

DISCUSSION PAPER 4

POTENTIAL CHANGES TO  
PLANNING LEGISLATION AND  
STATE GUIDELINES

A DISCUSSION PAPER TO GUIDE THE  
EUROBODALLA SHIRE COUNCIL RURAL  
STRATEGY

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# 1 INTRODUCTION

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The NSW State Government has two significant reviews underway that may influence the approach and options for implementation of a Rural Strategy in Eurobodalla. The Government is also considering possible changes to the planning legislation. The two current reviews are:

1. The suite of legislation surrounding biodiversity.
2. New guidelines for the appropriate use of Environmental Zones in local environmental plans.

There is also the potential for a new planning Act or at least a major revision of the current Environmental Planning and Assessment Act 1979 (EPA Act). In addition, reviews of State Environmental Planning Policies may influence but not necessarily change the directions for the Rural Lands Strategy.

However, both reviews and the possible major revision of the EPA Act appear to be moving quite slowly as at the date of this Discussion Paper. Council needs to progress its Rural Strategy, with a current aim for completion by the end of 2015. Should the above reviews finalise before the Strategy is adopted, then they will be incorporated into the system of strategy implementation. But Council is required to work within the existing legislation and State guidelines, and as such the Strategy may need to be resolved and Council commence implementation of its many goals before the full outcome of the above reviews is known, and hence face some adjustment should changes come later.

From the information published to date on the above reviews, there do not appear to be any outcomes that would necessarily alter the strategic rural directions Council may wish to take. The form of implementation of the Strategies may be influenced, for example, if the State Government reduces or alters the range of available zones. However, the land use direction from the strategy would still be applicable.

This Discussion Paper explores the current stage of the reviews so the alternative potential options that may flow from the reviews are identified and, as far as practical, strategies developed that will fit within likely State direction.

## 2 A NEW PLANNING SYSTEM FOR NSW

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### 2.1 THE DRAFT PLANNING BILL

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The proposals for a new Planning Act progressed to the stage of a draft Bill at the end of 2013. However, as the Bill did not pass parliament before it was prorogued, to enable the 2015 election, the Bill has lapsed. With the creation of a new parliament any changes to the planning legislation would require a fresh Bill to be brought forward if the current *Environmental Planning and Assessment Act 1979* is to be amended or replaced.

There is currently no formal program or timetable for a review of the planning legislation.

Should the process recommence before the Rural Strategy is complete, it may be necessary to review the work in the light of a possible new Act. This is unlikely. From examination of the previous draft Bill, there do not seem to be matters that would significantly reset the rural direction. The new legislation (if implemented as currently drafted) would seem to apply more to the process of how the strategy may be implemented and subsequent development managed and assessed.

For current information on the draft planning legislation visit:

<http://www.planning.nsw.gov.au/en-us/policyandlegislation/planningforourfuture.aspx>.

### 2.2 REVIEW OF THE STANDARD INSTRUMENT

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Under the lapsed Bill and its White Paper, one of the major recommendations related to possible changes to the Standard Instrument (the base planning instrument all NSW councils are required to follow).

The White Paper suggested a shift to fewer, broader zones that focuses on land use with reliance on codes and guidelines for assessment detail.

The current Minister has made comment that there may be a case to expand the range of zones available under the Standard Instrument. It is also understood the Government is proposing a process of further consultation before any new Bill suggesting major change might come forward.

The Minister is proceeding with several reforms:

- The large number of State Environmental Planning Policies are proposed to be simplified and replaced with fewer and theme based policies. Some standard controls may go to Local Environmental Plans.
- Move towards an e-planning environment.
- The old regional plans face repeal and replacement with the new Regional Growth Plans. For example the Draft Illawarra Regional Growth Plan:

<http://www.strategy.planning.nsw.gov.au/illawarra/the-draft-plan/>.

