

From: [REDACTED]  
Sent: Wednesday, 9 August 2023 8:28 PM  
To: IPART  
Cc: [REDACTED]  
Subject: RE: IPART Biodiversity Market Monitoring Review

Hello,

LGNSW unfortunately does not have capacity at this time to provide a formal submission to IPART's consultation on monitoring the NSW Biodiversity Credit Market. However, many of the issues are covered in our attached submission to the Statutory Review of the Biodiversity Conservation Act 2016. We also understand a number of councils and local government organisations are sending in submissions that cover similar issues.

If you have any questions, please get in touch with myself and [REDACTED]

Many thanks,

[REDACTED]

[lgnsw.org.au](http://lgnsw.org.au)

# LGNSW Submission- Statutory Review of the *Biodiversity Conservation Act* 2016

APRIL 2023

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

# OVERVIEW OF THE LOCAL GOVERNMENT SECTOR



Local government in NSW employs more than **55,000 people**



Local government in NSW looks after more than **\$136 billion of community assets**



Local government in NSW spends more than **\$1.9 billion each year on caring for the environment, including recycling and waste management, stormwater management and preserving and protecting native flora and fauna**



NSW has 450 council-run libraries that attract more than **34.8 million visits each year**



Local government in NSW is responsible for about **90% of the state's roads and bridges**



NSW councils manage an estimated **3.5 million tonnes of waste each year**



NSW councils own and manage more than **600 museums, galleries, theatres and art centres**

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## Opening

Local Government NSW (LGNSW) is the peak body for local government in New South Wales (NSW), representing all NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

LGNSW welcomes the opportunity to provide its views on the *Biodiversity Conservation Act 2016* (BC Act). Councils play a key role in vegetation management and land use regulation, including:

- as a regulatory and consent authority for development and vegetation regulated under the *Environmental Planning and Assessment Act 1979* (EP&A Act),
- as a local strategic land use planning authority, implementing land use zoning and local vegetation and biodiversity policy,
- as a land management authority for public land with biodiversity values, and
- as a development proponent for projects impacting on biodiversity.

To obtain input from councils, LGNSW hosted four feedback forums which were well attended by staff and councillors across NSW. Those views have been incorporated into this submission and we are also aware of councils making their own submissions.

LGNSW's advocacy work is guided by annual conference resolutions debated and agreed by councillors. The conference resolutions relevant to this submission are listed in *Annex A*.

This submission was endorsed by the LGNSW Board in July 2023.

## Background

The NSW Government introduced the *NSW Land Management and Biodiversity Conservation Framework* in 2016 following an independent review of the NSW biodiversity legislation. This included the introduction of the BC Act, as well as amendments to the *Local Land Services Act 2013* (LLS Act), namely the addition of Part 5A and Schedules 5A and 5B.

The new regulations commenced in August 2017, replacing the *Threatened Species Conservation Act 1995*, the *Nature Conservation Trust Act 2001*, the *Native Vegetation Act 2003* and parts of the *National Parks and Wildlife Act 1974* relating to private land conservation and native animal and plant management.

The BC Act is supported by the *Biodiversity Conservation Regulation 2017* and the *Biodiversity Conservation (Savings and Transitional) Regulation 2017*.

The NSW Government, with the support of an independent expert advisory panel, is carrying out a five-year statutory review of the BC Act which will determine:

- if the policy objectives of these provisions remain valid, and
- whether the provisions themselves remain appropriate for securing the objectives of this part of the Act.

The review is being carried out in conjunction with the statutory review of the Part 5A and Schedules 5A and 5B of the LLS Act. The advisory panel is to report by August 2023.

## Response

The consultation paper recognises that the natural, economic and political environment has changed since the introduction of the land management and biodiversity reforms in 2017. At global, national and regional level, biodiversity and the state of the natural environment is continuing to decline. The impacts of climate change are being felt more intensely, putting increased pressure on ecosystems. In NSW, the condition of most native vegetation has deteriorated since the reforms.<sup>1</sup> Land clearing and the number of species listed as threatened continues to rise and more extinctions are expected in the next decades.<sup>2</sup> The 2019-20 bushfires burnt 5.5 million hectares or almost 7% of NSW.<sup>3</sup>

Social and political momentum has shifted towards taking greater action on environmental issues including climate change mitigation and adaptation, and biodiversity loss. There is now greater appreciation of nature's intrinsic ecological value, as well as recognition of the economic, health and wellbeing benefits. Australia has recently committed to new national and international climate and environmental targets. These include commitments under the Kunming-Montreal Global Biodiversity Framework to conserve 30% of terrestrial and marine ecosystems, restore 30% of degraded ecosystems and bring loss of high biodiversity importance to close to zero by 2030.<sup>4</sup>

The current system is not in line with this shift in momentum and without further action, it will not adequately support the achievement of these targets. Although the BC Act provides a strong foundation for protecting and regenerating biodiversity in NSW, its present functioning is inconsistent with the principles of ecologically sustainable development. There is underregulation in some areas, including endangered and critically endangered species, native and domestic animals, and wildlife corridors, as well as loopholes where proponents are able to 'game' the system. In addition, there is a lack of focus on local biodiversity outcomes, and a resulting net loss of biodiversity in some local government areas (LGAs), particularly in coastal and urban areas.

However, there are vast differences in regional/rural and urban outcomes which need to be addressed. Rural and regional areas are facing excessive barriers to development and job creation. Some parts of the Act and associated processes are overly complex and may not be delivering the intended outcomes. It overregulates areas of limited environment value, leads to high costs for small families and restricts land use changes unnecessarily. There is a need to address these issues and ensure they are not exacerbated by any changes to the Act to improve environmental outcomes.

This submission focusses on issues associated with the BC Act and its interaction with other pieces of legislation. LGNSW's submission in December 2022 to the Statutory Review of the LLS Act highlights the key issues with the interface between the two pieces of legislation and covers recommendations on improving the LLS Act.<sup>4</sup>

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<sup>1</sup> NSW Environment Protection Authority (2021) '[NSW State of the Environment 2021](#)', NSW Government

<sup>2</sup> Ibid.

<sup>3</sup> NSW Bushfire Inquiry (2021) '[Final Report of the NSW Bushfire Inquiry](#)' <sup>4</sup> The Conference of the Parties, to the Convention on Biological Diversity (2022) '[Kunming-Montreal Global Biodiversity framework](#)'

<sup>4</sup> LGNSW (December 2022) '[Submission to the Statutory Review of Part 5A of the LLS Act](#)'

Although the focus is on changes to the BC Act itself, many issues are operational and relate to how the Act is currently administered.

A summary of LGNSW's recommendations is listed in *Annex B*.

## Objectives of the Act

### **Q1. How effective are the objects of the Act to restore, conserve and enhance biodiversity today and into the future?**

Section 1.3 of the BC Act sets out its objective to maintain a healthy, productive and resilient environment for the greatest wellbeing of the community, now and into the future, consistent with the principles of ecologically sustainable development, and it highlights 15 sub-objectives.

Overall, these objectives broadly remain effective for supporting biodiversity. However, the focus of objective 1.3(a) is on conserving biodiversity at bioregional and state scales. This overlooks the need to prevent loss of biodiversity at a local level and does not account for locally important biodiversity. The objective should be expanded to also include conserving biodiversity at a local scale.

In addition, another objective should be added to explicitly support wildlife corridors and the connectivity of the landscape. Unless stronger action is taken, habitats will continue to become more fragmented due to development and biodiversity will be lost. Connectivity and access to climate refugia will be increasingly important as the climate changes for species to relocate during natural disasters or permanently as temperatures warm.

**Recommendation 1:** Amend section 1.3(a) to make its purpose "to conserve biodiversity at local, bioregional and State scales".

**Recommendation 2:** Add an additional objective on improving the connectivity of the landscape.

### **Q2. Is the current purpose to conserve biodiversity consistent with the principles of Ecologically Sustainable Development appropriate?**

The purpose of the Act to conserve biodiversity consistent with the principles of Ecologically Sustainable Development (ESD) is appropriate. However, it is not currently being achieved due to issues with the Act, the way in which it is administered and its interaction with other legislation.

Although ESD needs to balance environmental considerations with other social and economic priorities, biodiversity is currently undervalued, and therefore isn't given equal weighting against housing and other development. This is resulting in the loss and fragmentation of biodiversity, which is not in line with the principles of ESD, as described in section 6(2) of the *Protection of the Environment Administration Act 1991*.

### **Q5. How current and comprehensive are the existing elements of the Act for biodiversity conservation?**

The Act needs to do more to halt biodiversity decline in NSW and enable improved biodiversity and ecological outcomes at both state and local scales. There is under-regulation in some

areas, including endangered and critically endangered species, native and domestic animals, and wildlife corridors, as well as loopholes where proponents are able to 'game' the system.

There is a lack of focus on local biodiversity outcomes, and a resulting net loss of biodiversity in some LGAs, particularly in coastal and urban areas. However, there are also excessive barriers to development in rural and regional areas and for small families, which requires additional flexibilities. More detail on these issues is provided later in this submission.

## International obligations and climate change adaptation

### **Q3. How could the Act best support national and international biodiversity aspirations including climate change adaptation, nature positive and restoration goals?**

#### ***How adequate is the climate change considerations in the Act and how could climate considerations be better integrated?***

The review of the BC Act should be seen as an opportunity to better align NSW biodiversity directions with national and global targets.

In 2022, Australia signed the Kunming-Montreal Global Biodiversity Framework ahead of the UN Biodiversity Conference (COP15) in Montreal, committing to:

1. Bring the loss of areas of high biodiversity importance, including ecosystems of high ecological integrity, close to zero by 2030;
2. Conserve 30% of global terrestrial and marine ecosystems; and
3. Restore 30% of degraded ecosystems by 2030.<sup>5</sup>

This commitment was signed by the Australian Government but should also be adopted by the NSW Government at state level and added to the BC Act. NSW is currently well behind on the target to protect 30% of terrestrial and marine ecosystems. Only around 10% of NSW is protected as National Park. Increased funding is needed to expand national parks as well as protect biodiversity through other means, including through private land conservation agreements (see section on *Private land conservation and investment* for more detail).

In addition, marine ecosystems do not receive sufficient protection from the BC Act processes. The Biodiversity Assessment Method (BAM), currently used under the Biodiversity Offset Scheme (BOS) and biodiversity certification, does not effectively account for aquatic habitats and it is difficult for such ecosystems to be offset. There should therefore be increased focus on avoidance for these habitats to ensure they are not lost.

Australia is also a signatory of the Ramsar Convention on Wetlands and bilateral migratory bird treaties. However, councils shared concerns that the ability to meet these international commitments is undermined by NSW water management. To avoid this, there should be stronger recognition of international agreements within the BC Act legislation and processes.

As a signatory to the UN Paris Agreement, Australia must take action to limit global warming to well below 2 degrees Celsius above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5 degrees Celsius. In 2022, Australia passed legislation enshrining a

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<sup>5</sup> The Conference of the Parties, to the Convention on Biological Diversity (2022) '[Kunming-Montreal Global Biodiversity framework](#)'



pledge to cut greenhouse gas emissions by 43% below 2005 levels by 2030 and to net zero by 2050.

In most cases, action on climate change supports biodiversity goals but there can be issues of conflicting objectives. For example, councils cited concerns around renewable energy zones where large areas of land are being cleared for new green energy facilities to meet net zero commitments. To reduce this impact, a strategic approach must be taken to ensure energy zones are located in areas of the lowest biodiversity values, and there should be a focus on 'avoidance' on such sites. It should also be made clear what role biodiversity has to play in the NSW net zero targets, and government agencies should work collaboratively to identify and prioritise projects that achieve shared objectives.

The impact of clearing on climate change needs to be better accounted for under the BOS. The carbon emissions associated with clearing of vegetation must be accurately quantified and offset, in addition to the biodiversity impacts. Both positive and negative impacts on climate change impacts must be effectively integrated into assessment frameworks for establishing offset requirements and the value of stewardship sites.

