agreement mechanism in legislation and ensure that activities such as mining are excluded.

Part 4 Division 13 – Offences relating to wildlife refuges and conservation areas

Sections 70 and 71 of the NPW Act contain prohibitions relating to the harm of fauna and picking or possession of native plants in wildlife refuges, conservation areas, wilderness areas or areas subject to a wilderness protection agreement. It is an offence to harm native animals or pick native plants if the land is covered by a conservation agreement, although there are some exceptions to these offences.[99]

Recommendation: The offence provisions for harming fauna and picking native plants should be retained, and supported by an improved compliance and enforcement policy.

Part 6A – Stop work orders, interim protection orders and remediation orders

The NPW Act provides that the OEH is responsible for enforcing laws that protect native animals and plants. This can be done through criminal prosecutions, although OEH may consider using its other enforcement powers before commencing a prosecution. These other powers include the power to issue penalty notices, warning letters, stop work orders and interim protection orders.

EDO NSW views these orders as essential **strengths** of the current legislation and when used, have functioned to temporarily (and sometimes permanently) prevent biodiversity destruction.

Stop work orders

The Chief Executive (through an authorised officer) can issue a stop work order if he or she is of the opinion that an activity is being, or is about to be, carried out that is likely to significantly affect a protected native animal or plant.[100] A stop work order cannot be issued if the activity is already authorised under another law, such as by a development consent or licence.[101]

A stop work order lasts for 40 days and can be extended for a further period of 40 days.[102] The Chief Executive does not need to notify anybody who might be affected by the order before issuing an order.[103] The person against whom an order is made can, however, appeal

[98] *National Parks and Wildlife Act 1974* (NSW), s. 69I.
[99] *National Parks and Wildlife Act 1974* (NSW), s. 70 and 71.
[100] *National Parks and Wildlife Act 1974* (NSW), s. 91AA.
[101] *National Parks and Wildlife Act 1974* (NSW), ss. 91AA(3), (4).
[102] *National Parks and Wildlife Act 1974* (NSW), s. 91DD.
[103] *National Parks and Wildlife Act 1974* (NSW), s. 91BB.

against the order to the Environment Minister.[104] There is no further merits appeal to the Land and Environment Court, but the validity of the order can be challenged in the Land and Environment Court if a legal error was made in issuing it.[105]

After making a stop work order, the Chief Executive must immediately consult with the person proposing to take the action to see if the activity can be modified. If satisfactory arrangements cannot be made to protect the environment, the Chief Executive must recommend that the Environment Minister make an interim protection order.[106]

Interim protection orders

The Environment Minister can make an interim protection order over land containing native animals and native plants, but only after receiving a recommendation to do so from the Chief Executive.[107] An interim protection order can prohibit someone from doing things, such as damaging the habitat of a native animal or picking a native plant.

However, there are some exceptions to this. For example, an interim protection order cannot be issued if the action in question is essential to carry out work under a development consent.[108]

The Minister is not required to notify anyone who will be affected by an interim protection order.[109] An interim protection order has effect for the time period specified in the order but not longer than 2 years, unless revoked beforehand.[110] The Chief Executive must keep a public register of all interim protection orders.[111]

An owner or occupier of land subject to an interim protection order can appeal against the order to the Land and Environment Court within 60 days of receiving the order.[112]

It is an offence not to comply with an interim protection order. The maximum penalty for a corporation is $1.1 million, and for an individual it is $110,000.[113]

The **weakness** of the orders is that they are not often made, and the protection afforded by the orders may be short-lived.

Recommendations:

- Retain existing order provisions
- As recommended in relation to native vegetation clearing, biodiversity legislation should include innovative orders equivalent to those available under the NSW POEO Act.
- A review of compliance and enforcement under the Act should include review of whether conditions with orders are complied with.

[104] *National Parks and Wildlife Act 1974* (NSW), s. 91CC.
[105] *National Parks and Wildlife Act 1974* (NSW), s. 176A; *Land and Environment Court Act 1979* (NSW), s. 20(1).
[106] *National Parks and Wildlife Act 1974* (NSW), s. 91EE.
[107] *National Parks and Wildlife Act 1974* (NSW), s. 91A.
[108] *National Parks and Wildlife Act 1974* (NSW), ss. 91AA(4)(a) – (d).
[109] *National Parks and Wildlife Act 1974* (NSW), s. 91C.
[110] *National Parks and Wildlife Act 1974* (NSW), ss. 91D, 91E.
[111] *National Parks and Wildlife Act 1974* (NSW), s. 91I.
[112] *National Parks and Wildlife Act 1974* (NSW), s. 91H; *Land and Environment Court Act 1979* (NSW), s. 20(1)(cf); *Land and Environment Court Rules 2007* (NSW), Rule 7.1.
[113] *National Parks and Wildlife Act 1974* (NSW), s. 91G.

Part 7 – Fauna

In NSW, the OEH is responsible for protecting native animals. All native animals (fauna - mammals, birds, reptiles and amphibians) and many species of native plants (flora) are protected in NSW.[114] The Chief Executive of the Office of Environment and Heritage (OEH) is responsible for protecting native animals and plants in NSW.[115]

As all native animals such as mammals, birds, reptiles and amphibians are protected in NSW, there is therefore no list showing which native species are protected (but as discussed, there are lists of which *threatened* species are protected).

Some non-native animals are listed as "unprotected fauna".[116] Unprotected fauna include: bears, lions, dogs, moles, hedgehogs, cloven hoofed animals, horses, donkeys, apes, monkeys, elephants, hares, rabbits and Indian Palm Squirrels.

Strengths

There are a range of offences protecting native animals, that cover a range of activities. For example:

- It is an offence to harm protected fauna. This includes harm by using a substance (e.g. poison), an animal (e.g. a hunting dog), or a gun, net or trap.[117] The maximum penalty is $11,000 or 6 months imprisonment, or both.[118]
- It is an offence to buy, sell or possess protected fauna, although there are some exceptions to this, such as having a licence to do so.[119] The maximum penalty is $11,000 or 6 months imprisonment or both.[120]
- An NPWS officer can give a direction to someone to stop feeding protected fauna, or to stop any activity that is causing or might cause distress to native animals.[121] Failure to comply with a direction could result in a maximum penalty of $2,750.
- An authorised officer can also give a direction to someone who is lawfully keeping a native animal in confinement (e.g. a cage) in relation to food, drink and shelter.[122] An individual who fails to comply with a direction could receive a maximum penalty of $11,000 and $1,100 for each day the offence continues.

We note that there is a broad range of defences that may be available to a person if they are charged with the offence of harming protected animals.[123] In short, if the offending activity was in some way authorised (such as by a licence or development consent), then the person will not have committed an offence.

For example, a person will not have committed an offence if:[124]

- they had a licence (see below);
- they were returning the animal after escape;[125]

[114] Under the *National Parks and Wildlife Act 1974* (NSW) and the *National Parks and Wildlife Regulation 2009* (NSW).
[115] *National Parks and Wildlife Act 1974* (NSW), ss. 92, 114
[116] Unprotected fauna are listed the *National Parks and Wildlife Act 1974* (NSW), Sch. 11. Note, unprotected fauna may be protected under other legislation such as the *Prevention of Cruelty to Animals Act 1979* (NSW), *Companion Animals Act 1998* (NSW), *Non-Indigenous Animals Act 1987* (NSW), *Exhibited Animals Protection Act 1986* (NSW), *Deer Act 2006* (NSW) and *Game and Feral Animal Control Act 2002* (NSW).
[117] *National Parks and Wildlife Act 1974* (NSW), s. 98(2).
[118] *National Parks and Wildlife Act 1974* (NSW), s. 98(2).
[119] *National Parks and Wildlife Act 1974* (NSW), s. 101.
[120] *National Parks and Wildlife Act 1974* (NSW), s. 101(1).
[121] *National Parks and Wildlife Act 1974* (NSW), s. 99A. The maximum penalty is $2,750.
[122] *National Parks and Wildlife Act 1974* (NSW), s. 102.
[123] *National Parks and Wildlife Act 1974* (NSW), ss. 98(3), 118G.
[124] *National Parks and Wildlife Act 1974* (NSW), ss. 98(3), 118G.
[125] *National Parks and Wildlife Act 1974* (NSW), s. 100(1)(b).

- they were carrying out a routine farming activity;
- they were carrying out a routine agricultural management activity such as clearing non-protected regrowth, continuing an existing farming activity or engaging in sustainable grazing.[126] (The weaknesses of RAMA provisions are noted above).

Harming or killing a snake is permitted unless the person had no reason to harm or kill it, i.e. the snake was not causing a danger to person or property.[127]

Recommendation: Retain offence provisions for fauna, and better resource enforcement and compliance.

Part 7A – Marine mammals, special provisions

Marine mammals include whales, dolphins and seals.[128] Depending on where they are found, marine mammals may be protected by either NSW or Commonwealth law. Marine mammals receive the same general protection as other native animals and also some additional protection.[129] The main thrust of this extra protection is that marine mammals cannot be approached within certain distances.[130]

Strengths

Marine mammals that are also threatened species

If the species of marine mammal is also listed as threatened, then additional protections will apply. In NSW, the following marine mammals are listed as threatened:

- Endangered:[131]
    - Dugong
    - Southern Right Whale
    - Blue Whale
- Vulnerable:[132]
    - New Zealand Fur-seal
    - Australian Fur-seal
    - Sperm Whale
    - Humpback Whale

NSW laws put specific distance restrictions on approaching marine mammals, and impose fines for interfering, harassing, chasing etc.[133] The set distances for different species are set out in the regulation.[134] A person will not commit an offence if: they had a licence to take the action;[135] or they were approached by the marine mammal itself.[136]

[126] See: *Native Vegetation Act 2003* (NSW), s. 11 for a full list of routine agricultural management activities.
[127] *National Parks and Wildlife Act 1974* (NSW), s. 112.
[128] *National Parks and Wildlife Act 1974* (NSW), s. 5, Definitions.
[129] *National Parks and Wildlife Act 1974* (NSW), Part 7A; *National Parks and Wildlife Regulation 2009* (NSW), Part 6, Div. 3.
[130] *National Parks and Wildlife Act 1974* (NSW), s.112G.
[131] *Threatened Species Conservation Act 1995* (NSW), Sch. 1.
[132] *Threatened Species Conservation Act 1995* (NSW), Sch. 2.
[133] *National Parks and Wildlife Act 1974* (NSW), s. 112G(1).
[134] *National Parks and Wildlife Regulation 2009* (NSW), cls. 61-64.
[135] *National Parks and Wildlife Act 1974* (NSW), s. 112G(3).
[136] *National Parks and Wildlife Regulation 2009* (NSW), cl. 60(1)(a).

Marine Mammals Advisory Committee

A Marine Mammals Advisory Committee[137] has been set up to advise the Environment Minister on, amongst other things:

- the conservation and protection of marine mammals;
- plans for dealing with strandings of marine mammals; and
- plans of management.

Plans of management

The Chief Executive can prepare a plan of management setting out how populations of marine mammals should be managed.[138] The plan can cover things such as identifying the threats to the survival of marine mammals; research and strategies relating to the conservation and protection of marine mammals, educational activities; and international agreements and agreements between the Commonwealth and the States relating to marine mammals.[139]

A plan of management is open for public comment for one month or longer before the plan is finalised and any comments received are forwarded to the Marine Mammals Advisory Committee.[140] The Environment Minister makes the final call on whether to adopt the plan.[141]

Weaknesses and recommendations

Marine mammal legislation in NSW covers a number of species with significantly different lifecycles and behaviours. These include species that may be resident in certain areas and species that migrate tens of thousands of kilometres and are protected under state and federal legislation and international agreements. While the current regulations for managing interactions with marine mammal seem largely effective, there are a number of areas that could be improved, namely:

- Need for licencing of commercial operators
- Need to clarify rules for approach distances to calves
- Need for stronger enforcement of regulations[142]
- Increase protection for resident populations and solitary marine mammals.

The whale watching industry off NSW has seen significant growth in recent years. This industry largely focusses on migrating humpback whales, although different regions of NSW, for example Port Stephens and Jervis Bay, also focus on resident dolphin populations. The ongoing recovery of marine mammal species suggests that the commercial whale watching industry is not having a significant impact on the populations of animals being watched, however concern has been expressed about impacts on some resident species in particular and the impacts of large numbers of commercial and recreational whale watching vessels.

[137] The Marine Mammals Advisory Committee was established under the *National Parks and Wildlife Act 1974,* s. 112B.
[138] *National Parks and Wildlife Act 1974* (NSW), s. 112D.
[139] *National Parks and Wildlife Act 1974* (NSW), s. 112C.
[140] *National Parks and Wildlife Act 1974* (NSW), ss.112D(2) and (3).
[141] *National Parks and Wildlife Act 1974* (NSW), ss. 112D(5)-(8).
[142] Kessler and Harcourt (2013) Whale watching regulation compliance trends and the implications for management off Sydney, Australia *Marine Policy* 42: 14-19.