### 3 THE REVIEW OF BIODIVERSITY LEGISLATION IN NSW

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In 2014 the NSW Government commissioned an independent review of the NSW biodiversity legislation. The report of the independent panel “A Review of the Biodiversity Legislation in NSW”, was released in December 2014 and is under consideration by the Government.

The objectives of the report focus on simplifying and clarifying biodiversity assessment processes including the removal of dual consent roles related to vegetation clearing and revision of mechanisms for determining biodiversity offsets.

A copy of the review can be viewed at:

<http://www.environment.nsw.gov.au/biodiversitylegislation/review.htm>.

The report makes 43 recommendations including some significant changes to the biodiversity legislation including:

- *“Repeal of the Native Vegetation Act 2003 and the Threatened Species Conservation Act 1995.*
- *Return vegetation planning powers to Councils under the EPA Act. But improve skill base of Local Government and LLS.*
- *More voluntary guidelines and codes for local and small scale clearing.*
- *Development consent for clearing only to be necessary over defined vegetation and OEHL to be resourced to map this.*
- *Some private forestry exemptions from the need to have approvals and a broader review of private native forestry processes.*
- *Expand the biodiversity offsets fund.*
- *Regional Conservation Plans to be absorbed into the more general Regional Growth and Infrastructure Plans.*
- *Implement the above and other recommendations through a new “Biodiversity Conservation Act”.*

Prior to the 2015 election the NSW Government announced its agreement to implement all recommendations of the review and it is understood several government departments are currently working towards implementation of the recommendations. If implemented, the review recommendations will have consequences for Eurobodalla rural planning. For example, Council may find it is required to administer planning controls over rural native vegetation that are currently administered by LLS – albeit in a reduced form with more exemptions and voluntary codes.

## 4 REVIEW INTO THE USE OF ENVIRONMENTAL ZONES IN LEPs

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### 4.1 THE REVIEW BY PARSONS BRINCKERHOFF

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Parsons Brinckerhoff (PB) were commissioned by the State Government to conduct an independent review into the way environmental zones (E2, E3, E4) and overlays are being applied to land on the Far North Coast. Their review, “Northern Councils E Zone Review Interim Report (2013)” was released towards the end of 2013. A copy can be viewed at:

[http://planspolicies.planning.nsw.gov.au/index.pl?action=view\\_job&job\\_id=6475](http://planspolicies.planning.nsw.gov.au/index.pl?action=view_job&job_id=6475).

In commissioning the review, the Government considered that a balance needed to be achieved between allowing agricultural and rural use to continue while protecting important environmental values. The concern was that Councils were applying environmental zones without evidence of the environmental significance of the land, which in some cases had the potential to limit the use of that land for agricultural purposes.

Although the investigations were carried out in the Northern Councils area, the overall findings have relevance to all Councils, particularly those with rural lands.

The consultant’s recommendations with possible implications for the Eurobodalla Rural Lands Strategy are summarised as follows:

- Only land with verified high value vegetation, such as recognised littoral rainforests, wetland areas or Endangered Ecological Communities, should be included in the environmental zones E2 ( Environmental Conservation) and E3 (Environmental management).
- E zones should only be applied where there is verifiable evidence of significant environmental values that meet pre-set criteria. The intent would be that E zones will be more restrictively applied, while still protecting the most important environmental areas.
- Where land does not have the required environmental significance to be given an E zone, it will be zoned according to its primary use.
- This means that cleared land used for agricultural or rural purposes will be given an appropriate rural zoning.
- Use of formal overlays in LEPs was not recommended where an E zone was also in place. Conversely, overlays, including overlays for Terrestrial Biodiversity could be employed over rural zoned land where validated data indicated biodiversity value.
- While the brief included a review of the use of the E4 zone, of the Councils included in the review, only Byron proposed an E4 zone and, somewhat different to any E4 zones elsewhere in NSW. Byron proposed to place the E4 zone in part over former residential zones.
- A new zone relating to “resource management lands” may be more appropriate to the connotations of a zone purely focused environmental protection, where the land clearly has use potential beyond just environmental protection or management.

