

Consultation Paper

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

Acknowledgement of Country

Country is at the centre of Aboriginal people's identity and sense of belonging, and we recognise and acknowledge that Country has spiritual and cultural significance to all Aboriginal people.

Aboriginal people have inherent rights and obligations to protect the land, waters, sky and natural resources of NSW. They have been stewards and caretakers of the lands and waters of NSW for tens of thousands of years. They are leaders in conserving and protecting biodiversity and have unique perspectives, knowledge and responsibilities to teach, inspire and help care for Country. The health of the natural environment, fresh waters, land and marine animals, plants and people are intimately connected. This connection goes deep, and has since the Dreaming.

By respecting and protecting the traditional lands, fresh water and seas, and the biodiversity that thrive within them, we recognise that Country and people nourish one another, and this contributes to the health and wellbeing of Aboriginal languages, cultural practices and stronger communities.

DISCLAIMER This Consultation Paper was prepared by Dr Ken Henry, Dr John Keniry, Distinguished Professor Michelle Leishman and Mr Mike Mrdak, supported by a secretariat from the Department of Planning and Environment, in good faith exercising all due care and attention, but no representation or warranty, express or implied, is made as to the relevance, accuracy, completeness or fitness for purpose of this document in respect of any particular user's circumstances. Users of this document should satisfy themselves concerning its application to, and where necessary seek expert advice in respect of, their situation. The views expressed within are not necessarily the views of the Department of Planning and Environment and may not represent department policy.

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Foreword

Biodiversity sustains human life. Our quality of life, our sense of well-being, and the opportunities we have to lead lives of our choosing are tied inextricably to the condition of the natural environment. In the state of New South Wales, we are fortunate to have those choices.

Yet, we have lost too much, and biodiversity loss continues at an alarming rate. More than 1,000 species are listed as threatened in this state. Some of the loss is connected to climate change, but it's much more than climate. What has been lost necessarily limits our future choices.

In 2016, the Biodiversity Conservation Act was enacted with the purpose of maintaining a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future.

Much has changed in the past five years, but three things are worth emphasising.

First, despite everything that has been achieved in those five years, the natural environment is at greater risk now. Today, we can have even less confidence that the natural environment will continue to be able to provide the flows of essential ecosystem services and environmental amenity that would sustain well-being.

Second, today, policy makers all over the world are resolving to pursue a 'nature positive' future. They are acknowledging that, because of past environmental degradation due to human activity, there is a significant risk that future generations will be denied the opportunity to be as well off as we are, and they are affirming that this generation therefore accepts an obligation to halt further environmental degradation and begin the repair of what has been damaged. Our objectives for biodiversity conservation have not been sufficiently ambitious. Conserving what is left is no longer good enough.

Thus, complementing the Paris Agreement for Climate, the global community has developed a new set of commitments to protect and restore nature, captured in the Kunming-Montreal Global biodiversity framework. This new framework calls for urgent action to halt and reverse biodiversity loss to put nature on a path to recovery for the benefit of people and planet. The framework contains clear measurable targets: (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.

The third point that needs emphasising is that it's all about data. You can't protect biodiversity if you don't know what you have to protect. Disconnected data fragments, on which we have had to rely up until now, including in our state of the environment reporting, are simply not fit for purpose. You can't target your interventions to achieve the biggest impact if you don't know what works and what doesn't. And you can't expect financial markets to invest in nature repair if they lack the high integrity data upon which well-functioning markets depend.

High quality environmental data rest on credible science that supports the development of metrics for measuring environmental condition, and science-based data collection and analysis that evidences outcomes. We need to be able to see, in close to real time, what is causing the damage and what interventions are working to repair what has been lost.

The good news is that we do have the skills, in NSW, to do what needs to be done. The review of the Biodiversity Conservation Act provides a window of opportunity to align policy and institutional settings in NSW with ambitious national and global biodiversity targets, and achieve a 'nature positive' future that ensures that future generations will be given the opportunity to be even better off than we are.

Dr Ken Henry AC

Lead Independent Reviewer

Statutory review of the *Biodiversity Conservation Act 2016*

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About the review

Purpose and scope

The *Biodiversity Conservation Act 2016* commenced on 25 August 2017. Under section 14.11 of the Act, the Minister for Environment and Heritage is required to review the Act after five years of operation to ensure that its policy objectives remain valid and that its terms are appropriate for securing those objectives.