The Paris Agreement also includes a goal on climate adaptation to "enhance adaptive capacity, strengthen resilience and reduce vulnerability to climate change". Climate change adaptation is recognised in the BC Act purposes, which sets out the aim to "support biodiversity conservation in the context of a changing climate" (Section 1.3(d)). However, there are no specific provisions supporting this. Councils' experience is that adaptation is not effectively considered in the BAM, which considers habitat to be a species' current range. This fails to account for a changing climate and the need for species to relocate, for example, to adapt to higher baseline temperatures, longer drought periods or rising sea levels. The Act should set out a requirement for the BAM to take into account a changing climate and what species will exist there in the future.

The Department of Planning and Environment (DPE) must identify and protect areas that can provide climate refuges, such as riparian areas and land at higher altitude. Corridors connecting existing habitats to these areas must be protected to allow the safe movement of species during extreme weather events, which will become more frequent under a changing climate. Species and ecological communities at the edge of their range should also be given additional protections. The response to Q11 in the section on *Private land conservation agreements* sets out more detail on how to increase the protection of wildlife corridors, climate refugia and species at the edge of their range. These areas should all be more highly valued when assessed for clearing and the creation of conservation agreements.

Some coastal management plans identify land for acquisition due to sea level rise and inundation, allowing species to gradually move up slope. More funding should be given to the coastal land protection scheme to support all LGAs to identify areas and support their ongoing management.

***Recommendation 3:*** *Include recognition of international agreements in the BC Act, including a commitment to achieve the Kunming-Montreal biodiversity commitments at state level by 2030.*

***Recommendation 4:*** *Strengthen the avoidance criteria for aquatic ecosystems in the Act.*

***Recommendation 5:*** *Take a strategic approach to ensure energy zones are located in areas of the lowest biodiversity values, and an increased focus on 'avoidance' on such sites.*

**Recommendation 6:** *Set out the role biodiversity has to play in the NSW net zero targets, and government agencies work collaboratively to identify and prioritise projects that achieve shared climate and biodiversity objectives.*

**Recommendation 7:** *Include a requirement in the Act for climate change mitigation and adaptation to be addressed within the BAM.*

**Recommendation 8:** *Integrate climate change impacts into assessment frameworks for establishing offset requirements and the value of stewardship sites.*

**Recommendation 9:** *Prioritise climate refugia, wildlife corridors and species at the edge of their range for protection and increase their value when assessed for clearing and the creation of conservation agreements.*

## Embedding Aboriginal cultural and ecological knowledge in biodiversity conservation

### **Q.4 How could the Act better integrate Aboriginal knowledge and support the aspirations of Aboriginal people in biodiversity conservation?**

#### **Q9. How can perspectives of Aboriginal people and indigenous knowledge be embedded in the conservation of threatened species and ecological communities?**

An objective of the BC Act is to improve, share and use knowledge, including local and traditional Aboriginal ecological knowledge (section 1.3). This is important because Aboriginal communities have a deep spiritual and cultural connection to the land, and it is vital they are given a say in conservation decisions which affect their wellbeing, culture and livelihoods. In addition, Aboriginal communities hold valuable ecological knowledge on sustainable land management practices, biodiversity and the conservation of threatened species which should be promoted and leveraged.

However, there is currently no systematic processes for consulting Aboriginal communities and integrating their cultural and ecological knowledge into biodiversity conservation. The BC Act does not set out how such knowledge should be incorporated into assessment processes, such as within the BAM as part of the BOS. Another example which lacks a formalised consultation procedure is the Threatened Species Scientific Committee assessment process which determines whether a species should be listed as threatened.

Councils' Local Environmental Plans set out consultation requirements with their local Aboriginal groups, which usually involves engaging with Local Aboriginal Land Councils (LALCs). However, councils expressed concerns that LALCs are often overwhelmed with a multitude of requests and may not be adequately resourced to provide the level of assistance required. The process can therefore be lengthy which slows down environmental assessments and actions. In some areas, there are Aboriginal community committees, but these face the same issues of under resourcing and consequently slow processes.

The NSW Government should formalise the consultation of Aboriginal communities within the BC Act and ensure the process is adequately funded and resourced. For example, the government could fund Aboriginal community committees or environmental officer positions at each of the five NSW Aboriginal Land Council (NSWALC) Zone Offices. Knowledge centres could also be funded to consolidate and promote Aboriginal biodiversity knowledge, for example on the conservation of threatened species.

Some councils have cultural heritage management plans with a map highlighting different levels of consultation requirements required depending on what the site contains. Due to sensitivity of publicising sites, the map is only available to a few staff internally in line with a signed memorandum of understanding. DPE could provide grant funding for councils and LALCs to develop similar maps for each LGA. These maps help to avoid overwhelming communities with requests, while ensuring they are consulted about the most important areas.

**Recommendation 10:** *Formalise the consultation of Aboriginal communities within the BC Act, including within the Threatened Species Scientific Committee assessment process, and ensure processes are adequately funded and resourced.*

**Recommendation 11:** *Consider funding Aboriginal community committees or environmental officer positions at each of the five NSW Aboriginal Land Council (NSWALC) Zone Offices, as well as knowledge to consolidate and promote Aboriginal biodiversity knowledge.*

**Recommendation 12:** *Provide grant funding for councils and LALCs to develop cultural heritage management plans and spatial maps with consultation requirements.*

## Conserving threatened species and ecological communities

### **Q7. How could the Act best support landscape-scale actions to prevent species from becoming threatened?**

Threatened species (TS) and threatened ecological communities (TECs) are plants, animals or naturally occurring groups of organisms that are critically endangered, endangered or vulnerable. The NSW State of the Environment Report 2021 (SoE 2021) found the number of listed threatened species rose by 8% since 2016.<sup>6</sup> The NSW Biodiversity Outlook Report 2020 states that without effective management, 50% of listed threatened species in NSW are likely to become extinct within 100 years.<sup>7</sup> LGNSW Annual Conference resolutions support the position that all three levels of government should work collaboratively to address the issues identified in the SoE 2021, the majority of which relate to the BC Act (see Annex A, resolution 1).

The SoE 2021 found that pressures affecting the largest number of TS in NSW were native vegetation clearing and permanent habitat loss (87%).<sup>8</sup> TS and TECs should be given greater protections during land use planning processes. A requirement should be added to the Act that when rezoning land, all areas of high environmental values, TS and TECs must be avoided. The Act should be explicit in the definition of 'avoid' to decrease subjectivity.

Issues of habitat loss have been compounded by land fragmentation due to roads and other development. Effective conservation of threatened entities requires conservation across their range. For example, a significant factor contributing to koalas being listed as endangered in NSW in 2022 is the erosion of their habitat, as well as vehicle strikes along roads. Creating new wildlife corridors and improving the connectivity of landscape is therefore critical to enable

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<sup>6</sup> NSW Environment Protection Authority (2021) '[NSW State of the Environment 2021](#)', NSW Government

<sup>7</sup> NSW Department of Planning and Environment (2020) '[NSW Biodiversity Outlook Report](#)', NSW Government

<sup>8</sup> NSW Environment Protection Authority (2021) '[NSW State of the Environment 2021](#)', NSW Government

the safe movement of species.

As discussed in the section titled *International obligations and climate change*, species at the edge of their range, climate refugia and wildlife corridors connecting existing habitats to these areas, must be given greater protections. This is critical to prevent more species becoming threatened or extinct as it will allow for the movement of species during natural disasters and support species to relocate permanently in response to new weather patterns. The response to Q11 in the section on *Private land investment* sets out more detail on how to increase the protection of *climate refugia, wildlife corridors and species at the edge of their range*.

The consultation paper highlights that the BC Act could further improve biodiversity conservation outcomes by applying an ecosystem-level approach. However, councils highlighted that it is important this isn't at the expense of local biodiversity when the broader ecosystem is in good condition. There is currently insufficient focus on local biodiversity in the Act and the operation of the Act, resulting in species becoming threatened or extinct locally. The section titled *Objectives of the Act* recommends that conserving local biodiversity be listed in the Act's objectives, while the *Biodiversity Offsets Scheme* section suggests ways to reduce biodiversity loss at a local scale.

The Act lacks the necessary ecological limits to prevent further extinctions. There is inadequate assessment of cumulative impacts and there are no triggers in the Act to ban or restrict clearing of critically endangered communities (CEECs). The *Biodiversity Offsets Scheme* section under *Serious and Irreversible Impacts triggers* sets out more detail on how to tackle this, including the need for stronger thresholds.

There is also currently no clear mechanism for when a new endangered ecological community (EEC) gets declared on land that has already been rezoned. This can be an issue for 'zombie developments' where approvals were granted years or even decades ago. A clear process should be defined for reassessing the land after a certain period of time and protecting the EEC where possible. Depending on the approach, DPE should provide funding to support the reassessment process and the protection of the EEC.

Furthermore, there are a number of issues causing the decline of TS which relate to other legislation but must be tackled to achieve the objectives of the BC Act and prevent more species from becoming threatened. The logging of native forests is continuing to destroy important habitats and the NSW Government should create a strategy to end the practice as soon as possible, in line with other states in Australia. This position is supported by LGNSW Annual Conference resolutions (see *Annex A, resolution 2*). The Annual Conference resolutions also include a resolution that councils must retain a role as a consent authority in relation to forestry, including private native forestry (see *Annex A, resolution 3*).

Having two different Koala chapters in the (Biodiversity and Conservation) 2021 State Environmental Planning Policy (BC SEPP) for urban and rural areas is causing many issues in development assessments. Some keyhole LGAs have had koala protections removed, for example, Dubbo is exempt from protections despite being surrounded by LGAs which are covered, and despite having target trees and koalas. This should be urgently reviewed to ensure koalas gain adequate protections and their declining populations are reversed. LGNSW Annual Conference resolutions support urgent action to protect koala habitat and address all other threats, as identified in the NSW Koala population and habitat in NSW report<sup>9</sup> (see

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<sup>9</sup> Legislative Council, Portfolio Committee No. 7 (2020) *'Inquiry into koala populations and habitat in New South Wales'*, NSW Parliament

*Annex A, resolution 4).*

The LLS Act and *Rural Fire Services Act 1997* (RFS Act) have significantly less stringent biodiversity protections than the BC Act and in many cases, landholders are able to clear land with no or minimal approvals. For example, under the LLS Act, any vegetation germinated after 1990 is not protected, which for some vegetation types can include mature or semi-mature species capable of hosting hollows. Some such vegetation is now over 30 years old and providing valuable habitat. Biodiversity protections under other legislation should be strengthened, including limiting allowable clearing without authorisation and bringing forward the germination date under the LLS Act after which vegetation is not protected. There are loopholes between the BC Act and legislation with less stringent biodiversity protections, which is covered in the section titled *Interaction with other legislation*.

**Recommendation 13:** *Add a requirement in the Act that when rezoning land, all areas of high environmental values, TS and TECs should be avoided.*

**Recommendation 14:** *Introduce a mechanism to reassess and protect land when a new EEC is declared on land that has already been rezoned and consider providing funding to assist with its protection and management.*

**Recommendation 15:** *Create a strategy to end native forest logging in NSW as soon as possible.*

**Recommendation 16:** *Review the koala chapters in the BC SEPP and ensure a high level of protection for koalas in all LGAs.*

**Recommendation 17:** *Strengthen biodiversity protections under other legislation, including limiting allowable clearing without authorisation under the LLS Act and RFS Act.*

**Q8. Are there improvements that could be made to AOBVs and the SoS program to give them a greater role in enhancing biodiversity?**

The BC Act gives the Minister for the Environment the power to declare Areas of Outstanding Biodiversity Value (AOBVs) for sites that are biologically significant. These areas are prioritised for investment under the Biodiversity Conservation Investment Strategy, providing a mechanism for protecting and effectively managing the land.

AOBVs can be declared on public or private land. However, the process for nominating a new AOBV requires landholder support which councils find is difficult to obtain for the entire area. This is an unnecessary barrier which should be reviewed to ensure the mechanism can be used more effectively to protect important areas. Greater use of AOBVs should be enacted to protect wildlife corridors and climate refugia, in particular for threatened species such as koalas. Critically endangered species habitat and communities and World Heritage areas should automatically be declared AOBV.

The Saving our Species (SoS) program involves targeted conservation projects which seek to preserve and increase species that are listed as threatened in NSW. However, there is a need for stronger legislative effect of the SoS program within the BC Act. There is currently a disconnect between the program objectives and development processes which are leading to the decline of the species. SoS program sites are not protected from development, and they are often not considered in assessments carried out for the BOS or for biodiversity certification.

