

In the Zone

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PARTNER
WELCOME

INTRODUCTION

Welcome to our latest edition of **In the Zone**.

Both the Land and Environment Court (**LEC**) and the Court of Appeal have recently delivered some compelling decisions. The LEC's ordering of the State owned Forestry Corporation to pay \$450,000 to the Yurruungga Aboriginal Corporation for restorative justice actions, is a landmark decision, which we outline below.

In *Nagra v Coffs Harbour City Council* [2026] NSWLEC 1028 the Court considered how cropping structures are characterised at law and in *Fred Caterson Champions Inc v The Hills Shire Council* [2026] NSWCA 68, the NSW Court of Appeal examined whether particular expert evidence will be admissible in judicial review proceedings. Rescission of a contract for the sale of land because of an innocent misrepresentation by the vendor (about the impact of adjoining development upon ocean views) was considered by the Supreme Court in *Keci v Barnes* [2026] NSWSC 521.

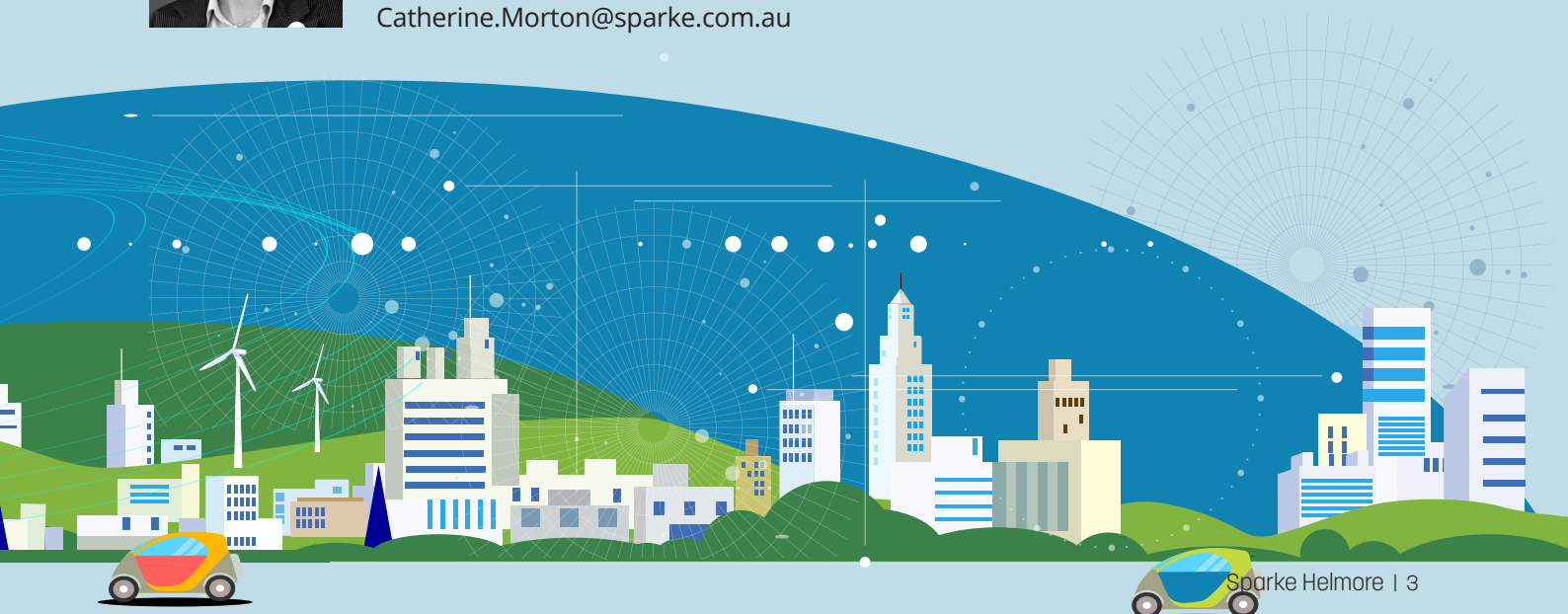
We also discuss the recent Court of Appeal decision in *Joseph v Spencer* [2026] NSWCA 46, which clarifies the purpose of conciliation conferences and explains the role of Commissioners of the LEC in making orders giving effect to s 34 agreements.

Finally, in *City of Parramatta Council v Transport for NSW* [2026] NSWSC 294, the Supreme Court held that the registration of a VPA operated to create an 'interest' in the relevant land on the part of the Council, which then gave the Council a right to compensation under the *Land Acquisition (Just Terms Compensation) Act 1991*.

Lots of interesting reading! Please get in touch if you have any questions about the content in this edition.



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Recent Decisions

Cropping structures characterised for a purpose permissible without development consent, rather than as ‘farm buildings’

Nagra v Coffs Harbour City Council [2026] NSWLEC 1028

Read the full decision [here](#)

On 22 January 2026, the Land and Environment Court handed down its decision in *Nagra v Coffs Harbour City Council* [2026] 1028 (**Nagra**), finding polytunnels to be an integral part of raspberry growing as a form of ‘intensive plant agriculture’ on the subject site, and not ‘farm buildings’.