The overarching objective of the Act is 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.¹

The review is being led by independent experts Dr Ken Henry AC, supported by Mr Mike Mrdak AO, Dr John Keniry AM and Distinguished Professor Michelle Leishman.

The scope of the review is detailed in its [Terms of Reference](#). To effectively evaluate whether the terms of the Act remain appropriate for securing its objectives, the review experts may make observations on policy settings across other legislation, but only to the extent they are directly relevant.

The review of the Act is being carried out in conjunction with the statutory review of the native vegetation provisions of the *Local Land Services Act 2013* (LLS Act).

More information on the LLS Act review can be found on the [LLS website](#).

The review experts are also required to consider the findings of previous reviews that relate to the operation of the Act. These include:

- June 2019, Audit Office of NSW performance audit into the [management of native vegetation in rural areas](#). The response from agencies is at [Appendix 1](#) to the report.
- July 2019, [Natural Resources Commission \(NRC\) report](#) on a policy review trigger. The [government response](#) to the report is available on the NRC website.
- August 2022, the Audit Office of NSW performance audit on the [Effectiveness of the Biodiversity Offsets Scheme](#). The response from agencies is at [Appendix 1](#) to the report.
- November 2022, the Legislative Council inquiry into the [Integrity of the Biodiversity Offsets Scheme](#). The [government response](#) was tabled in February 2023. The statutory review is an opportunity to further consider relevant inquiry recommendations.

Process for the review

| | |
|----------------------------------|--|
| 21 September 2022 | Release of Terms of Reference and announcement of independent review experts |
| October 2022 – February 2023 | Initial engagement with local government, environment, farming, industry and Aboriginal stakeholders |
| 28 February 2023 – 11 April 2023 | Consultation paper released for six-week public consultation |
| April – May 2023 | Consideration of submissions and continued stakeholder engagement |
| July – August 2023 | Review report provided to Minister |
| August 2023 | Final report tabled in Parliament |

¹ [Biodiversity Conservation Act 2016](#) (NSW), section 1.3

How to have your say

Community participation is vital to the success of the review – and you are invited to make a submission.

The review experts have already had the opportunity to meet with some key stakeholders to learn about issues of most importance to them. This consultation paper has benefited from their perspectives.

Throughout this paper we share some of the messages we've heard from early stakeholder consultations. These messages are indicative, not a complete representation of the views or issues, which will expand as the consultation continues. We share these messages to stimulate the consultation process and seek your reactions. They do not necessarily reflect the position of the review experts or the government.

The consultation paper outlines questions for you to consider when making your submission. The questions are a guide to particular issues, but you are welcome to comment on other aspects of the Act. If you have relevant examples, data and research, ideas or issues you would like to raise as part of the review, we encourage you to include them in your submission.

We look forward to hearing further ideas on what is working well, what's not, and where the review should focus its attention.

Submissions can be made:

Online

Respond to the consultation questions online at www.environment.nsw.gov.au/get-involved/have-your-say/

By Email

Email your submission to biodiversity.review@environment.nsw.gov.au

By Post

Post a written submission to:
Biodiversity Conservation
Act Review

Department of Planning
and Environment
Locked Bag 5022
Parramatta NSW 2124

Closing date – 11 April 2023

How submissions will be used (privacy statement)

The review experts and the Department of Planning and Environment will collect and use your submission to inform the review analysis, final report and recommendations to government.

Providing a submission is entirely voluntary. Submissions will be published on www.environment.nsw.gov.au along with the organisation or individual's name. Other personal information, such as your address and contact details, will be removed prior to publication.

Submissions requested to be 'anonymous' will have identifying information, such as your name, removed before publication. Submissions marked 'confidential' and those that raise legal or other concerns (e.g., privacy, defamation) will not be published. Views presented in submissions are the responsibility of the author of the submission.

There may be circumstances where the government is required by law to release the information in your submission, even if marked confidential, such as for law enforcement purposes or under the *Government Information (Public Access) Act 2009* (NSW).

Background on the Biodiversity Conservation Act

History of the Act

In 2014, the NSW Government appointed an independent expert panel to review NSW biodiversity legislation. The panel made 43 recommendations proposing an integrated package of reforms to deliver on the government's commitment to establish simpler, streamlined and more effective legislation to facilitate the conservation of biodiversity, support sustainable development and reduce red tape.²

The government accepted all the review recommendations, and in 2017 implemented a new integrated Land Management and Biodiversity Conservation (LMBC) framework.