**Recommendation 18:** Remove the requirement to receive landholder consent for new AOBV nominations.

**Recommendation 19:** Expand AOBVs to include important wildlife corridors and climate refugia.

**Recommendation 20:** Declare all critically endangered species habitat and communities and World Heritage areas as AOBV.

**Recommendation 21:** Increase protections for SoS program sites so that development cannot occur in these locations.

## Private land conservation and investment

The Act sets out a framework for landholders to enter into private land conservation (PLC) agreements. The three different options available include wildlife refuge agreements, conservation agreements and biodiversity stewardship agreements, under the BOS.

The Act also requires the Minister for Environment and Heritage to prepare a Biodiversity Conservation Investment Strategy which guides government investment in conservation.

Effective private land conservation is vital to protect NSW's existing biodiversity, regenerate degraded land, provide wildlife corridors, and increase ecosystem connectivity. There are also wider environmental benefits such as supporting carbon abatement and mitigating flood risks. An increase in conservation agreements will be necessary to meet our international biodiversity and climate change targets. Current levels are too low and are concentrated in rural areas where land prices are cheaper. Some councils reported not having a single stewardship site in their LGA.

**Q10. How could the Act best support partnerships with private landholders to conserve, restore and enhance biodiversity across NSW?**

**Q12. How could the Act enable financial investment by government, businesses and philanthropic organisations?**

Councils raised concerns that there is a lack of awareness of PLCs among landholders, and the process is complex and onerous. Even council staff who work in the field can find the process difficult to understand. DPE, with the support of consultants, recently carried out Customer Journey Mapping on improving BOS processes. It would be useful to carry out a similar exercise for other conservation agreements not linked to the BOS, as well as consulting landholders on how to increase awareness of the options available. Creative ways to increase understanding should be considered, such as through case studies, videos and features on popular platforms such as Gardening Australia.

There is also insufficient financial incentive to encourage uptake of private land conservation agreements and the requirements of establishing and managing the site can be cost prohibitive. For example, installing and maintaining necessary fencing and access tracks can cost more than the funding provided. Councils reported that increased labour rates have exacerbated this issue and made it difficult for some landholders to meet the requirements of existing agreements. The financial incentive to use land for other means is greater: in urban areas, development is always more economically attractive than conservation sites, while many potential locations in rural areas are lost to private native forestry (PNF).

PNF companies also actively approach landholders to persuade them to establish agreements. Some councils have seen a swathe of PNF across their LGA as landholders are targeted, which is compounded by a ripple effect from other landholders hearing the financial benefit from their neighbours.

DPE should consult private landholders on how to create better incentives to conserve existing bushland and regenerate degraded land. Funding for stewardship agreements should be increased to compete with PNF, including accounting for required activities such as fencing and access tracks. More resourcing is needed from the NSW Government to actively approach landholders and guide them through the process.

High quality vegetation is given less value than degraded land due to the lower levels of management required, however, it means there is a lack of incentives for landholder to conserve existing high-quality vegetation and habitats. DPE should therefore consider providing more flexible arrangements and assistance for private owners to conserve these high-quality areas.

In addition, the current limits on size of stewardship sites means that it is challenging to obtain a conservation agreement for smaller parcels of land. This has been a barrier for both councils and private landholders in setting up stewardship sites as some councils only have land that is just under the threshold. This fails to account for the importance of small pockets of biodiversity, particularly in urban areas with very limited biodiversity left. Such areas are highly important to local biodiversity and the wellbeing of those who live around them, and can provide benefits to air quality, urban cooling and flash-flood mitigation. They can also be protected from risks such as bushfires and disease. In recognition of this, the minimum area threshold for stewardship sites should be reduced for urban areas.

***Recommendation 22:*** Consult with landholders on how to increase awareness of the options available, improve processes from a user-perspective and make conservation agreements more desirable.

***Recommendation 23:*** Increase funding available for establishing conservation sites to account for the entire cost associated with managing the land.

***Recommendation 24:*** Increase government resourcing to actively approach and support landholders, targeting those which would improve landscape connectivity.

***Recommendation 25:*** Consider providing more flexible arrangements and assistance for private landowners to conserve areas of existing high-quality vegetation.

***Recommendation 26:*** Reduce the area minimum threshold for stewardship sites in urban areas.

**Q11. How could the Act best support strategic landscape-scale biodiversity conservation outcomes and improve connectivity?**

There is currently a lack of consideration for biodiversity corridors within the Act and biodiversity assessment processes. Much bushland has already become fragmented due to roads and clearing for housing and other types of infrastructure. As ecosystems continue to become more divided to make way for development, an increased focus on wildlife corridors is critical to enable the safe movement of species and avoid vehicle strikes. Connectivity to

climate refugia, will also be of increasing importance as the climate changes and extreme weather events become more common.

The Act should be amended to explicitly support the connectivity of the landscape, in its objectives and provisions. The creation of wildlife corridors should be made mandatory for new development, roads and train lines to reduce roadkill and habitat fragmentation. Wildlife corridors should be clearly defined in the Act and BAM criteria, including setting minimum corridor widths and ensuring a link to other protected areas. More guidance should also be provided on what constitutes a good wildlife corridor, including features and other considerations, such as pest management and connectivity to refuge areas.

Government agencies should focus their conservation efforts strategically to prioritise wildlife corridors and climate refugia for protection and regeneration. Existing and potential biodiversity corridors should be targeted by DPE for private land conservation agreements, and by the Biodiversity Conservation Trust (BCT) for their payments linked to the BOS. DPE should also utilise other existing options to protect these areas such as the creation of AOBVs or liaising with councils on whether rezoning to conservation areas is appropriate. Biodiversity certification has the potential to offer better protection of biodiversity connectivity than the BOS but there are a number of issues which DPE must address (see *Biodiversity Certification section* for recommendations on addressing barriers to take up and improving the scheme).

Government agencies should work collaboratively with each other and with councils, to take advantage of all available data and mapping on biodiversity and climate predictions. Some councils already have good awareness of key parcels of land to improve landscape connectivity which should be tapped into, and local environmental strategies should be taken into account. This knowledge will vary by council so DPE could provide resources to identify and approach target landholders.

It is important to recognise that wildlife corridors can create pathways for pest species as well, and mitigation measures must be considered and applied. For example, additional funding and guidance could be given to landholders and councils to manage pest species in these areas.

***Recommendation 27:*** Amend the Act to explicitly support the connectivity of the landscape.

***Recommendation 28:*** Make the creation of wildlife corridors mandatory for new development and roads.

***Recommendation 29:*** Clearly define wildlife corridors in the Act and BAM criteria, and provide guidance on what constitutes a good wildlife corridor (features, considerations).

***Recommendation 30:*** Work strategically with councils to identify wildlife corridors and climate refugia, and prioritise their protection through private land conservation agreements and other methods.

***Recommendation 31:*** Fund mitigation measures for pests within wildlife corridors, such as providing additional funding to landholders and councils.

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

### Q20. How could the Act best support the protection of native animals and plants?



The BC Act is focussed on TS and TECs and gives inadequate consideration in decision-making to other species and natural ecosystems. Important ecosystems and habitats such as coastal vegetation, sand flats and aquatic ecosystems are undervalued in the assessment process because they are not threatened.

Councils fed back that impacts on non-threatened species and ecological communities are generally assumed to be not significant, which does not account for the fact that these species may be essential for the life cycle and survival of other species. Increased focus should be given on protecting biodiversity as a whole, and on protecting and restoring functional ecological processes that support biodiversity.

There is a lot of information on rehabilitation actions and outcomes, but nothing directly associated with the Act. The Act should define what restoration outcomes are expected (e.g., >90% fully structured) for varying vegetation types. There is also currently no mention of rewilding within the BC Act. Provisions should be introduced, as well as guidance on best practice.

The Act is currently insufficient in protecting the welfare of native animals. There needs to be a clearer definition of "harm to native wildlife" in the Act and stronger powers for authorised officers to impose Penalty Infringement Notices (PINs). The Act currently facilitates the removal of habitat trees through offsetting. Greater identification of appropriate buffer distances to breeding and roosting habitats is required. Hollow-bearing trees must be given increased protections, recognising they provide critical shelter for species during fires.

The Act should play more of a role in protecting the welfare of native animals in preparation for and during natural disasters more broadly. Hazard reduction burns are often carried out in spring when most plants and animals start their reproductive cycles, so they require surplus foods. Burning during this time kills plants, bugs, insects and essential food sources to support their survival. For example, ground dwelling birds such as quails, lyrebirds, nightjars are now extinct in Lane Cove National Park, mostly due to hazard reduction burns carried out when birds have their eggs and nests on the ground. Consulting Aboriginal communities and using cultural burning practices would help to mitigate these issues as cultural burning restricts the time of year when certain ecosystems can be burned. As covered in the *International obligations and climate change* section, refuge areas and corridors connecting to these must also be better protected to enable the safe movement of species during such events.

Both feral and domestic animals have a huge impact on native species which is not adequately addressed in the Act. Schedule 4 sets out key threatening processes which includes feral cats but not domestic cats. Like their feral counterparts, roaming domestic cats are also highly efficient predators and therefore should be included as a key threatening process. The difference is that the impact of domestic cats can be substantially reduced through cat containment policies. Councils have called for the powers to introduce enforceable cat containment policies and thus limit predation and the risk of domestic cats contributing to the feral cat population (see *Annex A, resolution 5*).

Similarly, domestic dogs can have a negative impact on local wildlife, particularly when off-lead. DPE produced a community engagement guide for protecting wildlife from domestic dogs<sup>10</sup>, which councils have found helpful. However, councils require more enforceable

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<sup>10</sup> Department of Planning, Industry and Environment (2020) '[Protecting wildlife from domestic dogs, a guide to community engagement](#)', NSW Government

powers to prohibit dogs (with the exception of assistance dogs) from koala protection areas and similar environmentally sensitive locations.

DPE doesn't typically support translocation of species and there is no guidance on translocation methodology in the BC Act or regulations. Although there are issues with relocating endangered species and it should not be the primary option, translocation will be of increasing importance as the climate changes. Some species will need to relocate to habitats with new weather patterns and conditions similar to what they are used to. There needs to be clearer legislative provisions around translocation of species and guidelines to ensure best practice.

**Recommendation 32:** *Provide additional protections in the Act for non-threatened species and ecological communities.*

**Recommendation 33:** *Define expected restoration outcomes (e.g., >90% fully structured) for varying vegetation types.*

**Recommendation 34:** *Introduce provisions in the Act on rewilding, as well as supporting guidance on best practice.*

**Recommendation 35:** *Introduce a clearer definition of "harm to native wildlife" in the Act and stronger powers for authorised officers to impose Penalty Infringement Notices.*

**Recommendation 36:** *Improve identification of appropriate buffer distances to breeding and roosting habitats.*

**Recommendation 37:** *Increase protections for hollow-bearing trees which provide critical habitats and protection to species during fires.*

**Recommendation 38:** *Ensure hazard reduction burns take into account species' breeding season.*

**Recommendation 39:** *Increase the use of cultural burns supported or managed by Aboriginal communities who have knowledge of the ecological cycles.*

**Recommendation 40:** *Enable the Act to recognise the impact of all cats by adding domestic cats as a key threatening process in Schedule 4 of the Act, and provide powers for council to manage them (e.g., cat containment).*

**Recommendation 41:** *Provide councils with more enforceable powers to prohibit dogs from koala protection areas (with the exception of assistance dogs).*

**Recommendation 42:** *Introduce clearer legislative provisions and guidelines around the translocation of species.*

## **Biodiversity conservation licences**

**Q21. Are the requirements and conditions for biodiversity conservation licences in the Act suitable? Do you have any suggestions for improvements?**

**Q22. How should wildlife licensing be modified to allow for climate-adaptation conservation activities?**

Councils have found that biodiversity conservation licences can take months to obtain which slows their ability to protect species from immediate threats. Improving the timeliness of licensing and/or streamlining licences required for emergency purposes would be of assistance. Wildlife licensing compliance also needs improvement and better resourcing to ensure animal welfare outcomes.

A related issue is that of flora and fauna management reports and related management plans developed to support requirements of the EP&A Act for a consent authority to consider the impact a development may have on native wildlife and vegetation, TS or TECs. Often the quality of the surveys and recommendations vary considerably and strategies for handling and caring for wildlife may not align with best practice and/or be adequately monitored.