## 4.2 THE RESPONSE BY DEPARTMENT OF ENVIRONMENT AND PLANNING

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The Department of Planning and Environment (DPE) issued an Interim response to the Parsons Brinckerhoff report in early 2014.

The Department's interim response to the recommendations is as follows:

- The Department of Planning & Environment (DPE) 'in principle' supports:
  - The criteria for applying E2 and E3 zoning, as identified by the consultant, so that these zones will only apply where there is validated evidence of significant environmental values.
  - Allowing extensive agriculture with Council's consent on E2 zoned land and without Council's consent on E3 zoned land.
  - The use of overlay maps and related clauses in LEPs to manage only matters of public health, safety, risk and hazard such as drinking water catchment areas, coastal risk areas, flooding and acid sulphate soils.
  - Scenic protection is best managed through development applications and if needed with assessment criteria in Development Control Plans.
  - The removal of aesthetic values from the objectives of the E3 zone.
- Given the Department's interim response supports the use of E2 and E3 zones where the criteria is met, the application of a biodiversity overlays on land that has an E2 or an E3 zoning was not supported. This is a logical position, as there is no need to identify that a site has high environmental value by both the application of an E2/E3 zone and an overlay. The Department's interim response however, did not provide a specific position on the use of biodiversity overlays in the specific circumstance where the criteria for E2/E3 zoning is met, but such zoning is not applied. Using the same logic as above, if an E2/E3 zoning is not used to identify high environmental values, then a biodiversity overlay should be used (there should be one or the other, but not both). An overlay does not change the permissibility of uses on land, does not result in any additional restrictions on development and does not trigger the need for a development application. It serves as an "identifier" of specific issues that exist on the land that are to be addressed should a development application be required.
- DPE's full response to the interim report is available at:  
[http://planspolicies.planning.nsw.gov.au/index.pl?action=view\\_job&job\\_id=6475](http://planspolicies.planning.nsw.gov.au/index.pl?action=view_job&job_id=6475).

The Department's interim recommended criteria for applying E2 and E3 zonings are provided below in Tables 1 and 2.



**Table 1: E2 Criteria**

E2 Criteria	
1	Statutory mapping for SEPP 26 Littoral Rainforests
2	Statutory mapping for SEPP 14 Wetlands
3	Land identified in a validated spatial dataset comprising areas of EECs (as listed under the <i>Threatened Species Conservation Act 1995</i> and/or the <i>Environment Protection and Biodiversity Conservation Act 1999</i> )
4	Land identified within a validated spatial dataset comprising areas of habitat for threatened species (as listed under the <i>Threatened Species Conservation Act 1995</i> and/or the <i>Environmental Protection and Biodiversity Conservation Act 1999</i> )
5	Land identified within a validated spatial dataset comprising over-cleared vegetation communities where >70% of the original extent has been cleared (vegetation formations as defined by Keith, D 2004, <i>Ocean Shores to Desert Dunes: The Native Vegetation of New South Wales and the ACT</i> , Department of Environment and Conservation, Hurstville.)
6	Land identified within a validated spatial dataset comprising areas of native vegetation in over-cleared Mitchell landscapes (includes native vegetation in the Byron-Tweed Alluvial Plains, Byron-Tweed Coastal Barriers, Clarence-Richmond Alluvial Plains, and Upper Clarence Channels and Floodplains)
7	Where appropriate, land identified within a validated spatial dataset comprising areas of culturally significant lands such as Aboriginal object sites and Aboriginal places and other significant objects and places that are not formally recorded (as identified by the local Aboriginal community)

