
From: Rachel Walmsley
Sent: Monday, 8 April 2024 2:33 PM
To: Portfolio Committee 7; Jasper Brown
Subject: RE: Follow-up - Post hearing responses - Inquiry into the planning system and the impacts of climate change on the environment and communities

Categories: Planning system climate impacts

Dear David,

Sorry for the delay in getting back to you. We would like to provide the following in response to the questions taken on notice:

1. **Design & Place SEPP** – We have checked our files and can confirm that EDO did not make our own submission on the Design & Place SEPP, but provided advice on legal issues to other groups who made submissions.
2. **Cumberland Pain Conservation Plan** – The EDO submission on the CPCP is available at: [201009-EDO-Submission-on-the-Draft-Cumberland-Plain-Conservation-Plan.pdf](#)
3. **Climate SEPP**: EDO would be happy to work with the NSW Government and parliament to progress the details of a Climate SEPP if the Committee makes the recommendation that a SEPP be made.

We have no corrections for the Hansard.

Thanks again for the invitation to give evidence to the Committee.

Yours sincerely,
Rachel Walmsley



Environmental
Defenders Office

**Rachel Walmsley – Head of Policy &
Law Reform**
(Mon, Tue, Thu, Fri)

I use she/her pronouns.

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Environmental
Defenders Office

Submission on the Draft Cumberland Plain Conservation Plan

9 October 2020

About EDO

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

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

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

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

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

Department of Planning, Industry and Environment
Green and Resilient Places Division
Locked Bag 5022,
Parramatta NSW 2124

Via online form:

www.planningportal.nsw.gov.au/draftplans/exhibition/draft-cumberland-plain-conservation-plan

For further information on this submission, please contact:

Cerin Loane
Senior Policy and Law Reform Solicitor (Sydney)

Introduction

Environmental Defenders Office (**EDO**) welcomes the opportunity to make a submission on the *Draft Cumberland Plain Conservation Plan (the Draft Plan)* and associated documents, including: Sub-Plan A: Conservation program and implementation, and Sub-Plan B: Koala, the Explanation of Intended Effect (**EIE**) for a proposed new State Environmental Planning Policy for Strategic Conservation Planning (**proposed SEPP**) and Draft Cumberland Plain Assessment Report.

The Draft Plan and associated documents have been prepared to support both an application to the NSW Minister for Energy and Environment (**the Minister**) seeking strategic biodiversity certification under the *Biodiversity Conservation Act 2016* (NSW) (**BC Act**) and an application to the Commonwealth Minister for the Environment seeking endorsement of the plan under the strategic assessment provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).

The material on public exhibition is voluminous and complicated, particularly in relation to the legal process for strategic assessment under the BC Act and the EPBC Act, and the assessment of impacts on biodiversity.

As a community legal centre specialising in public interest environmental law, our submission addresses the following key issues:

1. Overarching concerns with strategic biodiversity assessment under the BC Act and EPBC Act;
2. Overarching comments on the biodiversity values of the Cumberland Plain and proposed conservation measures, commitments and actions;
3. Implementation and Enforcement of the Draft Plan; and
4. Specific comments on the EIE for the proposed SEPP.

It is also our understanding that there is significant community concern in response to the Draft Plan, including in relation to the impacts of the Draft Plan on the biodiversity and environment of the Cumberland Plain, impacts on Aboriginal cultural heritage (including burial sites), impacts on individual land holders, and regarding implementation and enforcement of the Draft Plan, including the commitments and actions proposed for addressing impacts of the future development on biodiversity values.

This public exhibition period provides an important opportunity to understand and address community concerns, ensure proposed conservation measures, commitments and actions will conserve and enhance the natural environment, and that there are transparent and enforceable mechanisms for implementing the plan. **In light of the extensive material on public exhibition, clear community interest in the Draft Plan and importance of the strategic biodiversity certification process, we recommend that the public exhibition period be further extended to provide adequate time for the complex issues to be properly understood and for people to raise questions and concerns.**

We would welcome the opportunity to discuss the issues raised in our submission in further detail, and obtain clarification or further information in relation to concerns raised. Please do not hesitate to contact Cerin Loane, Senior Policy and Law Reform Solicitor, on (02) 9262 6989 or [cerin.loane\[at\]edo.org.au](mailto:cerin.loane[at]edo.org.au) in relation to this matter.