Further, once development consent is issued (which can still result in the removal of vegetation on a development site), it is possible that harm may occur to native wildlife that use this vegetation for habitat. Disturbance to the local habitat may occur during site construction activities with potential risk of harm to native fauna (e.g., being struck by plant, tools or vehicles) or contact with fauna, including species which may pose a threat to human safety such as venomous snakes and spiders. Ensuring best practice care for injured wildlife is a concern for the community and it is therefore important that consistent and enforceable standards are introduced for the preparation of fauna management plans.

The introduction of standards would have the benefits of streamlining the assessment process and providing certainty for the development industry, community and councils about the reasonable expectations for the management of wildlife on development sites. This is needed to ensure any potential harm to injured wildlife will be minimised and best practice standards for wildlife handling and care (including links to local wildlife rescue groups) are implemented.

Codes of Practice and Guidelines for handling native wildlife and other best practice and animal welfare laws should also be considered in development of the standards. These could be cross-referenced to wildlife licences. Key users of the standards and guidance should be consulted in their development e.g. councils, National Parks and Wildlife Service, Ecological Consultants Association of NSW and wildlife rescue organisations. This position is supported by LGNSW Annual Conference resolutions which calls for enforceable standards for flora and fauna management plans that draw upon existing animal welfare guidelines and are developed in consultation with key stakeholders (see *Annex A, resolution 6*).

***Recommendation 43:*** Streamline the process for obtaining licences required for emergency purposes.

***Recommendation 44:*** Strengthen wildlife licensing compliance to improve animal welfare standards.

***Recommendation 45:*** Introduce enforceable standards for the preparation of flora and fauna management plans, including Codes of Practice and Guidelines for handling native wildlife, and other best practice and animal welfare laws, which are then cross-referenced to wildlife licence conditions.

## Compliance and enforcement

**Q23. Are the Act's penalties and enforcement instruments an effective way to support the Act to achieve its objectives?**

**Q24. How can the Act give the community more confidence and clarity in the approach to regulation? Should the Act be strengthened to require data collection under the regulatory frameworks in place? Is the risk assessment approach suitable?**

In general, councils do not have confidence that native vegetation is being removed in accordance with approvals under the BC Act. It is widely known that landholders seek to avoid the BOS wherever possible due to the expensive and lengthy process. There is a lack of NSW Government compliance officers meaning complaints are not followed up promptly and issues often fall to councils to investigate.

It is recognised that it is difficult to successfully prosecute for native vegetation removal, particularly on a small scale. It is challenging to collect the evidence required, such as the date of clearing or to prove the existence of the TS once it has already been cleared. Better use of technology and mapping can support compliance, for example, a number of commercial providers can identify vegetation loss using satellite imaging.

The BC Act (Section 2.4(2)) also provides a defence if the person involved in damaging the habitat of TS or TECs can establish that they did not know that it was habitat of that kind, despite public records being available that show their existence. The protections provided to TS habitat and TECs are therefore overruled by a defence based upon the ignorance of the perpetrator, which is difficult to disprove and is not generally found in common law. With the publishing of the Native Vegetation Regulatory map, the Biodiversity Values map and state-wide vegetation maps, it may be timely to consider whether lack of knowledge should remain a defence.

Even when successful, the penalties are often given as a development breach, when is it linked to a development application (DA), rather than TS removal which would involve larger fines. There are limited enforcement options, and the fines can be less than the cost of investigating and carrying out the prosecution, acting as a disincentive for council and department staff to investigate the issue. For example, prosecuting through the Land and Environment Court can set a helpful precedence but is very costly and time-consuming.

Some landholders are willing to risk penalties due to the low likelihood of being penalised and because the fine can be significantly less than entering in the BOS. A council shared an example of a proponent receiving a penalty of \$400,000 for clearing a substantial area of land without approval. Under the BOS, the offset requirement would likely have been around \$10 million, in addition to the administrative costs of the scheme, saving the proponent over \$9 million.

The current system and penalties do not sufficiently deter clearing. The *Protection of the Environment Operations Act 1997* includes a provision for monetary fines to be based on the financial gain from the activity. The same approach should be included within the BC Act to provide a strong financial disincentive.

Reporting issues to the BCT is too onerous for councils to do regularly and it requires a substantial time commitment for filling out multiple forms. When councils have reported an issue, they have not usually heard back from the BCT or seen any evidence of action being taken. As a result, feedback to LGNSW suggests that many councils have lost confidence in

the process and no longer report the majority of problems. This is likely due to a lack of resourcing in the BCT which should be increased to ensure issues can be appropriately investigated and addressed in a timely way. To demonstrate action and regain confidence in compliance processes, the BCT should report back to councils on what action they are taking to address the issue reported.

More broadly, there is a need for more transparent monitoring and enforcement. The lack of public information on levels of land clearing (including unallocated clearing), approvals and breaches make it difficult for councils to identify issues. For example, when councils receive a development application, it can be difficult to determine if land already cleared has been cleared lawfully under other legislation or whether it was a breach. The section on *Interaction with other legislation* recommends a tool to address this issue.

***Recommendation 46:*** Increase use of technology to support compliance activities.

***Recommendation 47:*** Consider removing or further restricting the defence available for damaging threatened species habitat under section 2.4(2) of the BC Act.

***Recommendation 48:*** Introduce a provision for monetary fines to be based on the financial gain from the activity.

***Recommendation 49:*** Increase resourcing for compliance activities to ensure breaches can be investigated and addressed in a timely way.

***Recommendation 50:*** Place a requirement on the BCT to update councils on what action they are taking to address reported issues.

## Data and mapping

***How could the adequacy, accessibility and application of ecological data and information be improved, including the Biodiversity Indicator Program, to understand and respond to biodiversity impacts and threats?***

***How could the use of interactive maps, technology and innovation to inform and support decision-making be improved, including the Biodiversity Values Map and Native Vegetation Regulatory Map?***

There is a need to improve environmental data and allow for greater accessibility of mapping to support decisions about biodiversity.

The Biodiversity Values (BV) map provisions are under Part 7 of the BC Act as one of the factors for determining whether the BOS applies to a clearing or development proposal. The map identifies land with high biodiversity value that is particularly sensitive to impacts from development and clearing.

The Native Vegetation Regulatory (NVR) map shows which land is regulated or exempt under the LLS Act and supports landholders to make decisions regarding managing native vegetation on their land.

There are currently issues with incomplete and inaccurate mapping. Not all AOBVs, TECs, EECs and CEECs are correctly mapped on the BV map, for example, it doesn't include TECs west of the divide, in the Southern Highlands nor on some Commonwealth land. Conversely, in

some cases, there is over-mapping and incorrect DPE species profiles due to the difference between habitat and foraging area. For example, Swift Parrot mapping includes foraging areas, but in some cases, there are other nearby areas where parrots also forage.

The Native Vegetation Regulatory (NVR) Map is also incomplete and in draft, resulting in issues with rural land clearing under LLS that impacts upon development applications and the BOS, and councils' ability to conduct compliance activities.

Data collected from licences needs to be uploaded into BioNet at a faster pace, as there is currently a lag of 2-3 years in data. More resourcing is required for DPE mapping and BioNet teams to upload data and complete maps as a priority, and more ground truthing is needed to improve its accuracy.

Data from a range of sources should be incorporated into regular revisions of the state mapping. This includes data collected through Biodiversity Development Assessment Reports (BDARs) and data from other environmental organisations e.g., the Australian Koala Foundation's Koala Habitat Atlas. Where local government has undertaken mapping projects, the data should be integrated through consultation with the council.

The BC Act gives the Minister for the Environment the power to receive nominations from local government for land to be added to the BV Map if they believe the land is of bioregional or state significance. This is another example of how the BC Act fails to account for locally significant biodiversity. The wording should be amended to allow nominations for land is of local significance. The maps are also at a regional scale and can be problematic to use at the local level. Improvements must be made to the functionality of the maps, with an increased focus on the local level.

Councils and landholders can apply for a Biodiversity Values Explanation Report which provides detailed information about the different data layers applying to a property and explains the basis for inclusion of land on the Biodiversity Values Map. Landholders and those who lease a property can request a map review of their land.

However, the process for councils to obtain additions or changes to the BV map is currently unclear due to a lack of guidance on how to submit data. Councils have been told by agencies that they are not ready to process council TS data to add to the BV Map. It is understood that DPE are in the process of developing guidelines which are welcomed. The process should not require councils to request an explanation report prior to requesting a review, as it adds additional time and bureaucracy when councils already hold their own data.

Councils raised concerns that they not currently consulted when mapping is updated, despite this affecting DAs that are in progress. Although there is a 90-day window after land is added before it impacts the BOS threshold, the assessment of development applications can take longer than this. Councils should also be informed when mapping is updated, and ideally consulted on the changes in advance.

Further, council staff can only access Important Area Habitat Map if they have an accreditation. This needs to be widened to ensure non-accredited assessors can access the information. Councils' capacity to interpret GIS data is highly variable so additional training should be offered by DPE for council staff who use the data.

***Recommendation 51:*** Increase resourcing for DPE mapping and BioNet teams to complete maps and conduct more ground truthing to improve its accuracy.

**Recommendation 52:** Incorporate council mapping and data collected through BDARs and from other environmental organisations into regular revisions of the state mapping.

**Recommendation 53:** Amend wording in the Act so that local governments can nominate land for the BV map that is of local significance.

**Recommendation 54:** Improve functionality of maps at the local level.

**Recommendation 55:** Clearly define a pathway for councils to request changes to the BV and NVR maps which minimises bureaucracy.

**Recommendation 56:** Inform councils when mapping is updated, and ideally consult on changes in advance.

**Recommendation 57:** Widen access to Important Area Habitat Map for non-accredited council staff and provide GIS support.

## Biodiversity Offsets Scheme

The introduction of the BOS slowed the loss of biodiversity in NSW, but it has not been halted or reversed. LGNSW's submission to the 2021 Inquiry into the Integrity of the BOS<sup>11</sup> expresses support for the BOS in principle but highlights that changes are required to improve its functioning and outcomes.

DPE are working to address many of the issues identified. Recent changes are welcomed which include:

- improving awareness and understanding of the Scheme through new guidance, BOS seminars and newsletters,
- strengthening the robustness of accredited assessors through improving guidance and a Conflicts of Interest policy,
- the creation of the Credit Supply Fund to increase the supply of credits,
- a spatial map showing the approximate location of Biodiversity Stewardship Sites (BSA).

However, there are still fundamental issues around the scheme including insufficient focus on avoid and minimise, undefined thresholds for serious and irreversible impacts (SAII), incomplete mapping, no ability to link offsets to the same region that is experiencing impact, incremental clearing and staging of projects, and barriers to regional development. Overall, the scheme and the way it interacts with other vegetation frameworks is resulting in a net loss of biodiversity, particularly at the local scale.

### **Q13. Is the Act providing an effective mechanism to ensure that the right developments and land use changes are being assessed?**

The BOS is triggered where a proposal for development, vegetation clearing or other activity is likely to significantly affect TS, TECs or their habitats. This is determined if clearing:

- is carried out in a declared AOBV,
- involves clearing of native vegetation or a prescribed impact on land included in the BV Map,

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<sup>11</sup> LGNSW (2021) '[Submission to the Inquiry into the Integrity of the BOS](#)'

- involves clearing of native vegetation that exceeds the area threshold (based on the lot size),
- is likely to significantly affect TS, TECs or their habitats according to the Test of Significance.

Proponents must carry out a Test of Significance for all local development proposals that do not exceed the BOS threshold. The Test of Significance asks five questions to determine whether an extinction activity is likely to place a TS at risk. If the test finds that a development would have a significant impact, a BDAR would be required. However, this test does not take into account that extinction results from cumulative impacts to TS, their habitats and vegetation communities.

As covered in the sections on *Conserving Threatened Species* and *Regulating Native Species*, there is under-regulation in some areas, including endangered and critically endangered species, native and domestic animals, and wildlife corridors. In addition, there is a lack of focus on local biodiversity outcomes, and a resulting net loss of biodiversity in some LGAs, particularly in coastal and urban areas.