Commercial whale watching vessels in NSW currently operate without any licence for the activity of whale watching (unless the activity occurs in a marine park). Standard maritime licence requirements apply. As a result, there is no training or experience required before an operator begins a commercial whale watching business. Given that ship strike has been recognised as a growing risk for marine mammals, ensuring that commercial whale watching operators, many of which take large vessels to watch whales in close proximity twice a day for up to six months of the year, are able to understand and appropriately respond to whale behaviour should be an important pre-requisite to being in business. A recent study of the Sydney whale watching industry showed that commercial operator compliance varied from 36.8% to 95.8%, depending on the whale watching regulation considered. At present, there is little or no enforcement of the whale watching regulations and the only penalties that apply to commercial operators doing the wrong thing are those that apply more broadly. The introduction of a licence system was discussion in 2005 but never implemented. The industry has grown considerably since that time. This review provides an opportunity to introduce such a system and ensure that compliance with regulations is tied to licence renewal.

Commercial operators off Sydney also operate on the assumption that they are able to approach to 150m from calves, despite the regulations stating that approach distances should be limited to 300m. This situation has arisen from a perception that the industry has been given an exemption to this regulation. This creates a number of problems. The first is that any exemption is not formal and commercial whale watching operators are breaking the law. Of broader concern is the fact that many recreational whale watchers use commercial boats as their guide to appropriate approach distances. The result is that a large proportion of boats watching whales off Sydney approach close to whales that the current regulations allow.

Given the high variability in compliance with the whale watching regulations, their ongoing effectiveness will depend on ensuring that the regulations are enforced. Programs to ensure that recreational whale watchers are aware of the regulations they must follow and on the water enforcement of these regulations are vital.

Resident populations are particularly susceptible to harm as the same animals are consistently exposed to disturbance. Research on the resident bottlenose dolphin population in Port Stephens has shown that the dolphin's behaviour changed significantly in the presence of dolphin-watching vessels, and this ultimately has the potential to affect the health of both individual animals and the population as a whole[143]. Management protocols that reflect local impacts and conditions should be developed for resident cetacean populations that are subject to extensive human interaction.

Volunteer organisation ORRCA (the Organisation for the Research and Rescue of Cetaceans Australia) has recently expressed concern about the management of solitary marine mammals. International research has shown that solitary marine mammals that begin regular interactions with humans are far more susceptible to harm over the long term.[144] Recent management of solitary animals in Jervis Bay in particular has resulted in interactions between people and the animal that are potentially harmful for both the animal and the people. Stronger protocols for the management of lone animals should be developed.

[143] Steckenreuter A, Harcourt R, Möller L (2011). Distance does matter: close approaches by boats impede feeding and resting behaviour of Indo-Pacific bottlenose dolphins. *Wildlife Research* 38: 455-463.
Steckenreuter A, Harcourt R, Möller L. (2012). Are Speed Restriction Zones an effective management tool for minimising impacts of boats on dolphins in an Australian marine park? *Marine Policy* 36: 258-264.

[144] Bejder and Samuels (2003) Evaluating the effects of nature based tourism on cetaceans. In *Marine Mammals: Fisheries, Tourism and Management Issues* (ed: Nick Gales, Mark Hindell, Roger Kirkwood

Part 8 – Native plants

Picking or dealing with native plants is not allowed without a licence.[145] There is a list of over 100 native plant species that are protected in NSW,[146] many of which are commonly used in the cut-flower industry for ornamental purposes. These include Sturt's Desert Pea, Christmas Bell, Maidenhair Fern and Waratah.

Offences

It is an offence to pick or have in your possession a protected native plant.[147] It is also an offence to sell protected native plants without a licence.[148] The maximum penalty is $11,000 (plus $1,100 for each additional plant), or 6 months imprisonment, or both.[149]

Defences

There are many defences to a charge of picking or possessing a protected native plant.[150]

Some of the defences are:

- that the protected plant was grown upon private land and was picked by or with the consent of the owner, leaseholder or occupier of that land;
- the picking was authorised by a Conservation Agreement;
- the person had a licence to take the plant;
- the person cultivated the plant themselves as a (non-commercial) hobby; or
- the person got the plant from an authorised dealer.

Flora plans of management

If a particular species of native plant might be threatened by some sort of commercial activity, the Chief Executive can prepare a flora plan of management to regulate and monitor those impacts.[151] It is a condition of all licences that authorise the picking of a protected native plant in the wild that the picking takes place in accordance with any relevant flora plan of management.[152]

Forestry

Forests NSW must not issue a licence for the removal of native plants from State Forests, timber reserves or Crown land unless the removal is permitted under a flora plan of management or the plant would have been damaged or destroyed in the taking of timber, products or forest materials authorised by Forests NSW.[153]

Licences to pick, grow, etc. native plants

The NPWS can issue a licence authorising a person to:[154]

- pick the protected native plants named in the licence;
- grow protected native plants on private land for the purposes of sale;
- import or export native plants from NSW; or

[145] *National Parks and Wildlife Act 1974* (NSW), ss. 117, 118.
[146] See: *National Parks and Wildlife Act 1974* (NSW), Sch. 13.
[147] *National Parks and Wildlife Act 1974* (NSW), s. 117.
[148] *National Parks and Wildlife Act 1974* (NSW), s. 118.
[149] *National Parks and Wildlife Act 1974* (NSW), ss. 117, 118.
[150] *National Parks and Wildlife Act 1974* (NSW), s. 117(3).
[151] *National Parks and Wildlife Act 1974* (NSW), s. 115A.
[152] *National Parks and Wildlife Act 1974* (NSW), s. 133(1A).
[153] Under the *Forestry Act 1916* (NSW). See: *National Parks and Wildlife Act 1974* (NSW), s. 116.
[154] *National Parks and Wildlife Act 1974* (NSW), ss. 131, 132, 132A, 132C.

- pick any protected native plant for scientific, educational or conservation purposes.

All licenses that authorise picking native plants include a condition that the picking takes place in accordance with any relevant flora plan of management.[155]

There is no public register of licences to pick native plants.

Recommendations:

- Provisions to prevent the picking etc of native plants without a legitimate defence should be retained.
- There should be a public register of licences.

Part 8A – Threatened species, populations and ecological communities and their habitats, and critical habitat

A relatively broad range of criminal offences relating to threatened species, endangered populations and endangered ecological communities are set out in the NPW Act, not the TSC Act. Although these offences may be enforced through either civil proceedings, or criminal proceedings, most breaches are prosecuted as criminal matters. OEH and the NSW EPA are responsible for bringing criminal prosecutions.

Strengths

It is an offence to *harm* any animal that is a threatened species, or which is part of an endangered population or an endangered ecological community.[156] This includes harm which is caused by any substance (for example, poison), animal (for example, dog), firearm, net, trap or hunting device. The maximum penalty for harm to an *endangered* species, population or ecological community is $220,000 and/or two years imprisonment. For harm to a *vulnerable* species, it is $55,000 and/or one year imprisonment.

In many cases, however, it is the habitat rather than the individual animal itself which is harmed or damaged. It is therefore also an offence to damage the *habitat* of a threatened species, endangered population or endangered ecological community if the person knows that the land concerned is habitat of that kind. The maximum penalty is $110,000, and/or one year imprisonment.

It is also an offence to damage *critical habitat*. The maximum penalty is $220,000 or two years imprisonment, or both. If a map showing where the critical habitat is has been published in the Gazette, then the prosecution does not need to prove that the person knew it was declared critical habitat (they are assumed to have known).

It is an offence to buy, sell or have in one's possession (for example, in a vehicle, house, apartment or field) any animal or plant that is listed as a threatened species or which is part of an endangered population. The maximum penalty for an *endangered* species is $220,000 and/or two years imprisonment. For a *vulnerable* species, it is $55,000 and/or one year imprisonment.[157]

It is an offence to *pick* any plant that is listed as a threatened species, or that is part of an endangered population or endangered ecological community. The maximum penalty for an *endangered* species, population or ecological community is $220,000 and/or two years

[155] *National Parks and Wildlife Act 1974* (NSW), s. 133(1A).
[156] See *National Parks and Wildlife Act 1974* (NSW), s118A-G.
[157] This provision does not apply to a landowner or lessee if the plant is naturally occurring on their land.

imprisonment. For *vulnerable* species, it is $55,000 and/or one year imprisonment. "Pick" includes gathering, cutting, poisoning, digging up or injuring the plant or any part of the plant. For example, slashing a paddock which contains threatened plants would constitute "picking".

A key strength is the provision that any person can bring a case in the Land and Environment Court to remedy or restrain a breach of the laws protecting native plants and animals. This is a fundamental accountability mechanism that should be in all biodiversity legislation.

Weaknesses

Defences

Protection of threatened species under NSW legislation is not absolute. There are a broad range of defences that a person can call on if they are charged with an offence regarding threatened species. In short, if the offending activity was in some way authorised (for example, by a licence or development consent), then an offence will not have been committed. Some of the more typical defences include:

- *Licences to harm, kill, etc* - It is a defence to a prosecution for an offence if the person had a licence to harm or pick the threatened species and they were complying with that licence.[158]
- *Lawful development* - It is a defence if the work which harmed the threatened species was essential for the carrying out of development under a development consent issued under the *Environmental Planning and Assessment Act*. To have the benefit of this defence, the work must have been carried out in accordance with the relevant approval and its conditions. For example, if a person clears land in excess of that which is permitted under a development consent, then they cannot point to the development consent as a defence if they have cleared the habitat of a threatened species.
- *Property management plans* - The Director-General may approve a property management plan which has been prepared by a landholder. A property management plan may authorise the landowner, or others, to take certain actions (for example, to authorise Aboriginal persons to harm animals or pick plants). It is a defence to a threatened species offence if the person was carrying out the activity concerned in accordance with an approved property management plan.
- *Conservation agreements* - Conservation agreements also provide an important defence to threatened species offences. It is a defence to a threatened species offence if the activity was carried out under a conservation agreement.

However, *routine agricultural and farming activities*[159] - It is a defence if the person can prove that they were carrying out work which was reasonably necessary for: clearing native vegetation for a routine agricultural activity; a routine farming activity (which does not include clearing native vegetation); or an activity which is permitted under the *Native Vegetation Act 2003*, such as clearing non-protected regrowth, continuing an existing farming activity or engaging in sustainable grazing. Problematically, this category is likely to include clearing

[158] OEH does not issue licences concerning threatened fish species and marine vegetation. These are issued by Department of Primary Industries.

[159] Routine agricultural activities include things such as: constructing dams, fences, stockyards and farm roads; removing noxious weeds; controlling noxious animals; collecting firewood (but not for commercial purposes); lopping native vegetation for stock fodder; and traditional Aboriginal cultural activities (but not commercial activities). See Native Vegetation Act 2003 (NSW).

done under a self-assessable code in the near future. (Concerns with expanded categories of RAMAs are discussed above).

Compliance and enforcement

The following case studies illustrate the generally low penalties imposed for threatened species offences in NSW.

Case studies – NSW penalties

NSW engages in a range of regulatory activities with the NSW EPA undertaking environmental enforcement, however generally low fines are imposed with some exceptions in recent years.

In *Carmody v Brancourts Nominees Pty Ltd and Another* [2003] NSWLEC 84 both defendants were charged with knowingly clearing vegetation from land at Hawks Nest that was the habitat of an endangered population of koalas, contrary to s 118D(1) of the NPWA. The defendants pleaded guilty, and were fined $5,000, while agreeing to undertake remediation works under s 118E of the NPWA.

In *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 234 the defendant slashed, cleared and excavated land that contained thousands of plants of the vulnerable species *Tetratheca juncea*. The plant is listed as a vulnerable species under the TSCA. The defendant was convicted of picking threatened species contrary to s 118A(2) of the NPWA, and given a fine of $40,000.

In *Garrett v Williams* (2006) 160 LGERA 115 Mr Williams owned land in the Southern Highlands on which the listed Shale Woodland grew. The Southern Highlands Shale Woodland was listed as an endangered ecological community under the *Threatened Species Conservation Act 1995*. Picking plants a part of an endangered ecological community was in contravention of s 118A(2) of the NPWA. Over two separate periods, he arranged for trees of the woodland to be cleared or cut down. The offences occurred while Mr Williams' application for development consent to subdivide the land was being considered by the local council. Mr Williams pleaded guilty to the charges. The Land and Environment Court found that the clearing was premeditated and deliberate, and that it was done to remove an impediment to the subdivision being approved. A fine in the upper limit of the range was imposed. The Court fined Mr Williams a total of $180,000 and also ordered him to pay the prosecutor's costs.