Key Issues

1. Overarching concerns with strategic biodiversity assessment under the BC Act and EPBC Act

Strategic biodiversity assessment under the BC Act

The Draft Plan is the first to seek strategic biodiversity certification under the provisions of the BC Act. EDO has previously raised concerns that the provisions for biodiversity certification in the BC Act, and in particular the provisions for strategic biodiversity certification,¹ involve broad Ministerial discretion and compromised environmental standards.² For example:

- In determining whether to declare an application as ‘strategic’, the Minister must take listed criteria into account (including the size of the land, any regional or district plan that applies, any advice from the Planning Minister, and the economic, social or environmental outcomes that the proposed biodiversity certification could facilitate).³ These criteria are not very informative or directive, and once taken into account, the decision to declare strategic biodiversity certification appears otherwise highly discretionary.
- Under section 8.3(2)(b) of the BC Act, the Minister has broad discretion to authorise ‘approved conservation measures’ for strategic biodiversity certification. For example, in addition to the retirement of biodiversity credits, additional measures could include reserving land for new or expanded national parks, adopting development controls that conserve or enhance the environment (e.g. this may include restrictive zoning or development conditions), paying money for green infrastructure,⁴ or any other measure determined by the Minister, including measures that the biodiversity certification applicant asks the Minister to sign-off on.⁵

Strategic environmental assessment can be a useful tool to underpin strategic land-use planning, providing a mechanism for assessing cumulative impacts and landscape scale processes, and providing upfront certainty to business and the community about the future development potential of an area. However, to be done properly, it must include important safeguards (such as stringent environmental impact thresholds, accountability mechanisms, and strong provisions for monitoring and enforcement) and must not replace important site specific assessment.

The Cumberland Plain Conservation Plan is a test-case for whether the new provisions of the BC Act will achieve the objects of the BC Act, including to maintain a healthy, productive and resilient environment, conserve biodiversity at bioregional and State scales and slow the rate of biodiversity loss and conserve threatened species and ecological communities in nature.

¹ A category of biodiversity certification, called strategic biodiversity certification, is available for planning authorities only – see *Biodiversity Conservation Act 2016*, clause 8.5(2).

² See, for example, EDO, *Submission on the NSW biodiversity and land management reforms: Draft regulations and products on public exhibition*, June 2017, available at https://www.edo.org.au/wp-content/uploads/2020/08/170615_EDO_NSW_Submission.pdf

³ *Biodiversity Conservation Regulation 2017*, clause 8.3.

⁴ For example, ‘Special infrastructure contributions’ that conserve or enhance the natural environment – *Environmental Planning and Assessment Act 1979* - section 7.22(1)(c).

⁵ *Biodiversity Conservation Regulation 2017*, clause 8.2.

In the case of the Draft Plan under consideration, some of the specific concerns outlined below suggest that such broad discretion and low environmental standards are likely to put the important biodiversity values of the Cumberland Plains region at risk.

Strategic biodiversity assessment under the EPBC Act

Strategic assessments under Part 10 of the EPBC Act allow the significant impacts or likely significant impacts of a policy, plan or program on matters of national environmental significance to be considered on a larger scale. If the Commonwealth Minister approves a proposed Plan (for strategic assessment) it essentially ‘switches off’ the requirement for Federal project-level approvals.

In our recent submission to the 10-year review of the EPBC Act, EDO was critical that EPBC Act strategic assessments have not demonstrably delivered environmental outcomes or efficiencies.⁶ Strategic assessments should be used to create good data about the environment of the region, identify acceptable thresholds of impact, prevent ‘death by a thousand cuts’ cumulative impacts, and create clear decision rules for project-level assessment. Project-level assessments would then become quicker and cheaper (because the data already exists), with clearer goal-posts for project design (because the strategic assessment has identified the acceptable level of impact and decision rules). However strategic assessments should not displace the need for case-by-case assessments; all projects should remain subject to appropriate levels of environmental assessment.

2. Overarching comments on the biodiversity values of the Cumberland Plain and proposed conservation measures, commitments and actions

EDO has not undertaken a comprehensive review of the biodiversity assessment underpinning the Draft Plan, or analysed in detail the proposed commitments and actions and whether they would adequately avoid, mitigate or offset impacts on biodiversity and conserve and enhance the natural environment. This is a task best left to qualified ecologists.

However, for the purpose of this submission we briefly summarise the biodiversity values of the Cumberland Plain region, the anticipated impacts on biodiversity identified by the Draft Plan and key proposals for mitigating such impacts; and outline a number of overarching concerns in relation to the impacts of the Draft Plan on the biodiversity of the region. These overarching comments provide context to the remainder of our submission - which focuses on the legal mechanisms for implementing and enforcing the Draft Plan.