However, in some cases, the Act overregulates areas of limited environment value, leads to high costs for individuals and small families, restricts land use changes unnecessarily and is a barrier to regional development. For example, some rural councils have examples of where proposed rezoning has been assessed as requiring offsets of over \$500,000 when the land was largely devoid of native vegetation, making the proposal unfeasible and preventing vital regional development.

### **‘Mum and dad’ landowners**

The BOS disadvantages some ‘mum and dad’ landowners who bought a block of land with the intention to build a home but later found that such development would trigger the BOS with very expensive implications. Some owners purchased the land many years ago, before the introduction of the scheme. In other cases, they purchased the land more recently but were unaware of their potential obligations due to a lack of understanding of the BOS or due to inaccurate advice from real estate agents or conveyancers. Awareness of the scheme needs to be increased among individuals and real estate agents, especially targeting real estate agents that have previously given inaccurate advice to proponents. Penalties should be considered if real estate agents are found to be consistently providing inaccurate or misleading advice.

Councils have seen examples of individuals or families that have invested their life savings into purchasing land on the understanding they would be able to build a dwelling. The complexities and costs of implementing the BOS causes significant financial, emotional and psychological stress. The site assessment, preparing a BDAR and purchasing offsets can be in the tens and hundreds of thousands of dollars, which is financially crippling for many small-scale proponents.

Flexibility should therefore be introduced for minor developments barely exceeding thresholds, to permit the reinvestment of offset costs locally. Councils could work with proponents to reinvest the offset costs into the same property to improve biodiversity values on the site. Alternatively, money could be paid to the council to be invested in biodiversity elsewhere in the local area. This would provide more flexibility and less financial and admin barriers for small-scale projects.



Alternatively, the financial and administrative barriers for small-scale proponents/single dwellings under a certain size could be reduced by making administration costs proportional to land size. This could also be applied to setting up BSAs as there is a need to make it easier and more affordable for small-scale proponents to set up BSAs on their own properties.

**Recommendation 58:** *Increase awareness of the scheme among individuals and real estate agents, especially targeting real estate agents that have previously given inaccurate advice to proponents.*

**Recommendation 59:** *Introduce penalties for real estate agents that are found to be consistently providing inaccurate advice.*

**Recommendation 60:** *Consider an alternative approach for minor developments barely exceeding thresholds, to permit the reinvestment of offset costs locally.*

**Recommendation 61:** *Consider making the administration costs associated with conducting site assessments for development and for setting up a stewardship site proportionate to the land size.*

## Minor events

Part 7 of the BC Act requires a proposed development or activity to undertake a test to determine whether it is likely to significantly affect TS or TECs, or their habitats. Many councils, particularly those in rural and regional NSW, may not have the expertise or resourcing to determine whether a proposed development or activity is likely to significantly affect a TS or TECs, or their habitats. There are significant penalties associated with a failure to comply with the BC Act and a council officer deemed to have provided false or misleading information could be personally liable for a fine of \$330,000 and \$33,000 for each day the offence continues as well as up to 5 years imprisonment. Council could also be liable for a fine of up to \$1,650,000 and further fines of up to \$165,000 for each day the offence continues.

Therefore, council officers are, in essence, being forced to require a detailed ecological report before determining a DA for even relatively minor events, which can cost in the order of \$10,000 to \$20,000. This is of particular concern where the proposed development or activity relates to an annual event (or similar) where new DAs are required, to continue the use of the land for that purpose (i.e., to hold the event). These events often do not involve any clearing of vegetation and can involve the use of the same land for many years, such that there is usually no material effect on flora or fauna. The events are usually run on very tight budgets and the cost of an ecology report often means that the event becomes economically unviable. This has an adverse, and in some cases highly negative, effect on the economic development of the LGA in which the event was to be located.

LGNSW Annual Conference resolutions support the position that the BC Act should be amended to provide flexibilities for one off events and minor events (see Annex A, resolution 7). This could include an exemption from having to undertake the Test of Significance where no clearing will take place.

**Recommendation 62:** *Amend the Act to provide exemptions for one off events and other minor development where no clearing will take place, from having to undertake the Test of Significance.*

## Rural and regional development

Rural and regional areas are facing excessive barriers to building community infrastructure and industry to support development and job creation. These areas must balance environmental concerns with broader economic challenges around population decline and lack of opportunities.

The main hindrance to development is high offset costs, which are disproportionate to the costs of the projects and the price of land, making many developments unviable. For example, an area of industrial land in Gilgandra had a credit obligation representing 57% of the total current sale price, on top of costly assessment processes. It is not feasible to pass this substantial cost onto purchasers, as happens in urban and coastal areas where the high demand for land means the offset costs form a much smaller proportion of the final price.

Although there must be a continued focus on avoidance, this can be difficult to achieve as rural and regional development is usually on greenfield sites, and it is challenging when expanding existing infrastructure. For example, Bega Valley Shire Council recently paid \$1.3 million in offsets to extend an airport by 20 metres.

Flexibilities for some development in rural and regional areas should be looked at to support job creation, activate economic potential and support community aspirations while at the same time protecting the environment. Mechanisms to explore could include capping the cost of offsets in proportion to the cost of development or land price, timing of payments, and flexibility around credit purchase. This is supported by LGNSW Annual Conference resolutions (see *Annex A, resolutions 8-10*).

**Recommendation 63:** Consider flexibilities for rural and regional areas, such as capping the cost of offsets, timing of payments, and flexibility around credit purchase.

### **Q14. Does the Act provide the appropriate framework for avoiding and minimising impacts and addressing serious and irreversible impacts?**

#### **Avoid and minimise**

Councils report that the approach of offsetting as a last resort, only considered when all options to avoid or mitigate loss are fully explored and proven unachievable, is not being followed by many development planners and proponents. The principle is open to interpretation and there is currently no real impetus or compliance forcing proponents to take genuine action to avoid and minimise. Many developers jump to offsetting as they prefer to take the quickest option and seek to prioritise the financial gain through maximising the use of developable land.

This is problematic as it is leading to a higher rate of biodiversity loss in local areas and across NSW. An increased focus on avoiding and minimising impacts is needed to conserve existing high-quality habitats and vegetation, which are generally more ecologically valuable than offset sites. The BC Act or BC Regulation should set out clear steps that proponents must take to effectively avoid and minimise impact, and DPE should produce additional guidance on interpreting these terms. This should include explicit guidelines for avoiding and minimising impacts on TSs and TECs. Additional focus should also be given on 'avoidance' within the refresher accredited assessor training as councils reported that it is not sufficiently covered.

DPE has recently introduced the offset price estimation service. This is welcomed as it allows proponents to understand the offset requirement earlier in the process and may incentivise avoidance to reduce the offset cost. However, the financial gain from development usually far outweighs the offset costs. The incentive to avoid and minimise should therefore be increased by raising offset prices to account for the fuller biodiversity impact. This should include offset price multipliers to account for time, risk and distance factors. In urban areas, where the financial gain from development is greater and there is limited biodiversity left, prices should be further increased to sway the incentives and to reflect the importance of protecting these remaining biodiversity pockets. As discussed in the section titled *International obligations and climate change adaptation*, a greater price weighting should also be given to wildlife corridors and climate refuges.

A step should be added early in the development process that requires proponents to meet with councils to discuss the project's likely impact and ways to avoid and minimise biodiversity loss. This should be built in as a requirement prior to submitting a DA. It would enable councils to influence project design based on their local biodiversity maps and priorities, whilst assisting proponents in reducing their offset requirement. However, this will require additional resourcing from councils and should be funded by the NSW Government.

In addition, there is currently no obligation within the BC Act to avoid and minimise impacts for proposals that do not meet the BOS threshold. This should be added to the Act to ensure all clearing and development reduces biodiversity impacts as much as possible.

***Recommendation 64:*** Produce standardised guidance on 'avoid and minimise' which sets out steps that proponents must take.

***Recommendation 65:*** Increase focus on 'avoid and minimise' in refresher accredited assessor training.

***Recommendation 66:*** Increase offset prices to account for the fuller biodiversity impact, including offset price multipliers to account for time, risk and distance factors, as well as proportionally higher prices in urban areas where there is limited biodiversity remaining.

***Recommendation 67:*** Require proponents to meet with councils prior to submitting a DA to discuss ways to avoid and minimise biodiversity loss, and provide funding for councils to support this process.

***Recommendation 68:*** Include a requirement within the Act to avoid and minimise impacts for proposals that do not meet the BOS threshold.

## **Serious and Irreversible Impacts (SAIL) thresholds**

If a proposed development is considered likely to have serious and irreversible impacts (SAIL) on biodiversity values, the consent authority must refuse to grant consent under Part 4 of the EP&A Act (other than for SSI/SSD). However, this rarely happens as it is difficult to prove without clear thresholds. It also relies on TECs, EECs and CEECs being correctly mapped on the BV map, which is not always the case.

The lack of thresholds in the BC Act for when an impact is likely to be serious and irreversible, means the assessment is subjective. The first BAM had thresholds for SAIL, but these were removed in 2020. Thresholds must be reintroduced as it is difficult for consent authorities to make consistent and well-informed decisions, or to defend their decision to reject a DA. This is

particularly problematic when developers pit councils' expertise and reasoning against that of ecologists.

In the absence of state guidance, some councils have developed their own guidelines to support consideration of SAI. There has also been recent case law which councils are referring to assist decisions. However, there should be a consistent state-wide approach which is clearly defined in the legislation for TECs, EECs, CEECs and for wildlife corridors. DPE should draw on the court case rulings to produce clear guidelines and examples. Any clearing or impact on CEECs should automatically count as a SAI.

SAI thresholds should also be clearly defined for when there is limited ability to offset the species or ecological communities, for example, when there are no offset credits available to purchase or for habitats that build up over hundreds of years e.g., hanging swamps.

The thresholds should be established in consultation with experts, as was committed to during the biodiversity reforms. It should be based on current knowledge and be regularly updated to respond to changes in the entity's conservation status.

***Recommendation 69:*** *Introduce thresholds in legislation for serious and irreversible impacts for TECs, EECs and wildlife corridors beyond which development cannot be approved.*

***Recommendation 70:*** *Amend the Act so that any clearing or impact on CEECs automatically counts as a serious and irreversible impact.*

***Recommendation 71:*** *Introduce limits in the BC Act for when there is limited ability to offset the species or ecological communities, for example when there are no offset credits available to purchase or for habitats that build up over hundreds of years.*

## **State significant development or infrastructure**

For state significant development (SSD) or infrastructure (SSI), the BC Act only requires the Minister to take SAI impacts into consideration, and to determine whether there are any additional measures to minimise the impacts. Therefore, consent could theoretically be granted for a SSI/SSD project that results in the extinction of a threatened entity, or a reduction to a point where it would no longer remain viable. The avoidance of this outcome is reliant on the Minister applying their discretion to implement appropriate measures to minimise, but not avoid, such impacts. Provisions should be introduced to require the rejection of an SSI/SSD application if an entity is identified as being at risk of serious or irreversible harm.

In addition, section 7.9 (2) of the BC Act allows for approval without a biodiversity assessment report if the Planning Agency Head and the Environment Agency Head determine that the proposed development is not likely to have any significant impact on biodiversity values. Under section 7.14 (3), approvals for SSD / SSIs may be granted without a condition that the applicant be required to retire biodiversity credits. These flexibilities for SSD/SSI contradict the objective of no net loss and should be removed.

***Recommendation 72:*** *Introduce provisions within the Act to require the rejection of SSI/SSD application if it puts an entity at risk of serious or irreversible harm.*

***Recommendation 73:*** *Remove the flexibilities for SSI/SSD to be approved without a biodiversity assessment report and/or without a condition that the applicant be required to retire biodiversity credits.*

### **Q15. Can the Act in its current form result in improved ecological and environmental outcomes?**

The Act could result in improved ecological outcomes if the way it is administered is improved, as well as additional compliance to discourage ‘gaming’ and poor practices. In addition to recommendations made elsewhere in the submission, there are a number of other issues that need to be addressed around offsetting, the BAM and subdivisions. To support this, action must also be taken to reduce clearing occurring prior to submitting a DA, particularly if the development would have otherwise triggered the BOS threshold (see section titled *Interaction with other legislation*).

#### **Offsetting**

The way in which biodiversity offsetting currently operates under the Act is leading to a decline in biodiversity at local and state level. It will always be challenging to achieve ‘no net loss’ under an offsetting scheme, however, changes can be made to the BOS offsetting rules to reduce biodiversity impacts.