**Table 2: E3 Criteria**

E3 Criteria	
1	Land identified within a validated spatial dataset comprising areas of all types of rainforest other than SEPP 26 mapped areas
2	Land identified within a validated spatial dataset comprising areas of old-growth forest, defined as an ecologically mature forest where the effects of disturbances are now negligible (Commonwealth of Australia 1997)
3	Land identified within a validated spatial dataset comprising areas of riparian, wetland and estuarine vegetation other than SEPP 14 mapped areas
4	Land identified within a validated spatial dataset comprising areas of rare, endangered and vulnerable forest ecosystems based on criteria defined by the Joint ANZECC/MCFFA National Forest Policy Statement Implementation sub-committee (JANIS) (Commonwealth of Australia 1997).
5	Land identified within a validated spatial dataset comprising areas of native vegetation on coastal foreshores and land subject to coastal hazards (as listed under the <i>Coastal Protection Act 1979</i> ), including climate change effects.
6	<p>Land identified within a validated spatial dataset comprising areas of land where strict controls on development should apply. Such land includes those areas of native vegetation where the ecosystem services provided by the vegetation is critical including:</p> <ul style="list-style-type: none"> <li>▪ where the risks of severe erosion and landslides are extremely high (i.e. steep land) and the consequences are potentially catastrophic</li> <li>▪ where native vegetation that is critical to watershed protection (i.e. when vegetation protects against catastrophic floods or drought and the destruction of fisheries where spawning grounds are protected by mangroves or riparian forests).</li> </ul>

### 4.3 THE POTENTIAL FOR A MINISTERIAL DIRECTION

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The PB report has been under consideration since June 2014 and is yet to be implemented. Public comment was sought on the proposals in June of 2014 but no report of the outcome of exhibition has been released as of the date of this Discussion Paper, other than the Department's Interim Response.

The Government has made some informal comments to the effect a Ministerial direction may be issued to Councils on the appropriate use of the E2 (Environmental Conservation) and E3 (Environmental Protection) zones. The review also makes some comment about the use of zone E4 (Environmental Living) but only in the context of Byron's proposed use of the zone over residential lands which is not the standard practice elsewhere. Most Councils have been using E4 for rural living areas with reasonably high biodiversity values. It is not yet clear if directions will issue over the E4 zone as well.

It is understood from informal comments attributed to the current Minister, that directions based on the North Coast Interim Response of the Department are unlikely to be issued for the wider State without more consultation and without some wider consideration of both how the E zone and Overlay provisions are being applied and received in the rest of the State.

It may well be that there is a need for regional variations in approach.

The use of E zones and biodiversity overlays has been controversial in Eurobodalla. However, biodiversity overlays exist in approximately 60% of all NSW Council LEPs and have not been very controversial overall. Use of E zones, especially E3, has been more controversial and clearly some owners fear the "E" title may result in additional restrictions and affect land value. There are similar concerns about the use of biodiversity overlays, however as detailed below, an overlay does not change or otherwise affect the zoning of land or the permissibility of uses and only applies as a matter for consideration in the assessment of a development where an application would already be required.

Both Parsons Brinckerhoff and the (still current) Departmental Practice Note PN 09.002, point out the advantages of environmental overlays:

- An environmental overlay does not change the zoning of land (e.g. rural) and the uses which are allowed under that zoning. It also has no impact on carrying out existing activities.
- The overlay map and accompanying clause are considered by Council only when a development application is required for a land use. For example, if the land is within a drinking water catchment area and development consent is required, the overlay and accompanying clause would apply.
- Any land use that does not require a development application, for example, extensive agriculture in a rural zone, is not subject to the overlay or accompanying clause.
- The clause accompanying the overlay map lists the particular matters which Council must consider when assessing a development application in the area where the overlay applies.

## 5 IDENTIFICATION OF ISSUES FOR THE RURAL STRATEGY

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### 5.1 ISSUES RELATING TO A POTENTIAL NEW SUITE OF PLANNING LEGISLATION

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Up until mid-2014, there appeared to be prospects of a high priority being given by the State Government to a significant review of the Planning legislation and a complete replacement of the *Environmental Planning and Assessment Act 1979*.