In *Garrett v Freeman (No 5)* (2009) 164 LGERA 287 the Port Macquarie Hasting Council, headed by the defendant, constructed a road that caused damage to the habitat of a threatened species. The act of damaging the habitat of a threatened species contravenes s 118D(1) of the NPWA. Fines across all parties amounted to $137,500.

Plath[160] *v Knox* [2007] NSWLEC 670
The defendant engaged in spraying of vegetation on reserved land, harming three species of flora and fauna that are either endangered or vulnerable. Following the plea of guilty, and other mitigating factors, a $13,200 fine was imposed.

Plath v Chaffey [2009] NSWLEC 196
The defendant was charged with four counts of collecting eggs of a threatened species, and one count of harm to protected fauna. The defendant had intentionally collected the eggs of the threatened species on Lord Howe Island. The defendant pleaded guilty to collecting 94 eggs of four species (Masked Booby, Red-Tailed Tropicbird, Sooty Tern, White Tern) in contravention of s 118A(1) of the NPWA and also s 98(2)(a). The defendant had limited capacity to pay a fine, and as such was sentenced to 80 hours of community service – less than 1 hour per egg.

Plath of Department of Environment and Climate Change v Fish [2010] NSWLEC 144
The defendants cleared the habitat of threatened koalas contrary to s 118D(1) of the NSWPA, after receiving incorrect advice as to whether planning approval was needed. The defendants were found

[160] Note: Gordon Plath is from the then Department of Environment and Climate Change.

guilty, and cumulatively paid fines of $15,000, as well as being obligated to carry out remediation work.

Plath v Hunter Valley Property Management Pty Ltd [2010] NSWLEC 264
The defendant cleared vegetation, including of the endangered species *Acacia pendula* in the Hunter Valley, contrary to s 118A(2) of the NPWA. The defendant pleaded guilty. Due to mitigating factors, the defendant was fined $37,500.

Plath v Lithgow City Council [2011] NSWLEC 8
The defendant pleaded guilty to two charges under s 118A(2) of the NPWA of picking plants of threatened species, listed as 'endangered' under the TSCA, in the course of roadworks. The defendant was ordered to pay $105,000 in fines, and direct $105,000 to rehabilitation of the area that was cleared.

Similar to some of the penalties imposed for breaches regarding terrestrial threatened species, low fines have also been imposed in relation to marine species. For example, a recreational fisher from Lake Munmorah who killed an endangered grey nurse shark was in fined $2000 for the offence. The man pleaded guilty in Forster Local Court for taking the 1.7m long female shark off Hastings Point in June 2006. Grey nurse sharks were listed as an endangered species in 2001 under the *Fisheries Management Act 1994*, after first being declared threatened in 1984. The fine was disappointingly low. As the proceedings were dealt with in the Local Court , the maximum fine available was $10,000. If proceedings had been commenced in the Supreme Court or the Land and Environment Court, a much larger penalty would have been possible (that is, $220,000 or two years imprisonment).

Recommendations:

- Retain current provision that any person can bring a case in the Land and Environment Court to remedy or restrain a breach the laws protecting native plants and animals.[161]
- Review the current compliance and enforcement policy under the Act.
- Review the impact of RAMAs on threatened species.

Part 9 – Licensing in respect of fauna, native plants and threatened species

Strengths

Part 9 covers a relatively broad range of relevant activities. A wildlife licence is required from the NPWS to do any of the following things to protected fauna:

- harm, keep, exhibit or sell protected fauna;[162]
- keep native animals as pets;[163]
- collect native animals to sell; [164]
- carry out research on native animals;[165]
- move native animals from NSW across State or Territory borders;[166] or
- liberate an animal within NSW.[167]

There is also a range *of commercial operations* which are not permitted without a licence. These include:

[161] *National Parks and Wildlife Act 1974* (NSW), s. 193.
[162] *National Parks and Wildlife Act 1974* (NSW), s. 120(1) - general licence.
[163] *National Parks and Wildlife Act 1974* (NSW), s. 120 - general licence.
[164] *National Parks and Wildlife Act 1974* (NSW), s. 123 - commercial fauna harvester's licence.
[165] *National Parks and Wildlife Act 1974* (NSW), s. 132D - scientific licence.
[166] *National Parks and Wildlife Act 1974* (NSW), s. 106 (3) - import or an export licence. See also *National Parks and Wildlife Act 1974* (NSW), s. 126.
[167] *National Parks and Wildlife Act 1974* (NSW), s. 127 - licence to liberate.

- harming animals for sale;[168]
- being an animal dealer; [169]
- being a skin dealer; [170]
- being an emu breeder;[171] or
- exhibiting protected animals.[172]

Licences are issued by the NPWS. However, there is no public register of licences issued to harm native animals (although there is a public register for licences to harm threatened species).

Weakness

Enforcement in relation to licensing

Over a five year period (2008-2013) there have only been 22 prosecutions under the NPW Act 1974 and its Regulations pertaining to licensing issues. Notably, in 2012-13 there were zero (0) prosecutions to this effect. 2011-12 saw the highest number of prosecutions under the NPW Act 1974 at 8, whereas 2012-2013 saw the lowest number of prosecutions under the NPW Act 1974 at zero (0). The largest fine in any year was in 2010-11 at $5,600, and the lowest was in 2009-10 at $250. The highest cumulative fines were in 2010-11 at $6,600. There was one acquittal in the five year period covered, in 2009-10.

- **2008-09:** 3 prosecutions relating to breach of licence condition under Act; zero (0) prosecutions under Regulations. Smallest fine was $500; largest was $1,200.
- **2009-10:** 5 prosecutions relating to breach of licence condition under Act; 1 prosecution under Regulation for providing false information on licence application. 3 fines of $2000; 2 instances of not fined but dealt with under s 32 *Mental Health (Forensic Provisions) Act 1990*.
- **2010-11:** 2 prosecutions completed relating to breach of licence condition under Act; zero (0) prosecutions under Regulations. Smallest fine was $1,000; largest was $5,600.
- **2011-2012:** 8 prosecutions completed relating to breach of licence condition under Act; 1 acquittal; 3 fined at $200; 3 fined at 400; 3 charged under the Regulations (fined $300 each).
- **2012-13:** There are no reported prosecutions relating to licensing under the NPW Act or Regulations.

Figure 2

	DECCW/ DPC/ OEH Annual Report	NPW Act	NPW Regs	Total	Fined $ (smallest)	Fined $ (largest)	Fine $ (total)	# not fined
2008-09	DECCW	3	0	3	$500	$1,200	$3,200	0
2009-10[173]	DECCW	5	1 (not	6	$250[175]	$2,000	$6,250	2 (1 Act, 1

[168] *National Parks and Wildlife Act 1974* (NSW), s. 103.
[169] *National Parks and Wildlife Act 1974* (NSW), s. 124 – fauna dealer's licence.
[170] *National Parks and Wildlife Act 1974* (NSW), s. 125 - skin dealer's licence.
[171] *National Parks and Wildlife Act 1974* (NSW), s. 125A - emu licence.
[172] *National Parks and Wildlife Act 1974* (NSW), s. 107.
[173]

			fined)[174]					Regs)
2010-11	DPC[176]	2	0	2	$1000	$5,600	$6,600	0
2011-12	DPC[177]	8	3	11	$400 (Act); $300 (Regs)[178]	$2,000	$3,800	1 (acquitted)
2012-13	DPC[179]	0	0	0	0	0	0	0

Recommendations:

- Undertake a review of compliance and enforcement in relation to licensing and whether conditions are complied with.
- Undertake a review of the compliance and enforcement policy under the NPW Act more generally.

DECCW, Annual Report 2009-10. http://www.environment.nsw.gov.au/resources/whoweare/deccwar0910appsindexes_10900.pdf 269-270.

[175] This prosecution was for carrying on business fauna dealing without licence.

[174] Dealt with under s 32 *Mental Health (Forensic Provisions) Act 1990*.

[176] Department of Premier and Cabinet, Annual Report 2010-11, http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0013/133420/Department_of_Premier_and_Cabinet_Annual_Report_2010-11.pdf 248.

[177] Department of Premier and Cabinet, Annual Report 2011-12, http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0006/146256/Department_of_Premier_and_Cabinet_Annual_Report_bm_2011-12.pdf 182-183.

[178] For providing false information in licence application (prosecuted under Regulations).

[179] Department of Premier and Cabinet, Annual Report 2012-13, http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0003/158727/Department_of_Premier_and_Cabinet_Annual_Report_2012-13.pdf 178.

‘CATEGORY 2’ LEGISLATION:

Environmental Planning and Assessment Act 1979

As noted in the introduction, it is not the primary biodiversity legislation that is having the most significant impact on biodiversity in NSW. Planning legislation currently prevents the TSC Act from fully realising its legislative objectives. This part of the report looks at the interaction of planning and biodiversity laws in NSW.

The Australian network of EDOs has undertaken analysis of the interaction between planning and biodiversity laws for each jurisdiction – see our audit report in **Appendix 2.** A common theme is that planning and resource legislation often overrides biodiversity objectives.

Interaction of threatened species and planning laws in NSW

NSW threatened species laws do not protect threatened species absolutely. Rather, the laws identify and list species and communities and set up administrative procedures (such as requiring species impact statements) to guide decision-making where threatened species are concerned. Under the *Environmental Planning and Assessment Act 1979 (***EP&A Act***)* (the main legislation controlling development in NSW), a consent authority may grant development consent which will adversely affect threatened species.

The main EIA law in NSW is the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act).The majority of activities that have the potential to impact on threatened species are regulated and assessed through the EP&A Act.

The protections provided by the listing of threatened species, communities and critical habitat comes into play during the development assessment processes under the EP&A Act. Local councils and other government bodies must assess whether a proposed development is likely to have a significant impact on threatened species, populations or ecological communities, or their habitats. This is undertaken through the assessment of significance – known as the 7 part test. If the assessment finds there is likely to be a significant impact, then an SIS is required.

There are several ways that a project might undergo EIA under the EP&A Act:

- Part 4 (for any development which requires a development application); and
- Part 4.1 – State significant development (for major projects of state or regional significance);
- Part 5 (for development that doesn’t require a development application, including many public infrastructure developments)
- Part 5.1 – State significant infrastructure (for major infrastructure projects).

Both Part 4 and Part 5 have two tiers of environmental assessment — a ‘low-level’ tier (a Statement of Environmental Effects, and Review of Environmental Factors,[180] respectively), and a ‘high-level’ tier for cases likely to have significant impacts (a full Environmental Impact Statement). That assessment must be taken into account before the development is allowed to proceed.

[180] An REF has no statutory basis, but is required as part of the standard practice of the Planning Department and other public authorities which are bound by Part 5 of the EP&A Act, to determine if an EIS is required.

When it commenced in 1979, the NSW model of EIA was heralded as ground-breaking – for its relatively robust assessment processes and statutory decision-making criteria; and its emphasis on community participation, significant merits appeal rights,[181] and 'open standing' to enforce breaches in the specialised NSW Land and Environment Court.[182]

However, the EP&A Act has been subject to many major amendments in the subsequent three decades. These changes made the system highly complex, concentrated power and discretion in the Planning Minister and Department, and caused significant community dissatisfaction and disconnection. The former major projects fast-tracking provisions – the 'Part 3A' regime – was symbolic of this disconnection.

Weaknesses of the EP&A Act in relation to biodiversity

'Assessment of significance'

There are significant problems with the current assessment of biodiversity under NSW planning laws, particularly the assessment of whether a development will have a significant impact – the '7 part test'. The test is often not undertaken where required, and are applied inconsistently across Local Government Areas in NSW. [183] The consequence of this is that developments are often proceeding without a proper assessment of threatened species and in the absence of an SIS where one should have been required.

A key issue is the failure of consent authorities to undertake the 7 part test, often based on an arbitrary decision that the test is not required. This is to some extent due to the fact that the Act does not state that the test is mandatory, nor who should prepare it.[184] Moreover, often when the test is undertaken, it is done incorrectly, leading to a finding that no significant impact will ensue when this is not in fact the case.

Further issues relate to the lack of an auditing or oversight framework of 7 part tests and SISs, the lack of appropriate resources and skills within local government to conduct assessments and issues relating to the integrity and accountability of ecological consultants who are commissioned to undertake threatened species assessments.

Accuracy of environmental impact statements

There are problems associated with the accuracy of environmental impact assessments of threatened species. Examples include where a 7 part test has failed to identify all species or endangered ecological communities present on a site or has erred in failing to identify a likely significant impact. Further issues include inaccurate findings in environmental impact statements.