The current offset requirements do not fully reflect the true impact of the biodiversity loss. There is a time lag for credits to be retired and land can be cleared prior to the biodiversity gain being ensured. The allowance of non like-for-like offsets and payments into the BCT means offsets do not have to be within the same area or protecting the same species. There is a lack of availability of some types of credits, so they should be shown to be available before habitat is permitted to be removed.

Few proponents are attempting to seek credits to retire and are instead opting to pay into the Biodiversity Conservation Fund (BCF). According to the 2022 NSW Audit Office report, since the BOS commenced in 2017, around 340 development proponents have made payments into the BCF, worth around \$90 million, as of 9 May 2022.<sup>12</sup> Over the same period, fewer than 27 development proponents have acquitted obligations by purchasing and retiring credits.<sup>13</sup>

This is concerning as the BCF payments do not need to be linked to the location of the development or the nature of the biodiversity loss. Many councils are not seeing evidence of conservation actions in their LGA despite clearing occurring, even where staff have recommended sites contiguous with national park or other protected areas. The BCT should target payments towards LGAs with declining biodiversity through the scheme and should work strategically with councils to identify certain species and habitats for protection. This work should be aligned to councils’ local conservation objectives and frameworks. DPE should also explore ways to disincentivise payments into the BCF, including increasing the cost uplift in proportion to offset prices.

Even when developers do choose to purchase credits, the lack of requirement to offset certain credits locally means offsets often do not occur within the same LGA. This is a particular issue in urban and coastal areas, which are experiencing biodiversity declines because there is high development pressure and credits can be retired in less costly locations. In these areas, there is a lack of land available for stewardship sites, so offsets are often located in existing council reserves or on land with limited development potential. The price of offsets should be increased in these areas to reflect the limited biodiversity left and the value of this for local environmental goals and community wellbeing.

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<sup>12</sup> NSW Audit Office (2022) ‘[Effectiveness of the Biodiversity Offsets Scheme](#)’, NSW Government

<sup>13</sup> Ibid.

The flexibility for species credits to be offset elsewhere in the state also makes it difficult for councils to successfully manage the habitat and populations of TS and it could result in the local extinction of species. This approach of the BOS to manage threatened species at a state scale does not align with the objectives of the NSW BCSEPP to support a permanent, free-living population of koalas over their present range.

Action should be taken to encourage offsets to be procured in the same LGA in which the vegetation was removed where possible. An offset in an adjoining LGA (i.e., the region) is the next best option. Species credit offsets should be like-for-like only and within the same subregion. The variation rules should include the requirement for a comprehensive 'reasonable efforts' test prior to allowing variation and substantial additional credit penalties should be applied as an effective deterrent.

In addition, a requirement should be placed on the BCT to monitor biodiversity gains and losses in LGAs and make this information publicly available (see section titled *Monitoring, evaluation and reporting*). This would show where significant biodiversity losses occur in LGAs and would highlight areas the BCT should target for stewardship sites and/or where a further policy response is required from DPE to prevent a significant biodiversity drain at local level.

**Recommendation 74:** *Introduce a requirement that credits must be shown to be available before habitat is removed.*

**Recommendation 75:** *Target BCF payments towards LGAs with declining biodiversity through the BOS and work strategically with councils to protect species and habitats, in line with local conservation objectives.*

**Recommendation 76:** *Explore ways to disincentivise payments into the Biodiversity Conservation Fund, including increasing the cost uplift in proportion to offset prices.*

**Recommendation 77:** *Strengthen the like-for-like rules for offsets to occur within the same LGA or region where the development is taking place.*

**Recommendation 78:** *Species credit offsets should be like-for-like only and within the same sub-region.*

**Recommendation 79:** *Introduce a requirement for a comprehensive 'reasonable efforts' test prior to allowing variation and apply substantial additional credit penalties.*

**Recommendation 80:** *Place a requirement on the BCT to monitor biodiversity gains and losses in LGAs.*

### **Biodiversity Assessment Method (BAM)**

As discussed, changes are needed to the BAM to better account for climate adaptation, landscape connectivity, edge effects and aquatic ecosystems. The BAM is also currently limited to an individual development's impacts and does not consider cumulative outcomes across multiple developments. This reduces the effectiveness of the scheme at protecting biodiversity, especially when projects are broken down into subdivisions (see sub-section below titled *Subdivisions and the staging of projects*).

Councils reported other issues with the way the BAM is carried out which is leading to the inaccurate identification of species. The BAM allows for three modes of assessment for candidate species: expert report, targeted survey or assumed presence of candidate species.

There is no threshold for when targeted surveys are mandatory nor where assuming presence may occur, so developers often prefer to assume presence instead of undertaking targeted surveys as they see it as more time and cost effective. This means best practice ecological assessments are not being widely undertaken for candidate species and there is a risk that other species will be missed. A clear threshold should be introduced, limiting the ability for proponents to assume presence of species.

When assessments are undertaken, some species require multi-seasonal surveys, however, this is not the case for all species. To accurately identify plants requires extensive experience over multiple seasons and seeing a plant in different phases of its lifecycle. One-off site assessments can therefore lead to the misidentification of plants, particularly during certain times of year or after specific weather events, such as drought and flooding, that affect vegetation in the short term. For example, during a winter assessment or extreme weather event, there will usually be less groundcover, grass diversity and fauna species, and there may be a greater abundance of exotics, leading to a lower vegetation index than normal. Multi-seasonal surveys should be mandatory for all species, and they should take into account periods of extreme weather conditions. For example, it could factor in a likely lower level of biodiversity during these periods or require another round of surveying following the event.

In addition, many councils are receiving poor quality BDARs with missing information, incorrectly assessed impacts that have missed obvious TS or assessed the incorrect area, and no evidence of avoidance. Many BDARs are being submitted which contain only part of the application, for example not including water, sewerage and roads. Despite a clause in the regulations requiring developments to be assessed in their end state, some developers argue such infrastructure should come at the next stage. Some consultants are also including economic issues in BDARs which should not be there, for example, highlighting that a development wouldn't be economically viable without clearing a certain area.

The ability of councils to challenge such BDARs varies as many councils are under-resourced and some have less experience of working with the scheme. More training and guidance should therefore be given to councils, consultants and developers to ensure the requirements of BDARs are fully understood. There should also be an increase in compliance support from DPE to take action against developers and consultants who submit incorrect BDARs undervaluing the biodiversity impact.

Many councils have reported a reduction in support since funding for Local Government Support Officers finished in 2020 and they have had difficulties in getting consistent advice from DPE. DPE should consider reinstating dedicated Support Officers to assist small councils who lack resources or experience. Support officers can provide advice on the BAM and wider BOS processes such as establishing stewardship sites.

***Recommendation 81:*** *Improve the BAM to better account for cumulative biodiversity impacts across multiple developments and staged developments.*

***Recommendation 82:*** *Introduce a threshold for when targeted surveys are mandatory to limit the ability for proponents to assume presence of species.*

***Recommendation 83:*** *Require multi-seasonal surveys to be mandatory and ensure they take into account periods of extreme weather conditions.*

***Recommendation 84:*** *Increase training and guidance to councils, consultants and developers to ensure the requirements of BDARs are fully understood.*

**Recommendation 85:** *Increase DPE compliance support to take action against developers and consultants who submit incorrect BDARs undervaluing the biodiversity impact.*

**Recommendation 86:** *Consider reinstating dedicated Local Government Support Officers to assist small councils with the BAM and wider BOS processes.*

### **Subdivisions and the staging of projects**

The lack of ability for BOS assessment methodologies to account for cumulative impacts has resulted in some proponents deliberately staging developments to reduce their offset requirement or avoid the BOS altogether. It is leading to incremental losses which would have been avoided, minimised and offset had the whole project been submitted at the same time.

This is a particular issue for major projects usually undertaken in a staged nature, such as a road corridor. In another example in the Upper Hunter region, there are a number of large coal mines in close proximity to one another which are being developed in a staged way. The current processes are not adequately addressing the cumulative impact of an individual mine as it expands nor the cumulative impact of all the mines within the region.

In addition to improving the BAM to better account for cumulative impacts, DPE should consider policy options to ensure the staging of projects does not result in a reduced offset requirement. DPE should also provide further guidance on subdivisions.

**Recommendation 87:** *Provide further guidance around subdivisions and consider policy options to ensure the staging of applications does not result in a reduced offset requirement.*

### **Q16. How can complexity and costs be minimised while still achieving positive biodiversity outcomes?**

The BC Act lacks flexible and simpler alternatives for small scale development and offset sites, which currently face prohibitive cost and administrative barriers. As covered in the *BOS 'Mum and dad' landowners* section, a flexibility should be introduced for minor developments just exceeding the BOS threshold, to permit the reinvestment of offset costs locally. More flexible stewardship arrangements should also be possible for high-quality vegetation and small parcels of land that do not meet the BSA area threshold, as recommended in the *Private land conservation and investment* section.

Consolidating processes across approval pathways, including under the BC Act, the LLS Act and the RFS Act, can help to reduce complexity while improving environmental outcomes. The variety of pathways leads to confusion, and many perceive the large discrepancy in the requirements to be unfair. Action must be taken to reduce these discrepancies and close loopholes between legislation (see section titled *Interaction between legislation*).

For example, a single tool should be used for landholders to register clearing they will undertake which falls under any legislative pathway. The tool should be in a spatial format with pop up boxes providing information on requirements. It could also be used to collect data on land clearing and provide a spatial map for councils to refer to when assessing DAs, conducting compliance, and prioritising their work (see section titled *Interaction between legislation* for more information).



The NSW Government should consider whether the approval pathways should be rationalised under one piece of legislation, as was previously the case under the EP&A Act.

Although much action on improving the BOS will require investment, it should be recognised that more effective protections of biodiversity will reduce the need to carry out more expensive reactive actions in the future.

**Recommendation 88:** *Consider whether the approval pathways should be rationalised under one piece of legislation, as was previously the case under the EP&A Act.*

#### **Q17. How could the Act better support an effective and efficient offset market?**

The Audit Office 2022 report predicts that demand for credits is likely to far outstrip supply in the near future, predominately driven by major projects.<sup>14</sup> It predicts credit supply will increase but not at the pace required, especially for vulnerable and endangered species.<sup>15</sup>

DPE has already taken positive steps to increase the supply of credits through the creation of the Credit Supply Fund. However, further action must be taken to remove barriers to setting up BSAs and to make them more desirable. The section on *Private land conservation and Investment* sets out recommendations on simplifying BSAs, increasing the financial incentive, and actively approaching landholders to persuade them to establish a BSA and to help them with the process.

### Biodiversity certification

**Q18. How can the Act support better ‘up front’ consideration of impacts on biodiversity from development?**

**Q19. How can the Act support better consideration of impacts on biodiversity from development at a regional level?**

Biodiversity certification (biocertification) has the potential to achieve better biodiversity outcomes than the BOS scheme as biodiversity impacts are assessed upfront, reducing the so called ‘death by a thousand cuts’. It allows for a more strategic approach where landscape connectivity and cumulative impacts are taken into account, and it can provide more certainty to landholders about offset requirements.

However, in reality, biocertification is not commonly used. Councils that have been involved with the process have found it to be complex, lengthy and expensive, and have struggled to provide the resourcing required. This is partly due to the division of responsibilities between three separate agencies which adds additional bureaucracies.

This complexity is undesirable for developers who prefer to take the comparatively simpler and quicker BOS route. In general, there is a lack of incentives for developers to carry out biocertification as it does not provide cost savings, and some see it as protecting biodiversity at the expense of developable land. Even where councils encourage uptake of biocertification,

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<sup>14</sup> NSW Audit Office (2022) ‘[Effectiveness of the Biodiversity Offsets Scheme](#)’, NSW Government

<sup>15</sup> Ibid.

they have found developers to be very reluctant. It is generally only used in areas of high biodiversity values where proponents know the development might not otherwise be approved.

Councils shared concerns that there is usually still insufficient focus on 'avoidance'. There are examples of biocertification applications seeking to demonstrate 'avoidance' of areas which are undevelopable for other reasons, for example on floodplains. As recommended within the *Biodiversity Offsets Scheme* section under *Avoid and Minimise*, there should be clear steps set out in the BC Act or BC Regulations that proponents must take to effectively avoid and minimise impact.