The framework was designed around 'four pillars':

- simplifying land management (via Part 5A of the LLS Act)
- private land conservation
- native plants and animals
- ecologically sustainable development (including via the Biodiversity Offsets Scheme).

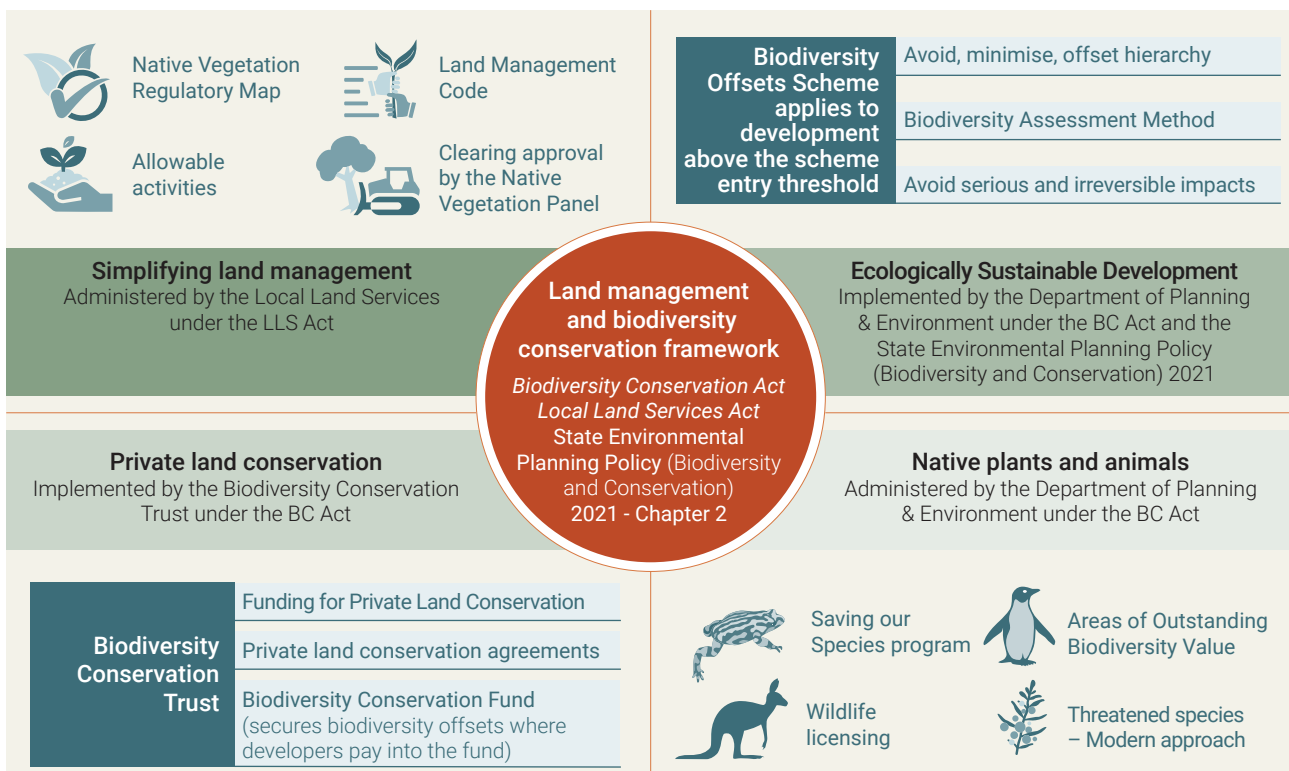
The Act and Part 5A (and Schedules 5A and 5B) of the LLS Act formed the key legislation to underpin the framework.

The Act commenced on 25 August 2017 and replaced the *Threatened Species Conservation Act 1995*, the *Nature Conservation Trust Act 2001* and parts of the *National Parks and Wildlife Act 1974* relating to private land conservation and native animal and plant management.

The *Native Vegetation Act 2003* was also repealed and new laws governing the clearing of native vegetation were added to the LLS Act.

For further detail on agency roles under the land management and biodiversity conservation framework, see Appendix A.

The land management and biodiversity conservation framework



Note: The Biodiversity Conservation Advisory Panel (BCAP) provides advice to the Environment Minister.

²A review of biodiversity legislation in NSW: Final report (December 2014).

Purpose of the Biodiversity Conservation Act

The Act aims to protect and conserve biodiversity in NSW while also facilitating ecologically sustainable development. This purpose is reflected in the objects of the Act outlined on the next page.