These issues are symptomatic of three key problems. First, there is an absence of any processes in either the TSC Act or the EP&A Act to assess the accuracy of environmental impact assessment after the event. Without independent technical review, the outcome of the environmental impact assessment process will always remain fraught with suspicion. Second, many local councils do not have the skilled personnel, nor the internal processes in place that allow them to properly conduct biodiversity assessments. Moreover, these assessments take time and getting an independent expert to conduct an assessment can be very expensive. In addition, there is pressure from the Department of Planning for local councils to undertake development assessment in a timely manner which creates a culture

[181] For projects categorised 'designated development' under Part 4.
[182] Although there remains a significant imbalance in merits appeal rights in favour of development proponents.
[183] Douglas, S, "Local Government and the Threatened Species Conservation Act – The Greatest Potential; the Weakest Link' (1999) 6(2) *The Australasian Journal of Natural Resources Law and Policy,* 135-149.
[184] *Ibid* at p137.

in which dealing with ecological issues is seen as an administrative burden. Third, there are serious issues around the accountability and integrity of private ecological consultants paid by proponents to conduct biodiversity assessments. There is a clear conflict of interest for consultants who are paid by the proponent to conduct ecological assessments.

Consideration of environmental impact assessments

A key failing of the assessment of threatened species under the EP&A Act is that even where an EIS or SIS demonstrates that a development will have potentially devastating impacts on threatened species or their habitats, this does not operate as a stop on development under the EP&A Act. This is because consent authorities are only required to take an ecological assessment into account and are free to give more weight to social and/or economic factors. Therefore, the listing of threatened species under the TSC Act ensures very little real protection as the final outcome is dependent on the discretion of development consent authorities. There is no requirement for consent authorities to *refuse consent* to development proposals where an environmental assessment has shown that there will be an unacceptable impact on threatened species, endangered ecological communities or their habitats. This is despite the fact that one of the objects of the EP&A Act is to encourage 'ecologically sustainable development' (ESD); and ESD itself requires 'that conservation of biological diversity and ecological integrity should be a fundamental consideration'; and 'that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations'.[185]

Case study – Planning laws allow development in critical habitat

One of the most significant failings of the current system is that even where a critical habitat declaration is made, it only introduces procedural protections and does not guarantee the protection of that habitat. For example, where development is proposed under the EP&A Act in critical habitat, then there is the automatic need for a Species Impact Statement (SIS) which must fully examine the impacts on the species by the development, and the concurrence of the Minister for environment is required.[186] However, once the SIS is taken into account, the development can be approved, even if it is likely to have a significant impact on critical habitat. Furthermore, the procedural requirement for an SIS did not apply to the assessment of the largest developments in NSW under the now repealed major projects fast-track provisions in Part 3A of the EP&A Act. Major private projects (State Significant Development) are still exempt from the SIS requirement.

Coordination with environmental planning instruments

The listing of threatened species under the TSC Act does not activate a requirement to consider such listings (particularly of Endangered Ecological Communities) when making or reviewing Local Environmental Plans (LEPs) in LEPs. As has been noted, "the implications of the TSC Act have not reflected in the LEPs through the application of appropriately restrictive zoning of land".[187]

A key issue with land-use planning in NSW is that local councils are not required to prepare a LEP that has the overall effect of adequately protecting biodiversity (i.e. a LEP is not required to meet any objective standard for biodiversity protection, such as 'maintain or improve'). A LEP is not required, for example, to prohibit development in high conservation

[185] *Environmental Planning and Assessment Act 1979*, s 3; *Protection of the Environment Administration Act 1991*, s 6.
[186] Except for major projects assessed under Part 3A or as State Significant Development (unless otherwise specified) .
[187] Douglas, S, "Local Government and the Threatened Species Conservation Act – The Greatest Potential; the Weakest Link' (1999) 6(2) *The Australasian Journal of Natural Resources Law and Policy,* 135-149 at p143.

value areas. Furthermore, the Standard Instrument, which is a template that all LEPs must eventually adhere to, currently provides little in the way of mandatory provisions relating to biodiversity. While the Standard Instrument sets out standard environmental protection zones and prescribes the objectives and land uses of these zones, again there is no mandatory requirement for Councils to adopt an environmental protection zoning in high conservation value areas.

Case study – Planning laws allow Local Council decisions to be contrary to listing status and require limited consideration of recovery plans

In 2011 Penrith City Council decided to approve the clearing of 300 hectares of vegetation from the Australian Defence Industries site (ADI site) near St Mary's in Western Sydney. Only one month *before* the Council granted the approval, the NSW Scientific Committee made a preliminary decision upgrading Cumberland Plain Woodland's status from endangered to critically endangered.

EDO NSW brought judicial review proceedings on behalf of Western Sydney Conservation Alliance challenging Penrith City Council's approval of four residential subdivisions on land containing the critically endangered Cumberland Plain Woodland.[188] The Land and Environment Court found that the Council had failed to consider the Cumberland Plain Recovery Plan (February 2011) as required under the EP&A Act. However, the Council later regranted the development applications for subdivision with a minor alteration, this time taking into account the Cumberland Plain Recovery Plan, notwithstanding the species' critically endangered status. Significantly, the Court also held that the main decision-making considerations in NSW planning law (s 79C of the EP&A Act) do not require a species recovery plan to be considered when evaluating the environmental impacts of a development, or the public interest.[189] This reduces the impetus for consent authorities to take positive steps to help recovery of a threatened species when assessing development applications, and may lead to a scenario of 'death by a thousand cuts'.

Major Projects Fast-Tracking

Provisions to fast-track assessment of major projects in Part 3A of the EP&A Act were repealed in 2011 under a new State Government, and a revised major projects system was enacted for 'State Significant Development' (SSD) and 'State Significant Infrastructure' (SSI).[190] The Minister (or delegate) is still the consent authority for these projects,[191] which are assessed by the Planning Department.[192]

A significant shortcoming retained in the SSD system is that major projects remain *exempt* from a significant list of 'concurrence' approvals normally required from various agencies. For example, this includes certain authorisations relating to coastal protection, fisheries, Aboriginal

[188] *Western Sydney Conservation Alliance Inc v Penrith City Council [2011] NSWLEC 244*. See further: http://www.edonsw.org.au/native_plants_animals_cases.

[189] 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 for example, *Environmental Planning and Assessment Act 1979* (NSW), ss 5A, 79B.

[190] For more detail on the amendments to Part 3A and the new SSD and SSI regime, see EDO NSW factsheets at http://www.edo.org.au/edonsw/site/factsh/fs02_3_1b.php. As at June 2012 there were still over 230 Part 3A projects in the system which are subject to transitional arrangements.

[191] Although the current Planning Minister has delegated these powers to an independent Planning Assessment Commission (PAC) and the Planning Department.

[192] The EIA process for SSD is set out in Director General's Requirements (DGRs) for the specific project, and requirements in the regulations. The EP&A Act also sets out certain exhibition and submission requirements.[192] A slightly different process applies for SSI. The SSD system narrows the scope of projects that were eligible for fast-tracking under Part 3A. It also reinstates the statutory assessment considerations that apply to decisions on Part 4 development. Merits appeals against SSD projects are available in some circumstances. The SSI system for fast-tracking infrastructure retains many features of the former Part 3A regime. It includes exemptions from merits appeal rights, exemptions from certain administrative orders for enforcement, and requires ministerial consent to bring proceedings to remedy or restrain breaches.

heritage, native vegetation, bush fire and water management. A range of other authorisations *cannot be refused*, and must be consistent with an SSD project approval.[193]

Planning law amendments relegate threatened species considerations

In November 2012, the NSW Government amended its State mining policy (the Mining SEPP[194]), elevating the economic benefits of a mining project to be the 'principal consideration' under the SEPP, when decision-makers such as the Planning Assessment Commission (PAC) consider new mining developments and expansions.[195] The Mining SEPP prioritises the significance of the mineral resource over other listed environmental, social and economic considerations such as:

- dust and noise pollution affecting local residents
- limiting truck traffic on local roads near houses and schools
- compatibility with other land uses such as farming, villages, vineyards or horse studs
- conditions for protecting water resources, **threatened species and biodiversity**, minimising greenhouse emissions and waste, and rehabilitating the land.

Consideration of these matters is to be 'proportionate' to the economic significance of the mineral resource, based on advice from the State mining department. This approach is not consistent with the objects of 'ecologically sustainable development' (ESD) in state and federal laws – including the EP&A Act (NSW) (under which the Mining SEPP is made), and the EPBC Act.

The policy changes followed a rare successful challenge by the residents of Bulga village, in the Hunter Valley, to the expansion of the Warkworth coal mine beyond 2021.[196] The Land and Environment Court refused the expansion, overturning the PAC's development approval due to significant adverse noise, dust and social impacts on Bulga residents; and impacts on biodiversity, including endangered plant and animal species, and clearing of an area previously set aside as an offset area. The case also scrutinised the economics behind the mine expansion. Rio Tinto and the NSW Planning Department challenged the Court's decision in the NSW Court of Appeal, but the appeal was dismissed.

The new weighting of factors under the Mining SEPP could now make the refusal of a mine approval on environmental and social grounds, similar to Bulga, even more difficult. At the time of writing, Rio Tinto had re-lodged an expansion application for the Warkworth coal mine under the new Mining SEPP rules.

[193] EP&A Act, sections 89J (Approvals etc legislation that does not apply) – including certain authorisations relating to coastal protection, fisheries, Aboriginal heritage, native vegetation, bush fire and water management; and 89K (Approvals etc legislation that must be applied consistently) – including aquaculture, mining leases and pollution licences.

[194] *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007*, as amended.

[195] These amendments are expressed to apply to coal and other minerals, but not coal seam gas (CSG).

[196] EDO NSW represented the Bulga Milbrodale Progress Association in this case. See http://www.edonsw.org.au/current_cases#bulga.

NSW Offsets Policy for Major Projects

In March 2014 the NSW Government released a draft Offsets Policy for Major Projects.[197] This has recently been finalised. The proposal was billed as the State's first mandatory biodiversity offsetting scheme, as there are now several voluntary pathways for offsets (including biocertification, biobanking and *ad hoc* negotiation between developer and Planning Department). Although it attempts to improve on offsetting proposals in the former Planning Bill 2013, there are still major environmental efficacy concerns with the draft policy.[198] Concerns include a weakening of 'like for like' requirements that are at the heart of the science of offsetting; and a proposal to allow 'discounting' of offsets requirements where a project has significant economic or social benefits (particularly worrying in the context of major mining and energy projects). Various other aspects also fail to meet the standards of the Commonwealth's *EPBC Act Environmental Offsets Policy* (October 2012)[199] – which, while not perfect, that policy remains the Australian benchmark to date.

The key EDO NSW recommendation on the Draft Offsets Policy for Major Projects was that it only be finalised once a comprehensive and independent review into offsets has been undertaken, and a rigorous national standard for offsetting is developed. The national standard must be based on robust and objective science and apply the fundamental principles of environmental offsetting. Once a best practice national standard has been developed through expert and public consultation, state standards and relevant legislation should be amended to meet the national standard. Accreditation of state standards must not occur until this precondition is met.

Notwithstanding these potential options, many environmental stakeholders and significant scientific literature note serious concerns as to whether biodiversity offsetting is actually possible, given the unique nature of local biodiversity. Furthermore, where offsets are used, outcomes are difficult to measure.

The revised policy was announced on Monday 8th September with some amendments – such as the removal of the discounting principle. It may be further amended during the 12-18 month transitional period prior to being legislated. However, the Framework for Biodiversity Assessment (FBA) that underpins the new policy represents a weakening of assessment and offsetting standards, especially when compared to the EOAM under the NV Act.

Potential strengths?

Tools to integrate threatened species and planning laws

Strategic Environmental Assessment

Increased use of robust strategic environmental assessment (SEA) is an important part of solution to address the limitations of the piecemeal NSW approach to biodiversity protection. It provides a way of assessing cumulative impacts and landscape scale processes. It requires up front assessment of environmental impacts at a broader strategic landscape scale, as compared with a single site assessment triggered by an individual project. It also provides greater upfront certainty to business and the community about the future development of an area, subject to localised biodiversity safeguards.

For strategic assessment to achieve these outcomes, it must be done properly. As noted by the federal Hawke EPBC Act review (2009), strategic assessment processes to date have not yet got the balance right in the trade-off between upfront comprehensive assessment

[197] See: http://www.environment.nsw.gov.au/biodivoffsets/1480biofpolmp.htm
[198] See: EDO NSW *Submission on the Draft NSW Biodiversity Offsets Policy for Major Projects,* May 2014, Download PDF
[199] See: http://www.environment.gov.au/resource/epbc-act-environmental-offsets-policy

requirements and providing future administrative streamlining and certainty (for example, relating to the Western Sydney Growth Centres and Melbourne's Urban Growth Boundary).

An appropriate model must therefore have the following safeguards:

- *Mandatory required information standards* for strategic assessment (including verified site data and consideration of alternative development scenarios).
- A requirement that the plan, policy or program for an area meets *a 'maintain or improve environmental outcomes' test*, as confirmed by the application of objective methodologies for biodiversity (for example, such as the NSW Environmental Outcomes Assessment Methodology under the *Native Vegetation Act 2003*).
- 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.