But since that time the Government has slowed the pace considerably and recent statements attributed to the current Minister suggest the reform process will be more gradual and incremental.

With the creation of a new Parliament in 2015, the former Bill for a new Act has lapsed. There is no proposal for a fresh bill as at the date of drafting of this Discussion Paper.

The former Bill proposed some major changes to zones and plan structures. But overall, the issues and strategies likely to be developed for the rural lands through the Eurobodalla Rural Lands Strategy, would still have full meaning – they may just be implemented in a different format.

It is now highly unlikely any new legislation of any significant impact on the current planning LEP and DCP process will be in place within 2 years. As such this Strategy should make recommendations relating to implementation of new land use initiatives within the framework of the current Act.

### 5.2 ISSUES FLOWING FROM THE REVIEW OF BIODIVERSITY LEGISLATION

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The current position with the review of the biodiversity legislation is similar to that of the planning legislation review.

While commitments from the current State Government for a move to a new suite of biodiversity legislation are still current, the pace towards reform has slowed considerably and at time of writing there is no clear timetable to the introduction of a new Biodiversity Act.

Even with a concerted effort, and even if a Bill is introduced to Parliament this year, the implementation of a new Act and associated regulations would seem to be 2-3 years away.

The independent report into Biodiversity flagged six main changes that could impact Council's role in conserving local biodiversity:

1. Return vegetation planning powers to Councils under the EPA Act, and improve the skill base of Local Government and LLS. Should this occur, Council's role in rural vegetation management and protection would expand considerably. Currently, the role is limited to regulating impacts on vegetation related to specific development applications, with the LLS being the consent authority for broad-scale clearing.
2. More voluntary guidelines and codes for local and small scale clearing. Should this occur there may be more exemptions to the need for consent to clear minor amounts or lower value vegetation.

3. Development consent for clearing only to be necessary over defined vegetation and OEH to be resourced to map this. Currently, there is detailed vegetation mapping and a policy position to conserve most extant native vegetation. This new position may see the categories of vegetation warranting the protection and more rigorous assessment of development consent lessened and result in changes not so much to the data in the vegetation maps but to the classifications and protection measures to be specified for the more at risk types.
4. Some private forestry exemptions from the need to have approvals. This may see an extension of private forestry as the current restrictions on re-clearing in the Native Vegetation Act can be a disincentive to establishing native private forestry. A separate process is suggested for approval / review of private forestry
5. Expand the biodiversity offsets fund. An expanded fund may go some way to addressing the claims of current landholders that they are being required to conserve biodiversity for the community at their own cost.
6. Regional Conservation Plans to be absorbed into the more general Regional Growth and Infrastructure Plans. The draft Illawarra Plan is an example where higher order biodiversity mapping is included but so far is being used to complement the more detailed terrestrial Biodiversity Mapping of component Councils like Shoalhaven. See: [http://www.strategy.planning.nsw.gov.au/illawarra/wp-content/uploads/sites/5/2014/04/Draft-Illawarra-Regional-Growth-and-Infrastructure-Plan-for-Web\\_.pdf](http://www.strategy.planning.nsw.gov.au/illawarra/wp-content/uploads/sites/5/2014/04/Draft-Illawarra-Regional-Growth-and-Infrastructure-Plan-for-Web_.pdf) (Chapter 6).

### 5.3 ISSUES RELATING TO THE USE OF ENVIRONMENTAL ZONES AND BIODIVERSITY OVERLAYS

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The suggested issuing of a Ministerial direction under Section 117 of the EPA Act setting revised parameters for the use of E zones has yet to occur and recent comments attributed to the current Minister for Planning indicate there will likely be more consultation and review by his Department before any direction or revised guideline is issued.