The Act does not work in isolation to achieve this purpose. Biodiversity conservation in NSW is facilitated through a range of other mechanisms, including the establishment and effective management of protected areas, both terrestrial and marine, which are a major contribution to biodiversity conservation outcomes. Separate regulatory frameworks for public and private native forestry, rural land management, fisheries and biosecurity also contribute to biodiversity conservation outcomes.

The Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) also protects and manages nationally and internationally important plants, animals, ecological communities and heritage places, which it calls 'matters of national environmental significance.' If an activity in NSW will significantly affect a matter of national environmental significance, it must be referred to the Australian Government for consideration under the EPBC Act.

Biodiversity is the variety of living animal and plant life from all sources and includes diversity within and between species and ecosystems.

Biodiversity values include vegetation integrity — the degree to which the composition, structure and function of vegetation has been altered; and habitat suitability — the degree to which the habitat needs of threatened species are present.

Ecologically sustainable development requires the effective integration of environmental, social and economic factors in decisions about development. It includes taking precautions to avoid serious or irreversible harm; maintaining or enhancing environmental health, diversity and productivity for future generations; ensuring conservation of biodiversity and ecological integrity is a fundamental consideration; and improving environmental valuation and incentives to conserve biodiversity.

Objectives of the *Biodiversity Conservation Act 2016*

The purpose of this Act is to maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future, consistent with the principles of ecologically sustainable development (ESD),³ and in particular—

- (a) to conserve biodiversity at bioregional and State scales, and
- (b) to maintain the diversity and quality of ecosystems and enhance their capacity to adapt to change and provide for the needs of future generations, and
- (c) to improve, share and use knowledge, including local and traditional Aboriginal ecological knowledge, about biodiversity conservation, and
- (d) to support biodiversity conservation in the context of a changing climate, and
- (e) to support collating and sharing data, and monitoring and reporting on the status of biodiversity and the effectiveness of conservation actions, and
- (f) to assess the extinction risk of species and ecological communities, and identify key threatening processes, through an independent and rigorous scientific process, and
- (g) to regulate human interactions with wildlife by applying a risk-based approach, and
- (h) to support conservation and threat abatement action to slow the rate of biodiversity loss and conserve threatened species and ecological communities in nature, and
- (i) to support and guide prioritised and strategic investment in biodiversity conservation, and
- (j) to encourage and enable landholders to enter into voluntary agreements over land for the conservation of biodiversity, and
- (k) to establish a framework to avoid, minimise and offset the impacts of proposed development and land use change on biodiversity, and
- (l) to establish a scientific method for assessing the likely impacts on biodiversity values of proposed development and land use change, for calculating measures to offset those impacts and for assessing improvements in biodiversity values, and
- (m) to establish market-based conservation mechanisms through which the biodiversity impacts of development and land use change can be offset at landscape and site scales, and
- (n) to support public consultation and participation in biodiversity conservation and decision-making about biodiversity conservation, and
- (o) to make expert advice and knowledge available to assist the Minister in the administration of this Act.

³ESD principles are described in s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW).

National and international biodiversity ambitions

Much has changed since the Act commenced five years ago.

Land development and pressure from changed land use has accelerated, particularly from the development of major State and Commonwealth infrastructure and urban and regional housing expansion. Clearing of native vegetation has also increased, in part to accommodate growth in urban and regional NSW.

The effects of climate change are being felt and are expected to become more pronounced. Projections show that extreme weather events such as bushfires, droughts, heatwaves, storms and floods will become more frequent and severe throughout NSW. The 2019-20 bushfires were some of the worst in Australia's recorded history, impacting more than five million hectares of NSW. The 2022 floods also affected wildlife. While the bush is showing signs of recovery, these extreme events have had devastating impacts on many animals and plants and some ecosystems may never be the same.

The need for urgent global action is recognised in the [Kunming-Montreal Global Biodiversity Framework](#), agreed by Australia and 195 nations in December 2022.

The 2030 mission of the Global Biodiversity Framework is to *'take urgent action to halt and reverse biodiversity loss to put nature on a path to recovery for the benefit of people and planet ...'*

The newly adopted framework sets global targets to 2030, including:

- reducing to near zero the loss of areas of high biodiversity importance, including ecosystems of high ecological integrity
- ensuring that at least 30 per cent of degraded terrestrial, inland water, coastal and marine ecosystems are under effective restoration
- effective conservation and management of at least 30 per cent of the world's terrestrial, inland water, coastal areas and marine areas (informally referred to as '30 by 30')
- preventing the introduction and establishment of priority invasive alien species and reducing by at least half the introduction and establishment of other known or potential invasive alien species on priority sites such as islands
- minimising the impact of climate change and ocean acidification and increasing biodiversity resilience.