Importantly, to get SEA right, significant investment is needed. For strategic assessment to provide a legitimate solution with ecological credibility, community buy-in and certainty for business, it is essential that upfront investment is directed at comprehensive mapping and addressing data gaps. Investment is required to prioritise strategic assessments for regions where there are known development pressures such as urban growth areas, environmentally sensitive coastal growth areas and resource development areas.

However, in NSW strategic assessments have not been comprehensively attempted. We note an assessment of the Hunter is underway. The use of biocertification in NSW has some theoretical potential benefits – if it was to be done properly – however in practice is unlikely to achieve biodiversity outcomes.

Case study – Biocertification

The TSC Act in NSW contains provisions for landscape scale assessment to allow areas to be biodiversity certified – if the overall outcomes is that biodiversity values in the certified area are maintained or improved. The scheme requires use of a regulatory assessment methodology.[200]

There are clear advantages of developing landscape scale approaches to biodiversity conservation, in addition to strengthening species based approaches. Assessment at a broad scale can better take into account cumulative impacts of a number of single developments, and better plan for strategic biodiversity corridors and links and enhance connectivity. However, as with biobanking, it is absolutely essential that the biocertification scheme is underpinned by a robust and objective scientific methodology that adheres to scientific offset principles. Weakening assessment requirements to make the scheme more attractive for potential participants risks the ecological credibility and overall success of the scheme.

Key concerns with the current methodology relate to the integrity of the "maintain or improve biodiversity values" test.[201] The current proposed methodology relaxes the offsetting rules to such an extent that the legislative test becomes meaningless. The clauses in the draft methodology allowing

[200] EDO biocertification submissions can be found at: http://www.edo.org.au/edonsw/site/policy.php#2 and include: Submission on the Draft Biodiversity Certification Methodology 30 July 2010; Submission on the proposed Sydney Growth Centres Strategic Assessment 25 June 2010; Submission on the DECC Guidelines for Biodiversity certification of environmental planning instruments 21 December 2007; Submission on the proposed biocertification of the Draft Growth Centres Conservation Plan 18 April 2007; and Biodiversity Certification and Banking in Coastal and Growth Areas, 13 September 2005.

[201] For further detail on our concerns with the methodology, please see: EDO submission on the *Draft Biodiversity Certification Assessment Methodology* available at: www.edo.org.au/edonsw/site/pdf/subs10/100730draft_biodiversity_certification_methodology.pdf.

offsetting of one species with an entirely different species and allowing for a financial contribution in lieu of an offset, represent a radical departure from the "like for like" principle of offsetting. The rationale that offset rules for biocertification must be relaxed due to the landscape scale and to make the scheme more attractive to voluntary participants do not justify such a significant departure from ecological principles.

Other key concerns with the methodology include: the ability to vary red flag areas, security of tenure and long-term (funded) management of conserved areas, and interim management of biodiversity values prior to land being dedicated for conservation management. Furthermore, as biocertification is a relatively new and untested tool, to live up to the claim of 'maintaining or improving' biodiversity values, there needs to be a monitoring and review mechanism built in to the biocertification framework to ensure that the values informing the future improvements in biodiversity values are based on demonstrated outcomes.

It is essential that these flaws are addressed if the scheme is to have any credibility. This is particularly important if plans using the scheme are to be proposed for federal accreditation under the *EPBC Act*. For example, the EDO NSW has highlighted a number of problems with the proposed federal strategic assessment of the Sydney Growth Centres which was based on the biocertification process.[202]

Ongoing Reform

Between 2011 and 2013 the NSW planning system underwent a comprehensive review process which, mid-way through 2014, has yet to reach resolution. Following an independent review report, the NSW Government released a planning Green Paper for consultation in June 2012, and a further White Paper and Exposure Bill in April 2013.[203] The Green and White Papers proposed a greater focus on strategic planning – which if done properly, may have benefits for biodiversity in terms of up-front identification of areas for conservation and regional corridors. However, there were significant concerns that community participation at the individual project assessment stage would be weakened by expanded 'code-assessable development', and that this would have implications for the ability of local communities to protect threatened species.[204]

There were also a number of other ways in which the Planning Bill 2013 was seen as watering down environmental protections (including for biodiversity), and missing opportunities for improvement. This included an excessive emphasis on economic growth and a retreat from the long-standing concept of ecologically sustainable development (ESD) and its principles, which have shaped environmental and planning law in Australia for over 20 years (at least on paper). There were no mandatory requirements for strategic planning to consider climate change impacts or cumulative impacts of development on the environment. The Planning Bill also proposed further centralising powers within the Planning Department for environmental authorisations and concurrences (under threatened species, water management and other laws). It also maintained and expanded exemptions from these authorisations to fast-track major projects. The Bill maintained limited merit appeal rights for community objectors against major projects, but rejected recommendations from the Independent Commission Against Corruption (ICAC) to expand public rights of appeal.

[202] See: www.edo.org.au/edonsw/site/pdf/subs10/100625growth_centres_strategic_assessment%20_EPBC.pdf
[203] See: www.planning.nsw.gov.au.
[204] M. Moore, '"Bold and daring" or undemocratic? Controversial planning law change', Sydney Morning Herald, 27 June 2012, available at http://smh.domain.com.au/real-estate-news/bold-and-daring-or-undemocratic-controversial-planning-law-change-20120627-211uw.html.

After amendment in the Legislative Council the Government withdrew the Bill from Parliament in 2014and is now understood to be considering the implementation of various planning reforms through regulation rather than legislation.

It is not clear how the potential reforms will affect the operation of existing biodiversity laws, however planning law reforms present an opportunity to address current failings by better integrating robust biodiversity considerations and protections into planning legislation.

We recognise that the Panel will not be able to consider the raft of amendments required to fix NSW planning laws, however, there are some general solutions that could be established in legislation to address current weaknesses.

Recommendations:

- Discussion about 'achieving balance' and 'triple bottom line' outcomes must be evidence-based and make any value judgements explicit, and be guided by the concept of **ecologically sustainable development** (ESD).
- Urban development must be subject to a **maintain or improve environmental outcomes** test.
- Biodiversity decision making processes must be robust, transparent and science-driven, and be underpinned by **objective scientific assessment methodologies**. Methodologies for biobanking, biocertification, and the FBA should be strengthened to meet the EOAM assessment and offset standards, rather than weakening them.
- The largest developments with the most significant potential impacts must be subject to **rigorous and comprehensive assessment,** and not exempted from environmental assessment requirements. Safeguards must ensure that development in sensitive environmental and heritage areas is not exempt from proper assessment.
- Biodiversity protection must be **integrated** across all decision making processes – especially planning decisions. Biodiversity considerations must be supported and integrated in other regulatory frameworks such as planning laws, fisheries management, native vegetation protection, public and private forestry, noxious weed control and bushfire management.
- To assist this integration, an independent, statutory **Biodiversity Commission** or similar body should be created. This focus of the Commission should be on identifying, developing and implementing a whole of government approach which ensures biodiversity protection is genuinely a *fundamental consideration* in planning and conservation decisions.
- Comprehensive **strategic environmental assessments** should be legislated, resourced and prioritised, to maximise the clear advantages of 'landscape scale' biodiversity conservation. Assessment at a broad scale can better take into account cumulative impacts of a number of developments, better plan for strategic biodiversity corridors and enhance connectivity. For example, the **Strategic Regional Land Use Policy** needs to be strengthened and expanded to include assessment and protection of high conservation value land, as was first intended.
- Biodiversity **offsets** must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts. Any use of offsets must be based on a national standard that is legally enforceable and uses transparent and sound ecological studies and principles, such as 'like for like' and the avoidance of the use of indirect offsets. Environmental 'red flag' areas must be maintained, recognising that some values cannot be offset. Offsets must be maintained in **perpetuity**, not subject to perpetual trade-offs.
- Biodiversity laws and related decisions must explicitly **consider and plan for climate change** impacts, using adaptation plans, buffers and adaptive management to enhance ecosystem resilience.
- There needs to be resourcing for improved biodiversity mapping and data base information to inform land use planning and strategic planning.

‘CATEGORY 3’ - Other relevant legislation

This section examines the role that other legislation plays in relation to biodiversity conservation, management and use in NSW. This section covers:

- *Fisheries Management Act 1994*
- *Rural Fires Act 1997*
- *Noxious Weeds Act 1993*
- *Crown Lands Act 1989*
- Mining legislation and policy
- Forestry legislation
- Special legislation

Fisheries Management Act 1994

In NSW, threatened fish (both saltwater and freshwater) and their habitat, and threatened marine vegetation, are protected by law.[205] There are a range of options for ensuring such species are adequately protected. It is an offence to harm a threatened species, population or ecological community. It is also an offence to damage their habitat. However, licences may be issued to authorise such harm.[206]

Strengths

A species is protected under the law once it is listed under the *Fisheries Management Act 1994*. Anyone can nominate fish, aquatic invertebrates, and marine plants for listing at any time.[207] Referrals are made to the Fisheries Scientific Committee,[208] an independent committee of scientists appointed by the Minister for Primary Industries which is responsible for listings. There are a number of things that should be included in a nomination, such as:

- Maps of both historical and present distribution of the species
- Biological and ecological data for the species involved (e.g. population size, profiles and trends, habitat requirements)
- Evidence of any decline in the species

The Committee considers nominations on scientific terms, but is required to consult with the Minister and the public before making a determination.[209]

Similar to the TSC Act, fish recovery plans are plans to promote the recovery of the species, population or ecological community to a position of viability in nature.[210] Threat abatement plans are plans to manage threatening processes to abate, ameliorate or eliminate their adverse effects on threatened species, populations or ecological communities.[211] Plans are

[205] Under the *Fisheries Management Act 1994* (NSW) http://www.legislation.nsw.gov.au/maintop/view/inforce/act+38+1994+cd+0+N
[206] *Fisheries Management Act 1994* (NSW), Part 7A Div. 4; *National Parks and Wildlife Act 1974* (NSW), Part 9.
[207] http://www.dpi.nsw.gov.au/fisheries/species-protection/fsc/nomination-process#For-Species--Populations-and-Ecological-Communities
[208] http://www.dpi.nsw.gov.au/fisheries/species-protection/fsc
[209] *Fisheries Management Act 1994* (NSW), Part 7A Div 2.
[210] *Fisheries Management Act 1994* (NSW), s 220ZI.
[211] *Fisheries Management Act 1994* (NSW), s 220ZJ.

prepared by the Department of Primary Industries, and are required to be released for public comment[212] before being made by the Minister.[213]

Fish or fish habitat can be protected by the absolute or conditional prohibition of fishing in any area.[214] It is an offence to take or be in possession of fish in contravention of a fishing closure.[215] There are rules and regulations governing recreational fishing,[216] including size and bag limits, and instructions on how to measure different species of fish.[217]

There are also special provisions for the critically endangered grey nurse shark, restricting actions, including fishing or diving, in or near the shark's critical habitat.[218]

Stop work orders can be issued by the NSW Government to prevent harm to listed species, populations or ecological communities.

Weaknesses

As noted above, there is currently a separate process for the listing of marine species under the FM Act. Marine threatened fish, invertebrates and plants are protected under a separate Act and by a separate agency, namely NSW Department of Primary Industries. As noted above, there is no logical reason for maintaining threatened species lists for marine species in a separate Act. The FM 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 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.[219]

Fisheries management in NSW is currently driven by the management of individual commercial and recreational fisheries. This means there is little opportunity for holistic consideration of the effect of fishing on fish stocks. While the department has taken some steps to rectify this through species assessments and the proposal to increase species based management, the current FMA does not have a formal requirement to move to ecosystem based management. To achieve truly sustainable fisheries management, consideration of the species being exploited must be at the forefront of fisheries management decisions.

EDO NSW is also concerned that despite the requirement for multi-stakeholder fisheries Management Advisory Committees, recent changes to management frameworks have resulted in a significant reduction in community, particularly environmental, participation in fisheries decision making. EDO NSW strongly supports fisheries management being science

[212] http://www.dpi.nsw.gov.au/fisheries/species-protection/conservation/what/recovery
[213] *Fisheries Management Act 1994* (NSW), Part 7A Div 5.
[214] *Fisheries Management Act 1994* (NSW), s. 8.
[215] *Fisheries Management Act 1994* (NSW), s. 14.
[216] http://www.dpi.nsw.gov.au/fisheries/recreational/regulations
[217] *Fisheries Management (General) Regulation 2010* (NSW), Part 2.
[218] *Fisheries Management Act 1994* (NSW), s. 264-267.
[219] *Environment Protection & Biodiversity Conservation Act 1999.*

driven but ensuring a full range of community participation, not just commercial fishers, in decision making forums is vital.