The BAM is not an appropriate biodiversity assessment tool for biocertification as it is designed to be site specific. It doesn't effectively take into account strategic challenges such as landscape connectivity. As recommended in the *Conserving threatened species* section, the BAM should ideally be improved to better account for landscape connectivity. However, DPE should also consider whether another assessment tool would be more appropriate to support biocertification.

In addition, the impacts to flora and fauna only need to be assessed once in the life of the development, irrespective of the amount of time that passes before construction is carried out. There is no recognition that the biodiversity importance of an area can change and there is no opportunity to provide comprehensive mitigation measures. For example, this can be an issue following a natural disaster such as a bushfire which affects the ecology of an area and whereby animals move to seek refuge. As recommended under the *Conserving Threatened Species* section, there should be a process for reassessing and preserving TS after a certain period of time.

Where biocertification is not an option, preference should be given to resolving biodiversity issues at the rezoning stage, rather than development application stage. It is also important that any avoidance or offset arrangements made at rezoning stage are able to be recognised at the development stage. This requires more effective integration of biodiversity considerations in strategic land use planning.

***Recommendation 89:*** *Simplify the biocertification process and consider other ways to incentivise uptake e.g., subsidising the cost.*

***Recommendation 90:*** *Consider replacing the BAM with another assessment tool that better accounts for landscape connectivity.*

## Additional feedback

***Q25. Do you have any feedback on these matters or other issues you would like considered in the review of the Act?***

Overall, there are many issues with the way in which the Act currently operates. Although improvements can be made to the legislation, it is important that steps are taken to improve the administration and compliance of the schemes that sit within the Act, as well as their interactions with other legislation.

## Public consultation

There must be an increased focus on consultation with key stakeholders including councils, LALCs and Aboriginal communities, developers, landholders and ecological consultants that

understand how the processes work on the ground and can provide valuable input. Many of the processes in the Act are complex and should be reviewed with stakeholders to improve useability and increase their uptake. DPE, with the support of consultants, recently carried out Customer Journey Mapping on improving BOS processes. It would be useful to carry out a similar exercise for other processes under the BC Act.

For any new policies or changes to legislation following this review, these groups should be consulted in a meaningful way at the start of, and throughout, the process. Policies and schemes should be co-designed to ensure they are fit for purpose and will not add additional complexity and confusion.

**Recommendation 91:** *Increase consultation with stakeholders to ensure processes are user-friendly and fit for purpose.*

### Interaction with other legislation

Councils are regularly seeing cases where landholders are ‘gaming’ the system by clearing as much vegetation as possible under other legislation prior to submitting a DA to avoid entering into the BOS or to reduce the offset requirement. This issue is occurring under the LLS Act ‘allowable activities’ self-assessment pathway and the *Rural Boundary Clearing Code* (RBC code) under the RFS Act as they allow the clearing of native vegetation with no or minimal assessment of the impact on biodiversity values.

*For example, in Goulburn Mulwaree, when a landholder lodged a DA for a new dwelling, a site inspection found that the new driveway access and proposed building site had already been cleared. The driveway cleared a large area approximately 30m wide by 500m long, but it also led to an existing farm shed, meaning it is permitted as an allowable activity. The area around the shed was cleared under the 10/50 Vegetation Clearing Code of Practice. Prior to the clearing, the area had consisted of native grassland which would otherwise have triggered the BOS. However, because the clearing had already occurred as an allowable agricultural activity, the Flora and Fauna Assessment Report supplied to support the DA concluded that the activity would have minimal impacts on biodiversity. This meant the DA did not trigger the BOS and the landholder did not have to offset the biodiversity loss.*

The NSW Parliamentary Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme<sup>16</sup> highlighted this issue. It recommended that DPE and LLS, in consultation with landholders, develop and implement a plan to prevent clearing on land regulated by LLS that would have otherwise triggered or increased obligations under the BOS.<sup>17</sup> LGNSW’s submission to the Statutory Review of Part 5A of the LLS Act<sup>18</sup> sets out recommendations to strengthen the approval pathways under the LLS Act and close the loophole with the BC Act.

It is important that action is taken to prevent landholders from carrying out clearing under other legislation prior to submitting a DA. For example, conditions could be introduced into the BC Act for DAs submitted for land that has been cleared under other legislation in the past 12 months.

Another option is to account for clearing under other legislation in the assessment methodologies that determine entry into the BOS and the offsetting requirement. However, it is difficult to assess the ecological value of cleared land and councils are concerned with the feasibility of conducting

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<sup>16</sup> Legislative Council, Portfolio Committee No. 7 (2022) *‘Integrity of the NSW Biodiversity Offsets Scheme’*, Report no. 16, NSW Parliament

<sup>17</sup> Ibid.

<sup>18</sup> LGNSW (December 2022) *‘Submission to the Statutory Review of Part 5A of the LLS Act’*

retrospective BDARs. The preferable approach is therefore to impose restrictions on clearing to reduce the incidence of 'gaming'.

Under the RBC code, landholders must currently conduct a search of their property on the day that they undertake clearing using the online Rural Boundary Clearing Tool. This is to ensure they have checked how the Code applies to their property. Landowners are required to provide evidence of the online search tool results if requested by the relevant regulatory authority. This requirement could be strengthened to include a short checklist to show landholders have understood the requirements, including confirming that they will not be submitting a development application for this land within the next 12 months.

The tool could also be widened to be required for clearing under all legislation, to discourage gaming and to ensure the system is simple for landholders. The tool should be designed in a way that helps to reduce complexity for landholders and it can be used as a single source of information. It should ideally be overlaid with the NVR map and the BV map so that landholders are able to see upfront what the requirements are.

The NSW Government should carry out a review of clearing occurring under all legislation, including the LLS Act, the RBC Code and the PNF Code, and consider ways to reduce complexity and the loss of biodiversity.

***Recommendation 92:*** Consider introducing conditions into the BC Act for development applications submitted for land that has been cleared under other legislation in the past 12 months.

***Recommendation 93:*** Explore ways for the development application process to take into account any clearing that has occurred within the past 12 months under other legislation.

***Recommendation 94:*** Carry out a review of clearing occurring under all legislation, including the Local Land Services Act, the Rural Boundary Clearing Code and the Private Native Forestry Code, and consider ways to reduce complexity and the loss of biodiversity.

## **Monitoring, evaluation and reporting**

At present, there appears to be a lack of monitoring, evaluation and reporting of the cumulative biodiversity impacts under the BOS and of clearing permitted under other legislation. There is no evidence that the BCT has a clear picture of the overall biodiversity losses occurring at a state or local level or that they are targeting payments strategically to counteract this.

At a local level, information on clearing and where and when a credit is retired is difficult to access. Councils are not routinely advised of where BCT payments are made, broader conservation agreements are established, or when action is taken following a compliance investigation. This makes it difficult for councils to prioritise and target their conservation work while they do not have a full understanding of the biodiversity gains and losses occurring within their LGA.

However, the Credit Supply Taskforce have recently developed a publicly available map showing the approximate location of BSAs and version 2 of the map is in development. The map should be expanded to include the option to also show conservation sites funded through the BCF and other conservation agreements.

It would be helpful for another version of this map to be available to councils (on a confidential basis) which shows the exact location of the offset and conservation sites, as well as the exact location of any clearing carried out. The maps should be updated regularly, for example on a monthly or quarterly basis, and should include a list of ecosystem and species credits generated and retired at the LGA level.

DPE or the BCT should also publish annual reports based on this mapping which highlight species and geographical areas of concern at state and local level and explain how the BCT are targeting these for protection. The report should set out how the BOS is contributing to state and regional biodiversity goals.

***Recommendation 95:*** *Expand the publicly available BSA map to include BCF funded projects and other private conservation agreements.*

***Recommendation 96:*** *Provide a spatial map accessible to councils which shows clearing, credits retired, BCF funded projects and other private conservation agreements at a more granular level.*

***Recommendation 97:*** *Place a requirement on DPE or the BCT to publish annual reports which highlight species and geographical areas of concern at state and local level and explains how the BCT are targeting these for protection.*

## Conclusion

LGNSW welcomes the opportunity to provide feedback on the BC Act and identify areas of improvement.

LGNSW is largely supportive of the objectives of the BC Act, but a greater focus is needed on protecting local diversity and landscape connectivity, which should also be reflected in the provisions. The Act provides a foundation for protecting and regenerating biodiversity in NSW, but its current functioning is not fully aligned with the environmental interests of NSW and is inconsistent with the principles of ecologically sustainable development. There is a need to address some areas of under regulation while minimising complexity and increasing flexibilities in other places. Compliance must be improved to prevent unlawful clearing and deter 'gaming' of the system.

It is important that the BC Act is not reviewed in isolation but is considered in the context of other legislation and statutory instruments that regulate clearing in NSW, including the EP&A Act, the LLS Act, the RBC Code and the PNF Code. The NSW Government should carry out a comprehensive review which assesses whether the multitude of approvals pathways is adequately achieving the social, economic and environmental interests of the state. It should consider whether the pathways should be rationalised under one piece of legislation, as was previously the case under the EP&A Act, to reduce complexity and loopholes between legislation.

LGNSW would be pleased to discuss these recommendations and possible ways to improve the functionality and outcomes of the BC Act and broader Land Management Framework.

For further information, please contact [Carys Parkinson](#), Senior Policy Officer Environment or [Susy Cenedese](#), Strategy Manager Environment.

## Annex A: Relevant LGNSW Annual Conference Resolutions

1. **State of The Environment Report 2021** (Bellingen Shire Council, 2022 Annual Conference – R96/2022) That Local Government NSW:
  - a. notes the findings of the State of The Environment Report 2021 (SER 2021);
  - b. advocates to the NSW and Federal Governments to review their existing policies and procedures that have resulted in the poor outcomes highlighted in the SER2021.
  - c. advocates to the NSW and Federal Governments for all three levels of government to work collaboratively to modify their current policies and practices and develop an initial response to the SER 2021 findings by early 2023.
2. **Logging in NSW native forests** (Shoalhaven City Council, 2022 Annual Conference – R100/2022) That Local Government NSW advocates for the ending of logging in NSW Native Forests.
3. **Private Native Forestry** (Tweed Shire Council, 2022 Annual Conference – Category 2 motion X57/2022) That Local Government NSW advocates to the State Government to ensure that councils retain a role as consent authority in relation to forestry, including private native forestry.<sup>19</sup>
4. **Koala conservation** (Bellingen Shire Council, 2020 Annual Conference – R125/2022) That Local Government NSW supports the findings and recommendations of the NSW Koala population and habitat in NSW report and urges urgent action by the NSW Government particularly given finding 2 which indicates that given the scale of loss to koala populations across NSW as a result of the 2019-20 bushfires and without urgent government intervention to protect habitat and address all other threats, the koala will become extinct in NSW before 2050.
5. **Stray cats in urban areas** (Liverpool City Council, 2020 Annual Conference - R140/2020) That Local Government NSW advocates for:
  - i. Tighter restrictions on cat owners (including that all cats to be microchipped and desexed) to be included in the NSW Companion Animals Act 1998;
  - ii. Council to be funded to provide services that identify stray cats that are not microchipped, nor desexed and found on the streets, to be microchipped, desexed and housed until rehomed; and
  - iii. Changes to be made to Section 11 of the Prevention of Cruelty to Animals Act 1979 (NSW) to permit the release of cats under a Trap Neuter Return Program. (*Several additional calls for cat containment powers also made at 2022 Conference*).
6. **Protection of native wildlife** (Hornsby Shire Council, 2022 Annual Conference – R99/2022) That Local Government NSW calls on the NSW Government to:
  - a. in conjunction with industry associations, introduce enforceable standards for the preparation of flora and fauna management plans.
  - b. consider Codes of Practice and Guidelines for handling native wildlife and other best practice and animal welfare laws in development of the standards.

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<sup>19</sup> This motion was not considered at a Conference as it was assessed as consistent with existing LGNSW positions. It can be found in LGNSW's [2022 Annual Conference Business Paper](#).