The Australian Government has committed to protect 30 per cent of Australia's land and seas by 2030, create a nature repair market and work towards zero new animal and plant extinctions.

The Australian Government's [Nature Positive Plan: better for the environment, better for business](#) sets out its commitment to reform the EPBC Act to deliver better environmental protections, support nature positive initiatives and increase Aboriginal engagement in decision-making.

Embedding Aboriginal cultural and ecological knowledge in biodiversity conservation

A significant concern we have heard is the need to better integrate Aboriginal cultural and ecological knowledge and values in biodiversity conservation across the board.

This review is an opportunity to build on state, national and global commitments to better support Aboriginal perspectives and engagement in biodiversity conservation; and contribute to the NSW [Closing the Gap](#) Implementation Plan priorities, particularly for improving socio-economic outcomes in connection to land and water, and partnerships to share decision making.

To support this opportunity, this paper includes consultation questions and messages we've heard to date on how to recognise and embed Aboriginal knowledge, aspirations and expertise in biodiversity conservation.

Messages we've heard to date

- The Act needs to do more to halt biodiversity decline in NSW and needs to enable improved biodiversity and ecological outcomes.
- The Act aims to support ecologically sustainable development, but there are opportunities for improvement and stronger biodiversity outcomes.
- The Act review is an opportunity to align NSW biodiversity directions with national and global targets, and ensure it is fit for purpose under a changing climate.
- The review should consider better integration of Aboriginal knowledge and aspirations in biodiversity conservation.





Focus questions

1. How effective are the objects of the Act to restore, conserve and enhance biodiversity today and into the future?
2. Is the current purpose to conserve biodiversity consistent with the principles of Ecologically Sustainable Development appropriate?
3. How could the Act best support national and international biodiversity aspirations including climate change adaptation, nature positive and restoration goals?
4. How could the Act better integrate Aboriginal knowledge and support the aspirations of Aboriginal people in biodiversity conservation?

Key elements of the Biodiversity Conservation Act

This section covers key parts of the Act and highlights some of the messages we have heard to date.

We welcome your input and perspectives on these and other issues you think are important to the Act review, and we provide some questions to stimulate your thinking and assist your submission.

| | | |
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|  <p>Conserving threatened species and ecological communities</p> <p>Listing process for threatened species, ecological communities, and key threatening processes.</p> <p>Establishes the Biodiversity Conservation Program for conserving threatened species and threatened ecological communities.</p> |  <p>Private land conservation and investment</p> <p>A framework for private land conservation administered by Biodiversity Conservation Trust.</p> <p>Establishes a Biodiversity Conservation Investment Strategy.</p> |  <p>Biodiversity Offsets Scheme</p> <p>A framework to avoid, minimise and offset impacts on biodiversity from development.</p> |
|  <p>Regulating impacts on, and caring for, native animals and plants</p> <p>This includes offences and limited defences for harming and picking threatened species, ecological communities, protected plants and animals.</p> <p>Licensing and regulation of wildlife management activities, such as wildlife rehabilitation.</p> |  <p>Compliance and enforcement</p> <p>Mechanisms for undertaking compliance and enforcement under the Act, and the native vegetation provisions under the LLS Act.</p> |  <p>Other important matters</p> <p>Community participation; advisory committees; data, mapping and biodiversity monitoring.</p> |

Messages we've heard to date

- Parts of the Act and associated processes are overly complex and may not be delivering the intended outcomes.
- The Act overregulates areas of limited environment value, adversely impacts development, and restricts land use changes unnecessarily.
- The Act should explicitly support restoration of ecosystems and connectivity of the landscape.
- There is an opportunity to improve environmental data and allow for greater accessibility to support decisions about biodiversity.
- Climate change adaptation is recognised in the Act's purposes but is not strongly applied in its terms.

Focus questions

5. How current and comprehensive are the existing elements of the Act for biodiversity conservation?
6. Is there other architecture that should be included to achieve the objects of the Act?

Conserving threatened species and ecological communities

The Act provides for the listing of threatened species and ecological communities. The [NSW Threatened Species Scientific Committee](#), an independent committee of scientists appointed by the Minister for Environment and Heritage, assesses species and communities at risk of extinction and determines their listing status.