Biodiversity values of the Cumberland Plain

The Cumberland Plain region is a biologically diverse area with significant biodiversity values. The Draft Plan summarises key features of the landscapes and ecosystems of the area covered by the Draft Plan as including:

⁶ EDO, *Submission to the 10 year review of the EPBC Act*, April 2020, available at www.edo.org.au/wp-content/uploads/2020/04/EPBC-Act-10-year-review-Environmental-Defenders-Office-submission-.pdf, and see case studies in EDO, *Devolving Extinction? The risks of handing environmental responsibilities to state & territories*, October 2020, available at <https://www.edo.org.au/2020/10/05/devolving-extinction-the-risks-of-handing-environmental-responsibilities-to-state-territories/>

- More than 100 threatened or migratory fauna and flora species, including matters of national environmental significance;
- Approximately 61,000 hectares of retained native vegetation, much of this being ecological communities or habitats for species listed under the BC Act and/or EPBC Act;
- 40 plant community types in the area, approximately 30 of which are associated with BC Act or EPBC Act listed threatened ecological communities or classified as over-cleared vegetation types;
- Areas of remaining native vegetation that are often of high conservation value as they may contain the only remaining habitat for species and ecological communities that occur only in the Cumberland sub-region;
- Severely fragmented landscapes. Connectivity in the Cumberland sub-region is already compromised - once clearing levels exceed 70% of the landscape, biodiversity loss from fragmentation increases. This threshold has been passed in the Cumberland sub-region.

The Draft Plan identifies that there will be impacts on:

- 1,777.8 hectares of native vegetation;
- 8 threatened ecological communities listed under the BC Act and 4 threatened ecological communities listed under the EPBC Act (and a fifth currently under nomination); and
- 25 flora species and 24 fauna species.⁷

Key proposals for ameliorating impacts on biodiversity

The Draft Plan includes a number of key proposals for ameliorating impacts on biodiversity. These include:

- *Avoided areas:* 2,735 hectares of native vegetation avoided from development for its biodiversity value and 935 hectares of native vegetation avoided for other purposes including riparian corridors and steep slopes. These areas will be zoned E2 Conservation with strict development controls.
- *Strategic conservation area:* 28,300 hectares of strategic conservation area that will be subject to development controls set out in a new strategic conservation planning SEPP.
- *New, protected conservation lands:* Creating a minimum of 5,475 hectares of new, protected conservation lands for impacted native vegetation communities.
- *Ecological restoration:* Undertake up to 1,370 hectares of ecological restoration of threatened ecological communities
- *Koala reserves and corridors:* Secure important koala movement corridors by establishing the Georges River Koala Reserve.
- *Prioritise and investigate other reserves:* The establishment of two new reserves - Gulguer Reserve Investigation Area and The Confluence Reserve Investigation Area.

⁷ See Table 3: Summary of impacts based on the Assessment Report in Department of Planning, Industry, and Environment, *The Draft Cumberland Plain Conservation Plan*, August 2020, p 36, available at <https://www.planning.nsw.gov.au/Policy-and-Legislation/Strategic-conservation-planning/Cumberland-Plain-Conservation-Plan/Community-engagement>