- c. consult with Councils, National Parks and Wildlife Service, Ecological Consultants Association of NSW, wildlife rescue organisations and other relevant agencies in the preparation of the standards.
7. **Biodiversity Conservation Act 2016** (Lachlan Shire, 2020 Annual Conference – R129/2020) That Local Government NSW lobbies the NSW Government to undertake a review of the need to include exemptions in the Biodiversity Conservation Act 2016 for events and other minor development.
8. **Impacts of the Biodiversity Offset Scheme** (Gilgandra Shire, 2020 Annual Conference – R128/2020) That Local Government NSW lobbies the NSW Government to provide designated funding to support councils' offset costs associated with the Biodiversity Offset Scheme that may be prohibitive to new midsize development which can demonstrate a direct positive impact on population and job growth as well as diversification of regional economies.
9. **Biodiversity Offset Scheme** (Gwydir Council, 2022 Annual Conference – Category 2 motion X40/2022) That LGNSW supports the Country Mayors Association representation to the Minister for Planning calling on amendments to the Biodiversity Offsets Scheme to address:
  - regional hardship, including barriers to regional development
  - issues around quality assurance of accredited assessors
  - the lack of clarity around the scheme's obligations for councils, industry and landowners.<sup>20</sup>
10. **Biodiversity Offset Scheme** (Gilgandra Shire Council, 2022 Special Conference – Category 2 motion X25/S2022) That Local Government NSW lobbies the NSW Government to amend the Biodiversity Offset Scheme making the scheme better suited to enable development in Rural and Regional NSW.<sup>22</sup>

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<sup>20</sup> This motion was not considered at a Conference as it was assessed as consistent with existing LGNSW positions. It can be found in LGNSW's [2022 Annual Conference Business Paper](#).<sup>22</sup> This motion was not considered at a Conference as it was assessed as consistent with existing LGNSW positions. It can be found in LGNSW's [2022 Special Conference Business Paper](#).

## **Annex B: Summary of Recommendations**

### **Objectives of the Act**

1. Amend section 1.3(a) to make its purpose "to conserve biodiversity at local, bioregional and State scales".
2. Add an additional objective on improving the connectivity of the landscape.

### **International obligations and climate change adaptation**

3. Include recognition of international agreements in the BC Act, including a commitment to achieve the Kunming-Montreal biodiversity commitments at state level by 2030.
4. Strengthen the avoidance criteria for aquatic ecosystems in the Act.
5. Take a strategic approach to ensure energy zones are located in areas of the lowest biodiversity values, and an increased focus on 'avoidance' on such sites.
6. Set out the role biodiversity has to play in the NSW net zero targets, and government agencies work collaboratively to identify and prioritise projects that achieve shared climate and biodiversity objectives.
7. Include a requirement in the Act for climate change mitigation and adaptation to be addressed within the BAM.
8. Integrate climate change impacts into assessment frameworks for establishing offset requirements and the value of stewardship sites.
9. Prioritise climate refugia, wildlife corridors and species at the edge of their range for protection and increase their value when assessed for clearing and the creation of conservation agreements.

### **Embedding Aboriginal cultural and ecological knowledge in biodiversity conservation**

10. Formalise the consultation of Aboriginal communities within the BC Act, including within the Threatened Species Scientific Committee assessment process, and ensure processes are adequately funded and resourced.
11. Consider funding Aboriginal community committees or environmental officer positions at each of the five NSW Aboriginal Land Council (NSWALC) Zone Offices, as well as knowledge to consolidate and promote Aboriginal biodiversity knowledge.
12. Provide grant funding for councils and LALCs to develop cultural heritage management plans and spatial maps with consultation requirements.

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

13. Add a requirement in the Act that when rezoning land, all areas of high environmental values, TS and TECs should be avoided.
14. Introduce a mechanism to reassess and protect land when a new EEC is declared on land that has already been rezoned and consider providing funding to assist with its protection and management.
15. Create a strategy to end native forest logging in NSW as soon as possible.
16. Review the koala chapters in the BC SEPP and ensure a high level of protection for koalas in all LGAs.
17. Strengthen biodiversity protections under other legislation, including limiting allowable clearing without authorisation under the LLS Act and RFS Act.
18. Remove the requirement to receive landholder consent for new AOBV nominations.
19. Expand AOBVs to include important wildlife corridors and climate refugia.
20. Declare all critically endangered species habitat and communities and World Heritage areas as AOBV.
21. Increase protections for SoS program sites so that development cannot occur in these locations.



### **Private land conservation and investment**

22. Consult with landholders on how to increase awareness of the options available, improve processes from a user-perspective and make conservation agreements more desirable.
23. Increase funding available for establishing conservation sites to account for the entire cost associated with managing the land.
24. Increase government resourcing to actively approach and support landholders, targeting those which would improve landscape connectivity.
25. Consider providing more flexible arrangements and assistance for private landowners to conserve areas of existing high-quality vegetation.
26. Reduce the area minimum threshold for stewardship sites in urban areas.
27. Amend the Act to explicitly support the connectivity of the landscape.
28. Make the creation of wildlife corridors mandatory for new development and roads.
29. Clearly define wildlife corridors in the Act and BAM criteria, and provide guidance on what constitutes a good wildlife corridor (features, considerations).
30. Work strategically with councils to identify wildlife corridors and climate refugia, and prioritise their protection through private land conservation agreements and other methods.
31. Fund mitigation measures for pests within wildlife corridors, such as providing additional funding to landholders and councils.

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

32. Provide additional protections in the Act for non-threatened species and ecological communities.
33. Define expected restoration outcomes (e.g., >90% fully structured) for varying vegetation types.
34. Introduce provisions in the Act on rewilding, as well as supporting guidance on best practice.
35. Introduce a clearer definition of "harm to native wildlife" in the Act and stronger powers for authorised officers to impose Penalty Infringement Notices.
36. Improve identification of appropriate buffer distances to breeding and roosting habitats.
37. Increase protections for hollow-bearing trees which provide critical habitats and protection to species during fires.
38. Ensure hazard reduction burns take into account species' breeding season.
39. Increase the use of cultural burns supported or managed by Aboriginal communities who have knowledge of the ecological cycles.
40. Enable the Act to recognise the impact of all cats by adding domestic cats as a key threatening process in Schedule 4 of the Act, and provide powers for council to manage them (e.g., cat containment).
41. Provide councils with more enforceable powers to prohibit dogs from koala protection areas (with the exception of assistance dogs).
42. Introduce clearer legislative provisions and guidelines around the translocation of species.
43. Streamline the process for obtaining licences required for emergency purposes.
44. Strengthen wildlife licensing compliance to improve animal welfare standards.
45. Introduce enforceable standards for the preparation of flora and fauna management plans, including Codes of Practice and Guidelines for handling native wildlife, and other best practice and animal welfare laws, which are then cross-referenced to wildlife licence conditions.

### **Compliance and enforcement**

46. Increase use of technology to support compliance activities.
47. Consider removing or further restricting the defence available for damaging threatened species habitat under section 2.4(2) of the BC Act.
48. Introduce a provision for monetary fines to be based on the financial gain from the activity.
49. Increase resourcing for compliance activities to ensure breaches can be investigated and addressed in a timely way.
50. Place a requirement on the BCT to update councils on what action they are taking to address reported issues.

### **Data and mapping**

51. Increase resourcing for DPE mapping and BioNet teams to complete maps and conduct more ground truthing to improve its accuracy.
52. Incorporate council mapping and data collected through BDARs and from other environmental organisations into regular revisions of the state mapping.
53. Amend wording in the Act so that local governments can nominate land for the BV map that is of local significance.
54. Improve functionality of maps at the local level.
55. Clearly define a pathway for councils to request changes to the BV and NVR maps which minimises bureaucracy.
56. Inform councils when mapping is updated, and ideally consult on changes in advance.
57. Widen access to Important Area Habitat Map for non-accredited council staff and provide GIS support.

### **Biodiversity Offsets Scheme**

58. Increase awareness of the scheme among individuals and real estate agents, especially targeting real estate agents that have previously given inaccurate advice to proponents.
59. Introduce penalties for real estate agents that are found to be consistently providing inaccurate advice.
60. Consider an alternative approach for minor developments barely exceeding thresholds, to permit the reinvestment of offset costs locally.
61. Consider making the administration costs associated with conducting site assessments for development and for setting up a stewardship site proportionate to the land size.
62. Amend the Act to provide exemptions for one off events and other minor development where no clearing will take place, from having to undertake the Test of Significance.
63. Consider flexibilities for rural and regional areas, such as capping the cost of offsets, timing of payments, and flexibility around credit purchase.
64. Produce standardised guidance on 'avoid and minimise' which sets out steps that proponents must take.
65. Increase focus on 'avoid and minimise' in refresher accredited assessor training.
66. Increase offset prices to account for the fuller biodiversity impact, including offset price multipliers to account for time, risk and distance factors, as well as proportionally higher prices in urban areas where there is limited biodiversity remaining.
67. Require proponents to meet with councils prior to submitting a DA to discuss ways to avoid and minimise biodiversity loss, and provide funding for councils to support this process.
68. Include a requirement within the Act to avoid and minimise impacts for proposals that do not meet the BOS threshold.

69. Introduce thresholds in legislation for serious and irreversible impacts for TECs, EECs and wildlife corridors beyond which development cannot be approved.
70. Amend the Act so that any clearing or impact on CEECs automatically counts as a serious and irreversible impact.
71. Introduce limits in the BC Act for when there is limited ability to offset the species or ecological communities, for example when there are no offset credits available to purchase or for habitats that build up over hundreds of years.
72. Introduce provisions within the Act to require the rejection of SSI/SSD application if it puts an entity at risk of serious or irreversible harm.
73. Remove the flexibilities for SSI/SSD to be approved without a biodiversity assessment report and/or without a condition that the applicant be required to retire biodiversity credits.
74. Introduce a requirement that credits must be shown to be available before habitat is removed.
75. Target BCF payments towards LGAs with declining biodiversity through the BOS and work strategically with councils to protect species and habitats, in line with local conservation objectives.
76. Explore ways to disincentivise payments into the Biodiversity Conservation Fund, including increasing the cost uplift in proportion to offset prices.
77. Strengthen the like-for-like rules for offsets to occur within the same LGA or region where the development is taking place.
78. Species credit offsets should be like-for-like only and within the same sub-region.
79. Introduce a requirement for a comprehensive 'reasonable efforts' test prior to allowing variation and apply substantial additional credit penalties.
80. Place a requirement on the BCT to monitor biodiversity gains and losses in LGAs.
81. Improve the BAM to better account for cumulative biodiversity impacts across multiple developments and staged developments.
82. Introduce a threshold for when targeted surveys are mandatory to limit the ability for proponents to assume presence of species.
83. Require multi-seasonal surveys to be mandatory and ensure they take into account periods of extreme weather conditions.
84. Increase training and guidance to councils, consultants and developers to ensure the requirements of BDARs are fully understood.
85. Increase DPE compliance support to take action against developers and consultants who submit incorrect BDARs undervaluing the biodiversity impact.
86. Consider reinstating dedicated Local Government Support Officers to assist small councils with the BAM and wider BOS processes.
87. Provide further guidance around subdivisions and consider policy options to ensure the staging of applications does not result in a reduced offset requirement.
88. Consider whether the approval pathways should be rationalised under one piece of legislation, as was previously the case under the EP&A Act.

### **Biodiversity certification**

89. Simplify the biocertification process and consider other ways to incentivise uptake e.g. subsidising the cost.
90. Consider replacing the BAM with another assessment tool that better accounts for landscape connectivity.

### **Public consultation**

91. Increase consultation with stakeholders to ensure processes are user-friendly and fit for purpose.

**Interaction with other legislation**

92. Consider introducing conditions into the BC Act for development applications submitted for land that has been cleared under other legislation in the past 12 months.
93. Explore ways for the development application process to take into account any clearing that has occurred within the past 12 months under other legislation.
94. Carry out a review of clearing occurring under all legislation, including the Local Land Services Act, the Rural Boundary Clearing Code and the Private Native Forestry Code, and consider ways to reduce complexity and the loss of biodiversity.

**Monitoring, evaluation and reporting**

95. Expand the publicly available BSA map to include BCF funded projects and other private conservation agreements.
96. Provide a spatial map accessible to councils which shows clearing, credits retired, BCF funded projects and other private conservation agreements at a more granular level.
97. Place a requirement on DPE or the BCT to publish annual reports which highlight species and geographical areas of concern at state and local level and explains how the BCT are targeting these for protection.