The committee also decides which threats to native plants and animals should be declared as key threatening processes.

Community members can nominate matters for the committee to consider and make submissions on preliminary determinations.

Once listed, the Act and other laws can trigger conservation action and regulatory protections.

For example:

- The Act requires that conservation strategies are developed for each threatened species and ecological community, which are delivered through the [Saving our Species \(SoS\) program](#).
- The Act includes a test for determining whether a proposed development under planning law is likely to significantly affect threatened species or ecological communities.

To promote a more nationally consistent list of threatened species and ecological communities, NSW is party to the [Intergovernmental memorandum of understanding - Agreement on a common assessment method for listing of threatened species and threatened ecological communities](#).

The Act also introduced [Areas of Outstanding Biodiversity Value](#) (AOBV) to recognise and protect areas that make a significant contribution to biodiversity conservation in NSW, Australia or globally.

Threatened species include native plants and animals that are critically endangered, endangered or vulnerable.

An **ecological community** is a naturally occurring group of native plants, animals and other organisms living in a unique location.

A **threatened ecological community** is an ecological community that is critically endangered, endangered or vulnerable.

The **Biodiversity Conservation Program** outlines strategies for assisting threatened species and ecological communities and is delivered through the Saving our Species program.

Messages we've heard to date

- Threatened species and ecological communities should be given greater protections during land use planning processes.
- There is no systematic process for incorporating Aboriginal ecological knowledge into the Threatened Species Scientific Committee assessment process.
- The Act could further improve biodiversity conservation outcomes by applying an ecosystem-level approach.
- There are challenges with consistently identifying threatened ecological communities and threatened species' habitat and a demand for evidence-based maps that clearly identifies these areas.
- There needs to be stronger legislative effect to the SoS program and stronger requirements and commitment to take action on Key Threatening Processes.
- There needs to be better use of the AOBV mechanism.

Focus questions

7. How could the Act best support landscape-scale actions to prevent species from becoming threatened?
8. Are there improvements that could be made to AOBVs and the SoS program to give them a greater role in enhancing biodiversity?
9. How can perspectives of Aboriginal people and indigenous knowledge be embedded in the conservation of threatened species and ecological communities?

Private land conservation and investment

The Act sets out a framework for private land conservation (PLC). Landholders can enter into three types of PLC agreements, each with a different purpose:

- wildlife refuge agreements (entry-level partnerships with grant funding available)
- conservation agreements (which may be in-perpetuity or termed, and may be funded or not)
- biodiversity stewardship agreements used under the Biodiversity Offsets Scheme and funded by developers.

The Act also establishes the Biodiversity Conservation Trust (BCT). The BCT is a statutory not-for-profit body responsible for partnering with landholders to enhance and conserve biodiversity on private land across NSW.

To guide and prioritise BCT and government investment in biodiversity conservation, the Act requires the Minister for Environment and Heritage to prepare a Biodiversity Conservation Investment Strategy.

Messages we've heard to date

- PLC is critical for expanding conservation, mitigating biodiversity loss and the impacts of climate change. Private land is also vital to support biodiversity, restore degraded areas and connect landscapes beyond the public reserve system.
- PLC should be implemented strategically to improve landscape connectivity.
- There is a desire to recognise Aboriginal cultural values that are associated with biodiversity in PLC.
- There is concern that establishing PLC agreements may be too onerous, complex and costly.

Focus questions

10. How could the Act best support partnerships with private landholders to conserve, restore and enhance biodiversity across NSW?
11. How could the Act best support strategic landscape-scale biodiversity conservation outcomes and improve connectivity?
12. How could the Act enable financial investment by government, businesses and philanthropic organisations?

Biodiversity Offsets Scheme

The Act establishes the [Biodiversity Offsets Scheme](#) to avoid, minimise and offset impacts of development on biodiversity. The scheme applies to certain proposals that need consent under the *Environmental Planning and Assessment Act 1979*. Parts of the scheme also apply to clearing proposals on rural land that require approval by the Native Vegetation Panel under the LLS Act.