Recommendations:

- Listing, recovery, offence and enforcement provisions retained and consolidated in biodiversity legislation – administered by an agency with a biodiversity conservation mandate.
- There needs to be a shift towards ecosystem-based management.
- Communities should have the opportunity to be involved in science-based fisheries decision-making.

Rural Fires Act 1997

The RF Act is a prime example of 'category 3' legislation completely undermining the objectives of 'category 1' biodiversity legislation.

Weakness

As noted, recent amendment to bushfire clearing rules under the guise of property protection are already having a significant impact on urban and coastal biodiversity. The changes allow land holders to clear vegetation up to 50 metres from their homes without approval.

The 10/50 Code overrides threatened species and native vegetation legislation and is self-assessable. Rather than requiring consideration of vegetation clearing to be based on likely bushfire risk and appropriate assessment, the 10/50 Code allows extensive clearing based purely on proximity to residential structure or high risk facilities. This undermines the current system of risk based management, with expert input from the RFS.

Conflicting environmental objectives

The Second Reading Speech for *Rural Fires Amendment (Vegetation Clearing) Act 2014* (**amended Act**) expresses the requirement for a balancing act between protecting properties from the threat of bushfire and 'legitimate environmental objectives'. In EDO NSW's view, this requirement is not adequately or robustly addressed in the amended Act or draft 10/50 Code rules. 'Legitimate environmental objectives' necessarily include the protection of threatened species and native vegetation.

To illustrate, as discussed a relevant object of the NSW *Native Vegetation Act 2003* is section 3(b) 'to prevent broadscale clearing unless it improves or maintains environmental outcomes'. The 10/50 Code permits all vegetation to be cleared within 10 metres of a residential structure or high risk facility, and vegetation excluding 'trees' to be cleared within 50 metres of such buildings. Some clearing around dwellings and rural infrastructure is already permitted under the NV Act, however, the 10/50 Code potentially allows for the further clearing of high conservation value native vegetation, threatened flora species and endangered ecological communities that will not be subject to a 'maintain or improve' environmental outcomes test.

Furthermore, the 10/50 code contains no legislative link to the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC). The EPBC is fundamental to the preservation of native vegetation and species habitat, and although the code has only recently come into effect, there is already evidence that 10/50 areas include threatened vegetation species or provide habitat for EPBC-listed species.

Furthermore, the code objectives conflict with riparian conservation objectives. Additional environmental impacts are likely to result from the unassessed clearing that is allowed in riparian zones under the 10/50 Code. Clearing near prescribed streams is usually restricted to require a buffer zone of 20 metres or more between the clearing and the top of bank of the prescribed stream.[220] These riparian zones are designed to protect important native vegetation and maintain water quality. The 10/50 Code allows clearing to 10 metres of a 'prescribed stream' (part 7.6). This is at odds with well-established NSW environmental and planning policy and has potential to create unacceptable land and water impacts.

EDO NSW is also concerned about the code allowing clearing on slopes as steep as 18 degrees, albeit with some limitations. Current forestry regulations prohibit clearing on slopes with a gradient steeper than 30 degrees. These restrictions are in place to protect slopes from erosion and instability. Allowing unassessed clearing on slopes as steep as 18 degrees, and steeper if 75% of the original canopy cover is retained, has no scientific justification and significant increases the risk of negative environmental impacts.

Self-assessment

As EDO NSW has recently submitted in relation to the proposed *Native Vegetation Self Assessable Codes*,[221] self-assessable codes are not capable of being effectively monitored or enforced. As a result they are not capable of adequately implementing environmental objectives such as the "maintain or improve environmental outcomes" test otherwise required by the NV Act and the TSC Act.

The 10/50 Code is self-assessable with no requirement to submit a report describing the work undertaken. The result will be that there will be no clear indication of where 10/50 Code clearing has actually occurred. Proposed mapping will provide relevant agencies with documentation regarding the location of potential clearing, but the lack of formal approval processes for clearing will inevitably increase the risk of non-compliance and objectives not being met.

Mapping

Areas where self-assessed clearing will be allowed are mapped and available on the RFS website as a 10/50 Vegetation Clearing Entitlement Area. The maps were not made available until the 10/50 Code was finalised. The result is that public consultation was conducted without any clarity regarding the areas that would be affected by the code.

Definitions

EDO NSW is concerned about the definition of a 'tree' under the 10/50 Code and the amended Act. A 'tree' is defined as a perennial woody plant with a single stem or trunk, 3 or more metres high and with a circumference greater than 30 centimetres when the plant is measured at 1.3 metres above ground. This definition fails to accurately define tree species present in NSW, fails to recognise the different growth patterns of trees and fails to recognise that many trees in NSW are slow growing and so would not meet this definition until they are many years old and already providing significant habitat value.

To provide just a single example of the problems arising from the current definition of 'tree', *Eucalyptus stricta* (Blue Mountains Mallee Ash), is a small eucalypt species that grows as a

[220] NSW Government, 'How the PADACS program and assessment tools operate' <http://www.environment.nsw.gov.au/vegetation/nvat.htm>.
[221] EDO NSW, 'Submission on the Draft Landholder Guides and Draft Orders to implement self-assessable codes under the *Native Vegetation Regulation 2013*' (2014) 3.

mallee, i.e. with multiple stems from underground lignotubers, to less than 5m. Under many growing conditions, this species would not meet the definition of a tree and could therefore be cleared within 50m of residential structure or high risk facility. Similarly, not all trees provide the same level of fire risk and clearing fire resistant species may in fact encourage the growth of more fire enhancing species (for example changes from rainforest to open schlerophyll forests).

Recommendations

- Application of the Code should be immediately suspended, pending the completion of the biodiversity legislation, a well as a specific review of the intended policy.
- Any future operation of the code must be excluded from areas of high conservation value, threatened species habitat, EECs etc.

Noxious Weeds Act 1993

Weeds are a major threat to biodiversity in NSW. Weed management laws in NSW have recently been reviewed by the NRC, resulting in the release of *Weeds – Time to get Serious, Review of the Weed Management in NSW – Draft Report*[222], followed by a final report and recently the *NSW Government response: Review of weed management in NSW* .[223] The review has identified that the effectiveness of weed management in NSW is variable and that current mapping of weeds is inconsistent, making it is increasingly difficult to get a complete picture of weed density, extent and impact.

EDO NSW supports the recommendations made in the NRC report. Weeds are serious environmental issue and strong cooperation and coordination between all landholders is necessary to ensure weeds are appropriately managed and ultimately eliminated. The proposals outlined in the draft report will make a significant contribution to improving weed management in NSW.

The NSW Government has announced it will adopt the majority of recommendations made by the NRC, however, we submit that there are important provisions that need to be included and/or strengthened in any biosecurity legislation.

Recommendations:

EDO NSW believes that the recommendations could be strengthened in relation to the **9** issues outlined below.

1. *Environmental weeds*

The current review provides an opportunity to revisit the definition of noxious weeds to include environmental weeds. The draft report refers to the DPI definition of noxious weeds as "*plants that have potential to cause harm to the community and individuals, can be controlled by reasonable means and have the potential to spread within an area and to other areas. A weed is declared noxious because its control will provide a benefit to the community over and above the cost of implementing control programs*."[224] Expanding the definition to include environmental weeds will ensure a more consistent approach to all weeds in NSW. Such a change would need to be supported by documentation of the current

[222] February 2014. Accessed at: http://www.nrc.nsw.gov.au/content/documents/Weed%20management%20-%20Draft%20report%20v1.1%20-%2013%20March%202014.pdf.
[223] http://www.dpi.nsw.gov.au/agriculture/pests-weeds/weeds/nsw-government-response-to-nrc-weeds-review
[224] Draft report, p 15.

status of NSW's environmental weeds, supporting coordination on environmental weed management and recognising the distinctive challenges of environmental weed management and the need to develop more effective ecological approaches to management. The Government response did not mention environmental weeds.

2. Marine species

We note that the weed review excluded marine species. Marine transport creates a significant risk of weed introduction into and movement throughout Australia. As an example, *Caulerpa taxifolia* is a marine alga that has colonised areas outside its natural tropical range. In NSW this has included spreading to 14 NSW estuaries and lakes and one oceanic area since its first detection in 2000[225]. The importance of maintaining and improving biosecurity around marine transport should not be overlooked in any proposed NSW Biosecurity Act. The Government response did not mention marine species.

3. Permitted List

EDO NSW supports the proposal for a permitted list of weeds, with aquatic weeds being the initial focus. We note that there are a number of known environmental weeds that continue to be sold as aquarium plants. These species should not be included on any list of permitted species and any industry proposals for permitted lists must be reviewed and endorsed by an independent expert group. This process should build on work previously conducted by the Department of Primary Industries (DPI) to conduct "a risk assessment of aquatic plants sold within the aquarium and nursery trade to identify any with high potential to become weeds"[226]. The use of a permitted weed list should be extended to species that can be brought into NSW from interstate.

The Government response stated: 'While the government supports the principle of regulating potential weed species coming into NSW and the 'ban from sale' of high-risk species within the state, the government does not support the process as proposed in the review paper. The proposed Biosecurity Bill instead focuses on prohibited matter which is a more efficient use of regulatory powers and available resources.'[227]

4. Tenure-neutral obligations

EDO NSW supports the move to a tenure-neutral approach and general biosecurity obligation for weed management. While it is appropriate for widespread weeds to "recognise the varied management objectives of different land managers, and allow priorities and obligations to be negotiated with the community on a regional basis"[228] it must also be recognised that some tenures (for example, road and rail corridors) facilitate the spread of weeds. As such, there must be some acknowledgement of the need for compulsory preventative actions if the further spread of weeds is to be prevented (for example weed control activities must include actions that will lead to the permanent control of weeds, rather than one off treatments). The draft report notes that public land managers have expressed concern about the cost of a tenure-neutral approach[229]. Given the current weed burden in NSW this is not surprising. However the cost of controlling weeds should not be used as an excuse for avoiding management although it may appropriately be used for prioritisation of

[225] http://www.dpi.nsw.gov.au/fisheries/pests-diseases/marine-pests/nsw/caulerpa-taxifolia
[226] http://www.dpi.nsw.gov.au/archive/agriculture-today-stories/ag-today-archives/february-2007/fish-tank-plants-checked-for-menace
[227] 'NSW Government response: *Weeds – Time to get serious* review of weed management in NSW' Natural Resources Commission, Recommendation 4(c), pg 6.
[228] Draft report, p 3.
[229] Draft report, p 45.

weed control. There must also be a clearer role for the State Government in ensuring prevention and eradication of weed species. The government 'supports the introduction of realistic and consistent weed management obligations across public and private land tenure.'[230]

5. Levy

EDO NSW supports the proposal to allow a levy on LLS rate payers to address significant weed issues. This proposal should be expanded to include environmental weeds and to include urban rate payers. Such an expansion would also allow for the development of a reserve fund for responding to new high-risk incursions. The Government response did not mention a levy.

6. Partnerships

EDO NSW supports the statement that "widespread weeds should be managed through partnerships at the local and regional scales, guided by strategic regional priorities"[231]. The scale of such partnerships should be relevant to the dispersal mechanism of the weed species being targeted. Regional management committees should have a stronger focus on recruiting individuals with appropriate technical expertise. The Government response included a commitment to establish regional weed committees…Membership will ensure that all major stakeholders have a say, and a primary responsibility will be to prepare and report on regional weed plans'[232]

7. Use of herbicides

EDO NSW supports the appropriate use of herbicide for weed control. EDO NSW has recently expressed concern about the proposed changes to the *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) through the proposed *Agriculture and Veterinary Chemicals Legislation Amendment (Removing re-approval and re-registration) Bill 2013*[233]. The benefits of any off label use of herbicide must be carefully weighed against the environmental risk created by unregulated chemical use. The NSW Government Response was that 'NSW is increasing its commitment in [sustainability of herbicide use]' by increasing resources funded by Weeds Action Program Innovation and other relevant funding.[234] There was no specific mention of off label herbicide use and environmental risk from unregulated chemical use.

8. Education and capacity-building

The draft report discusses the importance of education and capacity-building in managing weeds and highlights a number of successful program[235] One important area for future education programs will be smaller landholders without experience in rural land management. The Rural Industries Research and Development Corporation found that over 4% of Australia's rural land changes ownership each year and in NSW this tends to be higher due to greater demand for non-agricultural purposes[236]. This high change in ownership and land use creates a significant risk of new landholders not meeting their weed

[230] Ibid Recommendation 1(b), pg 2.
[231] Draft report, p 3.
[232] NSW Government Response, above n 1, pg 5.
[233] See: *Submission regarding the Agriculture and Veterinary Chemicals Legislation Amendment (Removing re-approval and re-registration) Bill 2013*, 7 March 2014 available at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1326/attachments/original/1394762054/ANEDO_submission_AGVET_BILL_070314.pdf?1394762054
[234] NSW Government Response, above n 1, Recommendation 7(f), pg 11.
[235] Draft report, p 65.
[236] http://www.rirdc.gov.au/news/2012/12/17/new-study-uncovers-how-often-rural-land-is-changing-hands

management requirements. To address this risk, additional education programs are required. Education and capacity building must be done in the context of a strong weed research capacity to ensure that weed control techniques are consistently updated to be as effective as possible.