Overarching concerns on impacts on biodiversity

- *Impacts on critically endangered Cumberland Plain Woodland (CPW):* We are particularly concerned about the impact the Draft Plan will have on the critically endangered CPW. The Biodiversity Assessment anticipates that a total of 1,015 ha of CPW will be directly impacted by the development. This is approximately 68 per cent of the TEC in the nominated areas. In contrast only 393 ha was avoided for biodiversity purposes and 80 ha was avoided for other purposes. Given the critically endangered nature of this ecological community such a large amount of clearing should be considered unacceptable. The Conservation Plan proposes securing an offset target of 3,170 ha of CPW (Commitment 8.1) in conservation lands within strategic conservation areas, we are concerned that this commitment will be difficult to meet, particularly because:
 - Appropriate offset sites have not been identified upfront. The Confluence Reserve Investigation Area is considered unlikely to benefit CPW;
 - Limited funding for securing offsets has been secured; and
 - Securing offsets for CPW is known to be difficult - the Growth Centres Biodiversity Offset Program, which was developed as part of the 2010 Sydney Growth Centres Strategic Assessment, was intended to secure offsets for CPW, but publicly available reporting shows that cost and suitability constraints may impede the ability to secure high-value biodiversity offsets on the Cumberland Plain;⁸
- *Impacts on threatened ecological communities and species:* We are concerned that the Draft Plan will have a significant impact on listed threatened species and communities. For example:
 - The offset hierarchy has been inappropriately applied with areas that have been identified as unavailable for development being considered ‘avoided’ land;
 - Impacts are not limited to the identified areas as infrastructure routes have not been determined and the Draft Plan envisages permitting infrastructure in otherwise ‘avoided’ land. This creates a significant risk of increased fragmentation;
 - The proposed offset ratio is low given the critically endangered and endemic status of many ecological communities and threatened species in the region;
 - Offset areas will include a significant proportion of revegetated areas which are not guaranteed to deliver the required vegetation communities or ecological functions and even if successful, won’t provide many ecological functions for tens - and for some important habitat features such as hollows - hundreds, of years; and
 - Cumulative impacts of development in surrounding areas remains inadequately considered.
- *Impacts on habitat connectivity in the area:* We are concerned that the Draft Plan will have a significant impact on habitat connectivity in the area. For example:

⁸ Department of Planning, Industry and Environment, *Conserving western Sydney’s threatened bushland Growth Centres Biodiversity Offset Program Annual Report 2018-19*, May 2020, available at <https://www.environment.nsw.gov.au/research-and-publications/publications-search/growth-centres-biodiversity-offset-program-annual-report-2018-19>

- The proposed M7 motorway and M7-Ropes Crossing Link Road will permanently isolate the Wianamatta Regional Park, Shanes Park, and Colebee Nature Reserve from each other.
 - The Plan fails to implement recommendations of the NSW Chief Scientist in relation to koala corridors.
 - Infrastructure routes through ‘avoided’ areas have not been mapped and may further fragment habitats (including though additional, unaccounted for, edge effects).
- *Impacts on koala:* The Draft Plan makes some ambitious commitments in relation to koalas and the protection of koala habitat, including for example the Georges River Koala Reserve. These are welcomed. However, the increase in urban development in the area and its associated impacts including increase in land clearing, road traffic and domestic dogs, means that the pressures on the koala population will be immense. Commitments to restore koala habitat and to undertake further research will also be essential.

3. Implementation and enforcement of the Draft Plan

Implementation and enforcement of the Draft Plan, and specifically the commitments and actions in the Draft Plan must be paramount. The strategic biodiversity certification framework essentially gives upfront approval to impacts on biodiversity but delays certainty on and implementation of actions proposed to ameliorate those impacts (e.g. potential acquisition sites are still under investigation, funding for actions has only been committed for five years). While not all development or impacts will occur immediately on commencement of the Plan there is a risk that unless properly implemented and enforced the Plan will result in significant impacts on biodiversity without guaranteed amelioration of those impacts (irrespective of whether the proposed conservation measures are sufficient to ameliorate potential impacts in the first place).

Proposed conservation measures, commitments and actions

As outlined above, in conferring strategic biodiversity approval under the BC Act, the Minister has broad discretion under section 8.3(2)(b) to authorise ‘approved conservation measures’ for strategic biodiversity certification. These can include reserving land for new or expanded national parks, adopting development controls that conserve or enhance the environment or any other measure determined by the Minister. The Department has released *Guidance for planning authorities proposing conservation measures in strategic applications for biodiversity certification*⁹ (**Conservation Measures Guidelines**) to assist planning authorities preparing applications for strategic biodiversity certification to design proposed conservation measures and demonstrate that proposed conservation measures adequately address the likely impacts on biodiversity values of the biodiversity certification of the land.

⁹ Department of Planning, Industry and Environment, *Guidance for planning authorities proposing conservation measures in strategic applications for biodiversity certification*, September 2020, available at <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Biodiversity/conservation-measures-strategic-applications-biodiversity-certification-200425.pdf>

The Draft Plan and associated documents refers to draft Guidelines, as the Guidelines had not been finalised at the time of writing the Draft Plan.

Similarly, the Terms of Reference for the Strategic Impact Assessment Report required to meet the requirements of the EPBC Act (**EPBC Act ToRs**) require the assessment report to consider the likely effectiveness of the conservation measures under the Plan in protecting and managing MNES and any related risks and uncertainties.