The Act sets out the main parts of the scheme and impact assessment processes, including:

- a [Biodiversity Assessment Method](#) (the BAM) to assess biodiversity loss and gain at development and offset sites using the standard of no net loss of biodiversity,⁴ and a process for accrediting people to apply the method
- a framework for determining which developments are required to apply the scheme
- a [Biodiversity Values Map](#) that identifies land with high biodiversity value that is particularly sensitive to impacts
- how decision-makers must consider assessment reports prepared using the BAM (including a need to avoid or reduce [serious and irreversible impacts](#) on biodiversity)
- rules for developers to meet their offset obligations, including the option to pay into a fund and transfer offset obligations to the BCT
- [biodiversity credits](#), which quantify biodiversity losses and gains and are calculated using the BAM (with credit types reflecting the range of ecosystems and species in NSW)
- requirements for [biodiversity stewardship agreements](#) to create those credits
- a market to buy and sell biodiversity credits (for landholders with stewardship agreements, developers, the BCT, philanthropists or other investors).

Messages we've heard to date

- 'Like-for-like' offsets are challenging to find in practice. Flexibility and discretion (such as variation from 'like-for-like' offsets or reduction in credit obligations) may reduce environmental outcomes.
- Improvements to the scheme are underway, however it is still considered overly complex and costly.
- There are concerns about scheme costs and impacts on regional development, housing and industry.
- The requirement to avoid and minimise impacts on biodiversity could be better defined and documented.
- The scheme is adding costs to development and communities and the ecological outcomes achieved from the scheme are not clear.
- Concern around the effective operation of the market, including matching supply and demand for credits.
- Costs of assessments and reporting, as well as uncertainty about future land uses, can be barriers for landholders to enter into biodiversity stewardship agreements.

⁴ Defined on www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/about-the-biodiversity-offsets-scheme/how-the-biodiversity-offsets-scheme-works.

Focus questions

13. Is the Act providing an effective mechanism to ensure that the right developments and land use changes are being assessed?
14. Does the Act provide the appropriate framework for avoiding and minimising impacts and addressing serious and irreversible impacts?
15. Can the Act in its current form result in improved ecological and environmental outcomes?
16. How can complexity and costs be minimised while still achieving positive biodiversity outcomes?
17. How could the Act better support an effective and efficient offset market?

Biodiversity certification

The Act also enables biodiversity certification or 'biocertification' of land to streamline the biodiversity assessment process for areas of land that are proposed for development. Once land is biocertified, development may proceed without the usual requirement for site by site biodiversity assessment.

Messages we've heard to date

- Biodiversity certification can support 'up front' consideration of cumulative biodiversity impacts and give developers certainty.
- There is support for regional level planning that streamlines and enables both regional development and biodiversity conservation.
- Biodiversity certification could be a good pathway to facilitate regional strategic environmental planning, but is underutilised and time and resource intensive.

Focus questions

18. How can the Act support better 'up front' consideration of impacts on biodiversity from development?
19. How can the Act support better consideration of impacts on biodiversity from development at a regional level?

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

The Act protects all native birds, reptiles, amphibians and mammals (except the dingo) and many species of native plants across NSW (see box, 'Wildlife offences').

Fish and marine vegetation are protected under the *Fisheries Management Act 1994*.

Licences and codes of practice are the Act's principal tools regulating a range of activities that have potential to harm protected plants and animals, such as keeping native animals as pets, trading in wildlife, controlling wildlife that damages property, translocating wildlife, and rehabilitating sick, injured or orphaned wildlife.

Defences apply for activities done in accordance with a licence or code of practice. A defence may also apply where an activity is authorised under other legislation.⁵

Protected plants include those listed in Schedule 6 of the Act.

Wildlife offences – it is an offence to harm, capture or kill protected animals, to pick protected plants, to damage threatened ecological communities and habitats of threatened species, or to liberate an animal to the wild (among other things).

Exceptions or limits to the protection of native birds - In certain parts of NSW, some native birds are not protected and can be harmed (culled) due to their adverse impacts on agriculture (Biodiversity Conservation Regulation 2017, cl 2.21).

Messages we've heard to date

- The Act needs to play more of a role in protecting the welfare of native animals.
- Parts of the Act impact Aboriginal people's ability to practice culture and undertake economic activity on Aboriginal land.
- Wildlife licensing and regulation needs to be improved and adequately resourced to achieve better compliance and animal welfare outcomes.

Focus questions

20. How could the Act best support the protection of native animals and plants?
21. Are the requirements and conditions for biodiversity conservation licences in the Act suitable? Do you have any suggestions for improvements?
22. How should wildlife licencing be modified to allow for climate-adaptation conservation activities?