The NSW Government Response was that it has invested significantly in capacity-building for community-based weed management programs, and supported all recommendations regarding 'support[ing] research and development' (see Recommendation 7).[237] It noted that it had recently employed a weeds researcher 'with a key role in establishing better collaborative arrangements with other research institutions'.[238]

9. Conflict species

If so called 'conflict species'[239] are to be permitted, monitoring and reporting requirements should including the requirement to monitor surrounding properties to ensure that the species are not spreading off site. The NSW Government response was that permits will be available under the proposed Biosecurity Bill, but it did not discuss monitoring and reporting requirements.[240]

Crown Lands Act 1989

The NSW Crown lands estate covers over 40 per cent of the State's landmass, from the NSW coastal fringe, to the Western Lands and Travelling Stock Routes. Crown lands therefore hold highly significant biodiversity, social and public economic values and assets (notwithstanding that the 2014 review, below, excluded national parks and Crown forests).[241]

The management of crown lands has significant ramifications for biodiversity. Travelling Stock Routes for example, are often significant biodiversity corridors. To sell off such lands would could have landscape-wide implications.

In mid-2014 the NSW Government consulted, somewhat belatedly, on major changes to Crown lands management and consolidated legislation.[242] EDO NSW noted a range of upfront concerns about the process and direction of these proposals, even though it makes sense to consider how best to clarify and harmonise the *Crown Lands Act 1989* with other intersecting Crown lands legislation.

First, the policy White Paper proposed significant shifts in management, commercialisation or sale of Crown Lands, but provided limited analysis or detail about the implications of this in a number of important areas.[243] Significant concerns that would affect biodiversity included a shift away from *long-term ecologically sustainable management* of Crown lands.

[237] Ibid Recommendation 1(b), pg 2 and recommendation 7.
[238] Ibid Recommendation 7(a) pg 11.
[239] Draft report, p 89.
[240] Ibid Recommendation 2(e), pg 4.
[241] See: lpma.nsw.gov.au/crown_lands/comprehensive_review_of_nsw_crown_land_management/fast_facts.
[242] At www.lpma.nsw.gov.au/crown_lands/comprehensive_review_of_nsw_crown_land_management.
[243] Areas with major implications, but limited detail, included:

- proposals to remove environmental principles from legal objects, and land assessment criteria;
- resourcing implications for local council management of additional Crown lands;
- the potential for lands in public use to be converted to operational land and sold;
- proposal to increase conversion to freehold title (against Western Lands Advisory Council advice);
- the role of Local Land Services and others in managing Travelling Stock Routes;

Second, despite terms of reference to do so, there was no detailed consideration of the *major social and environmental benefits* provided by Crown lands (present and potential). Given the significance of the estate, detailed environmental studies are vital to considering the role of Crown lands in responding to challenges such as biodiversity loss, native vegetation recovery, and climate change resilience.

Third, the review noted a need for *new benchmarks, performance indicators and accounting frameworks*, yet it also proposed to remove ecological sustainability principles and land assessment criteria. This is highly inappropriate. While no detail was provided on the form or development of such tools, *environmental and biodiversity values* must feature prominently.

Finally, the reform proposals relied on a range of *other legal frameworks that are in a state of flux*, including local government and planning laws, biodiversity and native vegetation laws, Aboriginal land rights and cultural heritage protections. Existing or proposed safeguards in other laws cannot be relied on in the name of 'reducing duplication' under Crown lands laws.

Recommendations

Overall, EDO NSW supports improved legislation, governance and management of Crown lands in accordance with the following principles:

- NSW Crown lands should be managed for the benefit of the people and environment of NSW in perpetuity, in accordance with the concept and principles of ESD[244]
- Legal safeguards are needed to ensure short-term economic benefits (commercialisation or sale) aren't elevated over long-term social, environmental and public economic values
- Good decisions require *proper valuation of environmental and social values* of Crown lands (now and in the future), including diverse contributions of ecological services[245]
- Land managers should be required to assess, protect and manage Crown lands in ways that *maintain or improve environmental outcomes*, based on leading practices
- Good management and accountability requires proactive community engagement, transparent process, and public participation in Crown lands management and decisions
- *Integrate Crown lands management* with State environmental protection and planning laws and policies, including to address biodiversity loss and climate change
- *Travelling Stock Routes* must be conserved and managed appropriately in perpetuity as significant corridors
- Proper monitoring, enforcement, auditing and reporting on Crown lands management is needed, including open standing for community enforcement of legal breaches.

- how proposed reductions in notification, consultation and reporting requirements accords with State Plan goals of increased public transparency and engagement; and
- consequences of the changes for the environment, Aboriginal and other community stakeholders.

[244] In brief, these principles include the precautionary principle; intergenerational equity; conservation of biodiversity and ecological integrity as a fundamental consideration; and improved valuation mechanisms and pricing of environmental costs and benefits (including the polluter pays principle).

[245] Such as recreation, biodiversity habitat, pollination, water quality, soil carbon, tourism, heritage.

Mining Act 1992 and associated policies

In NSW, mining is regulated under a number of different laws:

- *Mining Act 1992* (NSW)
- *Mining Regulation 2010* (NSW)
- *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
- *Environment Protection and Biodiversity Conservation Regulations* (Cth)
- *Environmental Planning and Assessment Act 1979* (NSW)
- *Environmental Planning and Assessment Regulation 2000* (NSW)
- *State Environmental Planning Policy (State and Regional Development) 2011* (NSW)
- *State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007* (NSW)
- *Strategic Regional Land Use Policies*
- *Aquifer Interference Policy*

Weaknesses

There is no protection for 'exempted areas' under a mining lease.

Case study: Mining in in state forests and conservation areas

There are no restrictions on mining in 'exempted areas' such as State Forests, State Conservation Areas and Travelling Stock Routes. Mining can therefore take place in these areas without the need for an exempted areas consent.

The Leard State Forest is located on the Liverpool Plains, about 80km north-west of Tamworth and contains a number of endangered species and ecological communities. The forest is already home to one major coal mine operated by Boggabri Coal which has gained approval to expand the mine. The nearby Tarrawonga coal mine has gained approval to expand into Leard State Forest. The Maules Creek open cut coal mine within the forest has also been approved. All three mines involve clearing thousands of hectares of native vegetation.

Mines may be required to offset their biodiversity impacts, but there is clear evidence that ecological outcomes are not guaranteed.

Case study: Mining of biodiversity offsets

Bulga Milbrodale Progress Association Inc. ats Warkworth Mining Limited & Ors
The NSW Court of Appeal has ruled in favour of the residents of the Hunter Valley village of Bulga and the protection of a rare forest containing endangered plants and animals, by upholding the refusal of an open cut coal mine expansion.

The Court of Appeal unanimously dismissed, with costs, an appeal by Warkworth Mining Ltd (owned by Rio Tinto) and the NSW Government against a NSW Land and Environment Court decision last year that refused the mine expansion.

EDO NSW is representing the Bulga Milbrodale Progress Association in the NSW Court of Appeal.
The Court of Appeal rejected all arguments put by Rio and the NSW Government that alleged that the NSW Land and Environment Court made errors of law.

The Court of Appeal found no fault with the Land and Environment Court decision that the economic benefits of the coal mine did not outweigh the significant impacts on Bulga residents and the

destruction of rare forests containing endangered plant and animal species.

Rio Tinto was seeking to open cut mine a biodiversity offset area, containing an endangered ecological community, the Warkworth Sands Woodland, and threatened animal species including the squirrel glider and the speckled warbler. This woodland is unique to the area and only 13 per cent of the original forest remains.

Rio Tinto had previously promised to permanently protect this area, under an agreement with the NSW government, as part of the existing approval from 2003.The protected area also includes Saddleback Ridge which provides a buffer between the mine and Bulga.

Significantly, the Land and Environment Court previously found Rio Tinto's economic modelling deficient in many ways, including its methodology that over-estimated the benefits of the mine.

Furthermore, as noted, mining is possible on land subject to conservation agreements and this has acted as a deterrent to private land conservation.

Recommendations:

- Biodiversity must not be relegated as a consideration compared to economic significant of a mineral resource. This is not consistent with ESD.
- Mining exclusion zones should be developed for biodiversity priority areas.
- In relation to strategic land use, EDO NSW has argued that the 'SRLUP Gateway' provisions should be amended to include specific environment and heritage protection safeguards relating to cumulative impact assessment; private conservation and biodiversity offset lands; upfront completion of biodiversity mapping; and proper protection of and consultation on Aboriginal culture, heritage, intellectual property and privacy rights.[246]
- Biodiversity **offsets** must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts. Any use of offsets must be based on a national standard that is legally enforceable and uses transparent and sound ecological studies and principles, such as 'like for like' and the avoidance of the use of indirect offsets. Environmental 'red flag' areas must be maintained, recognising that some values cannot be offset. Offsets must be maintained in **perpetuity**, not subject to perpetual trade-offs.

Marine Parks Act 1997

EDO NSW strongly supports retention of marine park provisions as a fundamental element of biodiversity conservation in NSW. In fact, we consider marine parks legislation to be 'category 1' legislation, however, we note that it was not included in the ambit of the current independent review. Furthermore, we note that marine park provisions attract a range of views and some conservation tools (such as certain protective zonings) have been opposed by resource users.

Recommendations

EDO NSW has previously submitted that the management of the NSW marine estate should be guided by five key principles. These principles should be the key drivers of developing a

[246] See EDO NSW *Submission on draft Gateway process for Strategic Regional Land Use Policy*, December 2012.

comprehensive, adequate and representative network of marine protected areas, including a network of strictly protected areas. The key principles are:

1. Recognition of the intrinsic value of the biophysical realm
The intrinsic value of nature should be taken into account when assessing the socio-economic dimensions of the NSW marine estate. This should in turn inform decision-making around the design of marine parks.

2. Decision-making to be informed by peer-reviewed science
EDO NSW submits that the NSW marine estate should be first and foremost managed in accordance with the best available science. Research should further be managed by an independent and appropriately qualified scientific committee. This committee should also be empowered to make recommendations directly to the Marine Parks Authority in respect of decisions the need for new and enhanced marine protected areas.

3. Ecosystem-based approach
The ecosystem-based approach to biodiversity conservation and resource management has been formally endorsed by the Conference of the Parties for both the Convention on Biological Diversity (**Biodiversity Convention**)[247] and Ramsar Convention[248]. The ecosystem approach has also been supported by a plethora of peer-reviewed science emphasising its importance in building resilience under climate change5, a process in which marine parks are key.

4. Application of the precautionary principle
Given the dearth of information regarding significant elements of the NSW marine environment[249], it is imperative that the precautionary principle be applied with a view to protecting the unique biodiversity of this region. This means that that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation[250], including the introduction of new marine and enhancing protection in existing marine parks.

5. Network of strictly protected areas
While individual no-take (or sanctuary) zones contribute to meeting the specific needs of species or habitats, networks of connected reserves are widely considered to be the most effective means of achieving long-term ecosystem health in both protected and non-protected areas, particularly under climate change[251]. EDO NSW submits that connectivity between no-take (or sanctuary) zones marine parks should be further promoted by incorporating adequate buffer zones into network design[252]. Allowing an amnesty on recreational fishing in marine sanctuaries is not consistent with a regime that appropriately protects the marine environment.

[247] 3 Biodiversity Convention, COP 5, Decision V/6.
[248] 4 Ramsar Convention, COP 9, Resolution IX.1 Annex A.
[249] 6 For further details regarding information gaps see for example: Brewer, D et al, *Ecosystems of the East Marine Region* (2007), Report to the Department of Environment and Water Resources, CSIRO, Cleveland.
[250] See section 6(2) *Protection of the Environment Administration Act 1991.*
[251] Coleman, Melinda. A. et al, *Connectivity within and among a Network of Temperate Marine Reserves*, PLoS One. 2011; 6(5):e20168. Epub 2011, page 1.
[252] See for example: Bennett, G. and K.J. Mulongoy (2006), *Review of experience with ecological networks, corridors and buffer zones*, Technical Series no. 23, Montreal: Secretariat of the Convention on Biological Diversity.

Forestry legislation

Forestry legislation is another obvious regulatory area that has direct and significant impacts on biodiversity in NSW. Forestry is currently regulated by a number of different laws.[253] This is an area in need of systemic review.