The Department of Planning and Environment's interim response to the review of environmental zones by Parsons Brinckerhoff seems not to favour the formal use of environmental overlays for terrestrial biodiversity and scenic protection where an E2 or E3 zone is applied. The Department's interim response sets the following constraints on the use of zones E2 Environmental Conservation and E3 Environmental Management:

- Limit use of E2 and E3 zoning to validated areas of:
  - Rainforest;
  - Old growth forest;
  - Rare, endangered or vulnerable vegetation as identified by the Janis Committee criteria; and
  - Native vegetation on hazard lands such as lands prone to slip, flood and coastal hazards.

There is a possible interpretation in the Department's Interim Response that there is no compulsion on Councils to have to introduce E zones but where they are used they should be justified by strong, validated data.

As previously discussed, from the Department's Interim Response it is logical to assume that the application of a biodiversity overlay is not supported where an E2 or E3 zoning is used, but that such an overlay on high conservation value vegetation that meets the criteria for E2/E3 zoning is appropriate if such zoning is not used.

Council's resolution of July 2014 was as follows:

- That biodiversity overlays not be used in the LEP;
- That E3 zoning is not appropriate in the general rural areas; and
- That this strategy review options and alternatives to LEP overlays and E3 zoning.

## **6 PREFERRED OPTIONS AND RECOMMENDED STRATEGIES TO ACCOMMODATE THE STATE LEGISLATIVE AND POLICY CHANGES**

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### **6.1 THE STRATEGY FOR DEALING WITH POTENTIAL NEW PLANNING LEGISLATION**

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The Eurobodalla Rural Lands Strategy should be prepared on the basis the current EPA Act 1979 will be in place for at least 2 years and that rural initiatives should be developed within the existing legislative framework. It is likely any new rural planning initiatives Council may adopt will be in place for some time before there is any major legislative change and almost certainly such change will have a transition period to roll over planning strategies into the new format.

### **6.2 THE STRATEGY FOR DEALING WITH POTENTIAL NEW LEGISLATION AND COUNCIL RESPONSIBILITIES REGARDING BIODIVERSITY**

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As with the Planning legislation review, any new biodiversity legislation seems unlikely within 2-3 years and is certainly beyond the completion targets Council has set for this strategy.

Therefore Council should develop the Strategy based on operating within the existing framework of the *Threatened Species Conservation Act* and the *Native Vegetation Act* for at least 2 years. This would see a continuing role for Council in assessing the impacts on biodiversity of new development but the LLS remain the consent authority for general clearing of native vegetation. A decision is needed on the manner of storage and methodology for use of the revised vegetation maps and this is a major focus of Discussion Paper 6.

### **6.3 APPROPRIATE USE OF ENVIRONMENTAL ZONES AND BIODIVERSITY OVERLAYS**

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Based on the discussion in this Paper, Council has three options.

Option 1 – would be to apply an E2/E3 zone to the vegetated areas that meet the criteria for such zoning. Given the level of validation of Council's vegetation mapping, this potentially significantly increases the amount of E zoning in the Shire, but given the Council's resolution and community concern around this issue specifically, this option is not recommended.

Option 2 – would be to apply neither an E2/E3 zoning nor a biodiversity overlay to areas of vegetation that meet the criteria identified in the Parsons Brinkerhoff Report and as supported in the Department's Interim Response. By removing any identification of important areas of biodiversity from the LEP, this option is inconsistent with the Parsons Brinkerhoff Report and Department's Interim Response, results in less transparency for land owners and development proponents and is not recommended.

Option 3 – which provides a middle ground between the above two options, would involve only using the E2 zone for wetlands, littoral rainforests and important foreshore areas (this is

the current approach in ELEP 2012), not using an E2 or E3 zone for other validated areas of high conservation value, but applying a biodiversity overlay to these other validated areas. This is the approach that is considered most appropriate having regard to maximum flexibility for land owners and identification of important biodiversity assets that need to be considered in the assessment of development applications. It will not trigger any additional development applications or restrictions but will identify matters to be considered in the assessment of DAs.