⁵ *Biodiversity Conservation Act 2016*, sections 2.8 – 2.10

Compliance and enforcement

The Department of Planning and Environment (Environment and Heritage Group) oversees compliance and enforcement under the Act and is also responsible for compliance and enforcement of the native vegetation provisions in rural areas under Part 5A of the LLS Act.

Enforcement tools under the Act include stop work orders, interim protection orders, remediation orders, biodiversity offset enforcement orders, advisory and warning letters, penalty notices, cancelling licences, enforceable undertakings, civil proceedings (by regulators or any person) and prosecutions. If an offence is proved in court, additional orders can be made to restore or prevent environmental damage, or to recover costs or monetary benefits from the offender.

The government must maintain public registers of remediation orders, biodiversity conservation licences and other matters.

Messages we've heard to date

- Transparent monitoring and enforcement are vital to ensuring the aims and objectives of the Act are being met; existing compliance frameworks could be improved.
- There is a need for more evidence and assurance that native vegetation is being removed in accordance with approvals.
- Public information on levels of land clearing (including unallocated clearing⁶), approvals and conditions makes it difficult to understand the impacts and outcomes for biodiversity.
- Increased government resourcing and landholder support services are needed to support land management for both agricultural production and environmental outcomes.

Focus questions

23. Are the Act's penalties and enforcement instruments an effective way to support the Act to achieve its objectives?
24. How can the Act give the community more confidence and clarity in the approach to regulation? Should the Act be strengthened to require data collection under the regulatory frameworks in place? Is the risk assessment approach suitable?

⁶ Unallocated clearing (previously known as 'unexplained clearing') refers to clearing or reduction in landcover that does not need approval, has not been recorded or is unlawful. See NSW Department of Planning and Environment, Unallocated clearing in landcover change, September 2022.

Other important matters

This paper aims to guide consultation on key issues, starting with those that have been identified to date. The review experts welcome feedback on any other relevant matters, and any relevant data, research and examples from your own experience.

These matters may include but are not limited to:

- the adequacy of climate change considerations in the Act and how we may integrate climate considerations better in future
- the adequacy of existing policy evaluation and reporting frameworks to assess the Act's effectiveness in meeting its objectives
- the adequacy, accessibility and application of ecological data and information, including the [Biodiversity Indicator Program](#), to understand and respond to biodiversity impacts and threats
- use of interactive maps, technology and innovation to inform and support decision-making, including the [Biodiversity Values Map](#) and [Native Vegetation Regulatory Map](#)
- opportunities for public participation in conservation programs and decision-making to draw on local and Aboriginal communities' knowledge and expertise, keep people informed and support government accountability.

Focus question

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

Appendix A: Agency roles in the land management and biodiversity conservation framework

Environment and Heritage Group, Department of Planning and Environment

- Implements the Biodiversity Offsets Scheme and Biodiversity Assessment Method, oversees accredited assessors, enters Biodiversity Stewardship Agreements with landholders to create offsets.
- Monitors biodiversity status and trends.
- Delivers the Saving our Species biodiversity conservation program.
- Issues licences for harming and picking protected animals and plants (including threatened species and ecological communities).
- Develops and reviews the Biodiversity Conservation Investment Strategy.
- Prepares and publishes the Native Vegetation Regulatory Map (under the LLS Act).
- Monitors and reports annually on woody and non-woody vegetation loss statewide and on rural land regulated under the LLS Act's native vegetation provisions.
- Undertakes compliance and enforcement of the Act and native vegetation clearing under the LLS Act.

Biodiversity Conservation Trust

- Partners with landholders to establish voluntary private land conservation agreements on their land to enhance and conserve biodiversity across NSW.
- Secures offsets where proponents pay into the Biodiversity Conservation Fund.

Local Land Services

- Administers the land management framework under the LLS Act by:
 - providing advice and extension support to landholders
 - processing notifications to clear native vegetation under the Land Management (Native Vegetation) Code
 - assessing proposals to clear native vegetation that require certification under the Land Management (Native Vegetation) Code
 - supporting the Native Vegetation Panel to assess proposals beyond the code
 - maintaining a public information register of notifications, certificates and set aside areas.

Planning Group, Department of Planning and Environment

- Administers the *Environmental Planning and Assessment Act 1979* (EP&A Act) and environmental planning instruments, such as the State Environmental Planning Policy (Biodiversity and Conservation) 2021.
- Oversees strategic planning, land use zoning and development assessment under the EP&A Act through state, regional and local environmental plans (with local councils).