To provide the evidence of the failings of the current regulatory scheme, we refer the Independent Panel to a previous body of evidence-based analysis.

Case study - *If a Tree Falls: Compliance failures in the public forests of New South Wales*

There is evidence of systemic breaches of forestry regulations throughout all of NSW's public forests. The Nature Conservation Council of NSW requested EDO NSW to prepare this report as a result of growing concern in the community about these breaches and the implications for biodiversity and the environment.

This report addresses the state of NSW's public-owned native forests and the flora and fauna species that inhabit them, the regulatory framework for the management of those forests and the widespread breaches of forestry regulation that our clients are reporting to us from across the state. It is clear that native forests are not being managed in a way that complies with the principles of Ecologically Sustainable Forest Management and the conservation of biodiversity. The report makes a number of recommendations to address the inadequacies of the current regulatory system.

The full report is available at: http://www.edonsw.org.au/forestry_clearing_vegetation_trees_policy

We also note that Integrated Forestry Operations Approvals (**IFOAs**) authorise and regulate forestry operations in State forests or other Crown timber lands, and incorporate a range of licence requirements,[254] including licences to pollute;[255] harm or kill threatened species (or their habitat);[256] and harm or kill a threatened species of fish (or their habitat).[257] IFOAs also include a number of conditions that are not connected to these licences. Our *Submission on the Remake of the Coastal Integrated Forestry Operations Approvals (IFOAs)* identifies

[253] In NSW, forestry is regulated by a number of different laws:
- *Regional Forest Agreements Act 2002* (Cth)
- *Forestry Act 2012* (NSW)
- *Forestry Regulation 2012* (NSW)
- *National Park Estate (Land Transfers) Act 1998* (NSW)
- *Plantations and Reafforestation Act 1999* (NSW)
- *Plantations and Reafforestation (Code) Regulation 2001* (NSW)

Forestry on Crown land is regulated under the *Regional Forest Agreements Act 2002* (Cth) which sets out the process for Regional Forest Agreements between the State and Federal governments, and the *Forestry Act 2012* (NSW) which set out forest agreements and a system of licences for carrying out logging operations on Crown land. The *Forestry Act 2012* (NSW) and the *Forestry Regulation 2012* (NSW) also set out offences in forestry areas. Forestry on private land is largely regulated under the *Plantations and Reafforestation Act 1999* (NSW) and the *Plantations and Reafforestation (Code) Regulation 2001* (NSW), and the PNF Code.

[254] *Forestry Act 2012* (NSW), s. 69T(1).

[255] issued under the *Protection of the Environment Operations Act 1997* (NSW).

[256] Issued under the *Threatened Species Conservation Act 1995* (NSW).

[257] Issued under the *Fisheries Management Act 1994* (NSW).

significant concerns about the proposed remake, and the implications for biodiversity in NSW.[258]

Special legislation

Even where robust biodiversity conservation provisions and processes are in place, our experience has shown that these protections can be trumped by the introduction of 'special legislation.' This is specific legislation that is introduced to facilitate the approval of a project or activity, often by exempting current environmental laws. In this report we have already noted the introduction of the Mining SEPP in an attempt to overcome the Warkworth judgment, and we note two further examples of special legislation designed to override biodiversity protections in the case studies below.

Case study – Biocertification of the Growth centres Plan in Western Sydney

Biocertification is another related voluntary scheme under the *Threatened Species Conservation Act 1995* whereby a proposal for development of an area of land can be granted biodiversity certification if it is deemed to result in an overall maintenance or improvement of biodiversity values. This involves identifying areas to be developed, areas to be protected, and additional offset areas where required. This is an alternative to individual site assessment and assessments of significance.

Earlier versions of the scheme were not based on an established scientific methodology and the first proposal to biocertify the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006* was challenged in the Land & Environment Court. The applicant, the True Conservation Association alleged that that (1) there had been insufficient on-site studies done of individual threatened species and (2) the Minister did not have any rational basis for concluding that the plan would improve or maintain biodiversity values. These allegations were denied by the Minister, however, the proceedings were effectively terminated by special legislation passed six weeks before the matter was due to be heard in court. The legislation simply conferred biocertification directly on the Growth Centres Policy, leaving the court case unable to proceed, but left the underlying provisions relating to biocertification unchanged.

Subsequently, the then Department of Environment, Climate Change & Water has developed an assessment methodology in an attempt to improve the scientific rigour and credibility of the process. As noted, the biocertification methodology has weaker standards than other methodologies, such as the EOAM under native vegetation laws.

[258] See: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1372/attachments/original/1397176833/140409_Submission_on_the_Coastal_IFOA_remake_EDONSW_FINAL_PDF.pdf?1397176833.

Case study - *Blue Mountains Conservation Society Inc v Director-General National Parks and Wildlife; the Minister for the Environment and AFG Talons Pty Ltd*

EDO NSW successfully represented the Blue Mountains Conservation Society Inc in its attempts to prevent filming of a war movie in the Grose Wilderness area of the Blue Mountains National Park in May 2004.

Justice Lloyd ruled that the proposed commercial filming of scenes for the war movie "Stealth" in the area was unlawful, in a significant statement on the value of wilderness areas and the protection that should be afforded to them.

The Society claimed that the authority and consent for the commercial filming activities were in breach of the National Parks and Wildlife Act 1974 and the Wilderness Act 1987. Justice Lloyd accepted the Society's arguments that the proposed commercial filming in a wilderness area was completely antipathetic to the intended use of the land.

His Honour concluded his judgement with the words, "wilderness is sacrosanct".

Following the court case, the Government at the time introduced special legislation to facilitate filming in protected areas, namely the *Filming Approvals Act 2004* to override the *Wilderness Act* and the NPWS Act.

Recommendation

NSW should consider applying the US model which requires environmental impact assessment of *legislative proposals or policy actions* that may significantly affect the environment.[259]

General Recommendations for addressing the impacts of 'category 3' legislation

We recognise that the independent panel does not have the mandate to recommend amendments to the plethora of laws and policies that impact biodiversity. However, the evidence is clear that category 3 legislation is significantly undermining the objectives of category 1 legislation. **There is therefore a real risk that any recommendations that the panel may make for specific biodiversity legislation may be undermined if planning and other laws do not adequately integrate biodiversity considerations**.

There are some general recommendations that are within the scope of this review that would help address this problem, namely:

- Biodiversity protection must be **integrated** across all decision making processes. Biodiversity considerations must be supported and integrated in other regulatory frameworks such as planning laws, fisheries management, native vegetation protection, public and private forestry, noxious weed control and bushfire management.
- To assist this integration, an independent, statutory **Biodiversity Commission** or similar body should be created. This focus of the Commission should be on identifying, developing and implementing a whole of government approach which ensures biodiversity protection is genuinely a *fundamental consideration* in planning and conservation decisions.

[259] *National Environmental Policy Act 1969* § 102(C), 42 USC § 4332(C), cited in The Hon Justice B J Preston, 'Internalising Ecocentrism in Environmental Law' (2011), paper to *3rd Wild Law Conference: Earth Jurisprudence – Building Theory and Practice*, 16-18 September, Griffith University, QLD, available at http://www.lec.justice.nsw.gov.au/lec/speeches_papers.html#Justice_Preston,_Chi, at 6.

Appendix 1 – Relevant EDO NSW submissions

The following legal and technical submissions are available at:
http://www.edonsw.org.au/native_plants_animals_policy

- Submission on Draft Report - Active and adaptive management of cypress forests in the Brigalow and Nandewar State Conservation Areas, 8 August 2014 - **Download PDF**
- Submission on Draft 10/50 Vegetation Clearing Code of Practice, 21 July 2014 - **Download PDF**
- Submission on the NSW Crown Lands Management Review, June 2014 - **Download PDF**
- Submission on Draft NSW - Commonwealth Bilateral Approval Agreement, June 2014 - **Download PDF**
- Submission on the Northern Councils Environmental Zones Review, June 2014 - **Download PDF**
- Senate Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 and the Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014, June 2014 - **Download PDF**
- Submission on the Draft NSW Biodiversity Offsets Policy for Major Projects , May 2014 - **Download PDF**
- Submission on the Draft Landholder Guides and Draft Orders to implement self-assessable codes under the Native Vegetation Regulation 2013, May 2014 - **Download PDF**
- ANEDO submission to the Federal parliamentary inquiry into Environmental Offsets, April 2014 - **Download PDF**
- ANEDO submission to Federal parliamentary inquiry into environmental regulation, April 2014 - **Download PDF**
- Draft Terms of Reference for a Threatened Species Commissioner (Commonwealth), April 2014 - **Download PDF**
- Submission on the Remake of the Coastal Integrated Forestry Operations Approvals (IFOAs), April 2014 - **Download PDF**
- Review of the Weed Management in NSW – Draft Report, 4 April 2014 - **Download**
- Submission on amendments to the NSW threatened species Priorities Action Statement, 21 February 2014 - **Download PDF**
- ANEDO submission on the EPBC Act Koala Referral Guidelines, 7 February 2014 - **Download PDF**
- Submission on Draft NSW-Commonwealth Bilateral Assessment Agreement, December 2013 - **Download PDF**
- ANEDO submission on streamlining of environmental approvals for offshore petroleum , December 2013 - **Download PDF**
- ANEDO Submission to the Senate Standing Committee on Environment and Communications regarding the *Environment Protection and Biodiversity Amendment Bill 2013,* April 2013 - **Download PDF**
- ANEDO Submission on the Draft Framework of Standards for Accreditation of Environmental Approvals under the *EPBC Act 1999,* 23 November 2012 - **Download PDF**
- ANEDO Submission to the Senate Inquiry into the Environment Protection and Biodiversity
  Conservation Amendment (Emergency Listings) Bill 2011, 15 December 2011 -

Download PDF

- Submission on proposed amendments to the Biobanking Assessment Methodology, 19th November 2010 - **Download PDF**
- Submission on the Review of the Threatened Species Conservation Act 1995, 17 November 2010 - **Download PDF**
- ANEDO Submission - further comments on EPBC interim report, 28 August 2009 - **Download PDF**
- ANEDO Submission to the 10 year review of the Environment Protection and Biodiversity Conservation Act 1999 – interim report, 10 August 2009 - **Download PDF**
- Submission on the National Parks and Wildlife Amendment Bill 2009, 13 July 2009 - **Download PDF**
- Submission to the National Biodiversity Strategy, 29 May 2009 - **Download PDF**
- Proposed National Parks and Wildlife Regulation 2009, 27 March 2009 - **Download PDF**
- ANEDO Submission on EPBC Act: Recommendations for Reform, 5 March 2008 - **Download PDF**
- Biodiversity Report - Recommends Regulatory Change, 18 December 2006 - **Contact Us**
- Submission on Threatened Species Priorities Action Statement, 18 August 2006 - **Download PDF**
- Possible new matters of National Environmental Significance under the EPBC Act 1999, May 2005 - **Download PDF**
- Accreditation to undertake threatened species and biodiversity assessments, February 2005 - **Download PDF**
- Threatened Species Position Paper and Response to Reforms, 19 April 2004 - **Download PDF**
- Comment on the proposed National Parks and Wildlife Amendment (Threatened Species) Regulation 2005, Threatened Species Conservation Amendment (Listing Criteria) Regulation 2005, and the Threatened Species Conservation (Savings and Transitional) Amendment (Significant Effect) Regulation 2005, 13 July 2005 - **Download PDF**
- Submission on "BioBanking - A Biodiversity Offsets and Banking Scheme" Working Paper, 5 March 2006 - **Download PDF**
- Submission to the Joint Select Committee on the Threatened Species Conservation Amendment (Biodiversity Banking) Act 2006, 9 May 2007 - **Contact Us**
- Accreditation Scheme for Individuals Involved in Threatened Species and Biodiversity Survey and Assessment - Draft for Comment, 7 June 2006 - **Download PDF**
- Biobanking consultation - Key concern: variation of red flags, 21 November 2007 - **Download PDF**
- Productivity Commission Draft Report into the impacts of native vegetation and biodiversity regulations, January 2004 - **Download PDF**

Appendix 2 – Audit of threatened species laws in Australia

Assessment_of_the_
adequacy_of_threate

Available at: http://www.placesyoulove.org/wp-content/uploads/2014/09/Assessment-of-the-adequacy-of-threatened-species-planning-laws-FINAL.pdf

Appendix 3 - EDO NSW report: *Climate change and the legal framework for biodiversity protection in NSW: a legal and scientific analysis*.

EDO NSW Climate
Change and Biodivers

Available at: https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1574/attachments/original/1408406611/090724nsw_discussion_paper.pdf?1408406611

Appendix 4 – *Assessment and Evaluation of NSW Conservation Mechanisms. A report for the Hunter & Central Coast Regional Environmental Management Strategy* (HCCREMS)

This Appendix is not for general publication.