However, the terminology used in the Draft Plan is confusing, and inconsistent with the BC Act, EPBC Act ToRs or Guidelines for Conservation Measures. For example:

- The Draft Plan, Sub-Plan A and Sub-Plan B identify 28 commitments and 141 actions¹⁰ but does not specifically describe these as ‘conservation measures’.
- Appendix E of Sub-Plan A identifies a list of ‘mitigation measures’ (which link back to the commitments), however it is unclear if these are intended to be ‘conservation measures’ for the purpose of section 8.3(2) of the BC Act. Sub-Plan A states that development control plans (**DCPs**)¹¹ will set out development controls to address specific biodiversity values, including threatened ecological communities and species as per *Appendix E. Species and TEC-specific mitigation measures* (suggesting that the Appendix E mitigation measures are conservation measures implemented via development controls).
- The Draft Cumberland Plain Assessment Report frames proposed mitigation measures as ‘commitments’ and evaluates the adequacy of those commitments and actions in light of section 8.7 of the BC Act and draft Guidelines for Conservation Measures and sections 4.6, 4.7, 5 and 6 of the EPBC Act ToRs.

If it is the intention for all commitments and actions under the Draft Plan to be ‘approved conservation measures’ then this should be explicit in the Plan (as well as in any order made by the Minister conferring biodiversity certification (BC Act, s8.3(1)). It may simply be a matter of better explaining that conservation measures proposed to address the likely impacts on biodiversity values as a result of biodiversity certification of the land are the commitments and actions identified in Conservation Program under the Draft Plan.

Clear identification of approved conservation measures is also integral to the implementation and enforcement of the Plan. For example, under section 8.13 of the BC Act the Minister can take action to rectify any failure to comply with the approved conservation measures under the biodiversity certification.

Implementation and enforcement

In our view, implementation of the commitments and actions identified in the Draft Plan will be challenging. Key challenges include:

- Lack of committed funding beyond the first five years of the Draft Plan.

¹⁰ See Department of Planning, Industry, and Environment, *Sub-Plan A: Conservation Program and Implementation*, August 2020, Appendix A, available at <https://www.planning.nsw.gov.au/Policy-and-Legislation/Strategic-conservation-planning/Cumberland-Plain-Conservation-Plan/Community-engagement> for table outlining commitments and actions.

¹¹ Instruments provided for by Div 3.6 of the *Environmental Planning and Assessment Act 1979* (NSW).

- Multiple agencies and levels of government being responsible for delivering the various actions identified in the Draft Plan.
- Uncertainty as to whether suitable offset sites can be identified and secured.
- Reliance on a SEPP as a key mechanism for implementing key proposals such as the rezoning of avoided land to E2 – Environmental Conservation, and the implementation of development controls for strategic conservation areas, and DCPs for implementing other development controls. These instruments do not create fixed, permanent controls – there are broad discretions for making, amending and repealing these instruments.
- Commitments and actions being drafted inadequately for the purposes of enforcement (for example, use of uncertain language such as “where possible”, “consult”, “consider” etc.; or ‘high-level’ actions - where lack of specificity makes it difficult to determine whether an action has been adequately completed - e.g. “Provide ongoing support to Councils in the application of DCP controls within the nominated areas, including the sharing of knowledge, maps and data”).

We recognise that there is a genuine intention to establish an implementation and assurance framework as part of the Draft Plan. The implementation and assurance framework does propose a compliance program, compliance working group and resourcing for compliance officers - however this focuses on compliance with the regulatory regime implemented to deliver actions (e.g. conditions on development consents, restrictions on clearing vegetation, illegal dumping etc.).

The legislative framework for ensuring strategic biodiversity certification approvals are adequately enforced is weak. That is, mechanisms for compelling implementation of the commitments and actions by the Department of Planning, Industry and Environment, (as the party to the strategic biodiversity certification under section 8.9 of the BC Act and as the approval holder under section 146B of the EPBC Act) are limited and subject to the broad discretion of the Environment Minister.

Division 8.4 of the BC Act outlines options for enforcing approved conservation and other measures. These include:

- The Minister, by order in writing, may require a party to a biodiversity certification to rectify any failure to comply with the approved conservation or other measures under the biodiversity certification - by implementing any of the approved measures within a time specified in the order, or by implementing any equivalent conservation measures within a time specified in the order (BC Act, 8.13(a));
- The Minister may require the party to pay to the Minister a specified penalty in the amount the Minister considers reasonable to cover the costs of implementing the relevant approved measures or equivalent conservation measures (BC Act, 8.13(2) and (3); and
- Disputes between a party to a biodiversity certification and the Minister can be referred to the Premier (BC Act, s 8.25).

The Minister may bring proceedings in the Land and Environment Court (**L&E Court**) for an order to remedy or restrain a breach of a biodiversity certification agreement under this Act (BC Act, s 13.16). The L&E Court has broad powers to make orders as it thinks fit to remedy or restrain the breach.

The ability for a third-party to bring civil proceedings to in the L&E Court for an order to remedy or restrain a breach of a biodiversity certification agreement under the BC Act, is limited – it can only be done with the written consent of the Minister.

Essentially:

- The Minister has broad discretion to determine ‘equivalent conservation measures’ as alternatives to the conservation actions identified in the biodiversity conservation agreement and modify biodiversity certification to give effect to those equivalent measures without the need for further biodiversity assessment or public consultation (BC Act, ss 8.13, 8.13, 8.22).
- The applicant (the Department of Planning, Infrastructure and Environment) and regulator (the Environment Minister) are essentially the same (the NSW Government).
- Civil enforcement requires the consent of the Minister.

Enforcement options under the EPBC Act are also discretionary and under utilised.¹²

4. Specific comments on the EIE for the proposed SEPP

As outlined above, the NSW Government intends to introduce a new SEPP to implement a number of the conservation measures proposed by the Plan including establishing E2 zoning for areas identified as avoided land and planning controls for land identified as strategic conservation area.

We make the following key comments on the EIE:

- *Lack of information:* The EIE provides only an explanation of how the proposed new SEPP is intended to operate, but does not include key draft provisions of the proposed SEPP (for example, proposed acquisition clauses). These are key elements of the SEPP, and also the broader Conservation Program, and should be available for consultation and feedback. The Department should consult on the provisions of a draft SEPP before it is made.
- *Consistency with precinct plans:* We generally support the inclusion of a clause that would require a precinct plan to be consistent with the Draft Plan, including the identification of certified – urban capable land in the precinct plan. The proposed SEPP should clearly define or explain ‘precinct plan’ so that it is clear which plans this clause would apply to.
- *Clearing of native vegetation:* The EIE states that development consent will be required to clear native vegetation on avoided land identified in the Plan, and that this will prevail over any inconsistency with another EPI. We understand this to mean that even though avoided land will be zoned E2 – meaning that clearing would be regulated by the *State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017* – the proposed Strategic Conservation Planning SEPP will include provisions requiring development consent under the EP&A Act to clear native vegetation in avoided land, and require that a consent authority must not approve the clearing of native vegetation on avoided land unless the consent authority is satisfied that sufficient measures have been, or will be, taken to avoid and minimise any impact to biodiversity, and where possible, protect and enhance the biodiversity value and ecological integrity of the avoided land. That is, clearing of vegetation in the avoided land will be regulated by the new

¹² See EDO, *Devolving Extinction? The risks of handing environmental responsibilities to state & territories*, October 2020, op.cit.

SEPP and not the SEPP (Vegetation in Non-Rural Areas), and the controls in the proposed SEPP will provide more stringent protections for native vegetation in the avoided areas than for E2 zones generally). This is important, particularly because avoided areas have been identified because they are unsuitable for development or are areas of high-value biodiversity. However, we note that this does not guarantee protection for avoided areas. If these were truly avoided areas then clearing should not be allowed. It is also unclear what incentives or support there will be for landholders of avoided land to enter into biodiversity stewardship agreements for these areas of land – which would provide greater protection, in perpetuity of these important areas. Our understanding is that the avoided areas will not be available for offsets in the same way the strategic conservation area will be. Clarification on this point would be useful.

- *Areas of high-value biodiversity* – The EIE uses the term ‘area/land of high-value biodiversity’ when describing avoided land. The term should be clearly defined in the SEPP with reference to how it is used in the Draft Plan to identify avoided land (see Appendix B of the Draft Plan).
- *Guidelines for Infrastructure projects*: The EIE states that “(t)he department will establish guidelines that will include the planning controls for the strategic conservation area that are described under section 2.2.3 [of the EIE], and these will need to be considered by the determining authority for activities assessed under Part 5 of the EP&A Act”. However it is unclear what legal mechanism will compel the determining authority to consider the guidelines – for example, will the proposed SEPP include a clause that will require determining authorities to consider the guidelines? Additionally, rather than require the determining authority to consider the guidelines, the determining authority must be required to make decisions consistent with the guideline and the guideline must include an enforceable, objective measure for determining what would constitute an acceptable environmental impact.