The proceedings involved a Class 1 appeal against a development control order (**DCO**) given by Coffs Harbour City Council (**Council**) which required the applicants to cease construction of several polytunnels on land zoned RU2 Rural Landscape. The appeal was heard by Commissioner Walsh.

The polytunnels the subject of the DCO were used for the commercial cropping of raspberries. The judgment includes photographs of the polytunnels, an example of which is provided below:



Both parties agreed that the cultivation of raspberries was 'intensive plant agriculture' permitted without development consent in the RU2 zone under the *Coffs Harbour Local Environmental Plan 2013 (CHLEP)*. However, Council argued that the DCO was valid and justified as the polytunnels were 'farm buildings' under the CHLEP, which are only permitted with development consent.

The CHLEP defines a

“ farm building' as ‘...a structure the use of **which is ancillary to an agricultural use of the landholding on which it is situated and includes a hay shed, stock holding yard, machinery shed, shearing shed, silo, storage tank, outbuilding or the like, but does not include a dwelling.**’

Key findings

Commissioner Walsh found that the polytunnels used in raspberry farming on the site:

1. were 'buildings' under the *Environmental Planning & Assessment Act 1979 (EPA Act)*
2. but were not 'farm buildings' that would require development consent on the Site under the CHLEP, and
3. rather were for the purpose of 'intensive plant agriculture' because the polytunnels formed an integral part of the raspberry cropping on the site.

Polytunnels are buildings

The Court followed the decision of Preston CJ in *Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council* [2017] NSWLEC 56, which summarised the Court's approach to identifying a structure as a building where the structure is of considerable size and substance and intended to be permanent or to endure for a considerable time.

The Court found in the circumstances of Nagra that the polytunnels were buildings as:

1. the polytunnels were constructed from component parts which, when brought together, make a substantial object at a fixed site and having some utility value
2. the way in which the polytunnels were braced and screwed into the ground means that they could remain in place for a long period of time, even though they are capable of being moved, and

3. the polytunnels were of considerable size with a range 'between 20m and 60m in length'.

Polytunnels are for the purpose of 'intensive plant agriculture', not 'farm buildings'

The question of whether the polytunnels were for the purpose of 'farm buildings' or 'intensive plant agriculture' turned on whether their use was separate or ancillary to the growing of raspberries, or an integrated part of the growing of raspberries.

The Commissioner agreed with the Applicants' submissions, applying the reasoning of Preston CJ in *Chamwell Pty Ltd v Strathfield Council* (2007) 151 LGERA 400 (**Chamwell**) where it was held that the nature of a use needs to be distinguished from the purpose of the use.

Commissioner Walsh held at [36]:

“ ... It follows from my findings above that I accept the position put by the applicant that the polytunnels are not an ancillary activity, but their purpose is included within the scope of the primary definition of intensive plant agriculture, as integral aspects of the cultivation of irrigated crops for commercial purposes. The polytunnels can be differentiated for example from, farm buildings for the storage of trucks for transport of the raspberries to market, as it is not so evident that those ancillary activities (transport of the raspberries to market) are included within the primary definition. Because the polytunnels are integral and fall within the scope of the definition of intensive plant agriculture, they are not ancillary to that purpose, and it would be in error to classify them as farm buildings under CHLEP.

Decision

The appeal was upheld and the DCO was revoked. This was based on the Commissioner's findings that development consent was not required for the polytunnels and therefore the legal prerequisites for the DCO did not exist.

1.1 LEC

Court makes landmark decision after illegal logging by NSW Forestry Corporation

Environment Protection Authority v Forestry Corporation of New South Wales (No 3) [2026] NSWLEC 25

Read the full decision [here](#)

This case was brought by the Environmental Protection Authority (**EPA**) and assisted by the Bellingen Environment Centre in consultation with the elders of the Gumbayngirr people, whose land covers the land where illegal felling by the NSW Forestry Corporation (**FCNSW**) took place.

The decision

The FCNSW was convicted of the illegal felling of six (6) giant trees and three (3) hollow bearing trees in Wild Cattle Creek State Forest, west of Coffs Harbour.

While the FCNSW was found not to be criminally negligent for the tree felling and there were no extra orders made for the protection of further trees, the Court directed FCNSW to engage independent consultants to assess their processes and training procedures for logging activities.

Significantly, instead of receiving a fine, the Land and Environment Court ordered FCNSW to pay a sum of \$450,000 to the Yurruungga Aboriginal Corporation for restorative justice actions. These actions include a healing ceremony, the development of a biological repair plan and cultural mapping of the area to prevent future harm. This was only the third time in the Court's history that restorative justice was determined by the Court to be the most appropriate course of action.

Restorative justice is a voluntary non-legal process which allows perpetrators to take greater responsibility for offending by making public admissions and communicating with victims.

On top of the financial contribution, FCNSW was ordered to publish admissions of its wrongdoing and penalties in multiple national, state and local newspapers.



1.2 Court of Appeal and Supreme Court

Expert evidence in judicial review proceedings

Fred Caterson Champions Inc t/as Fred Caterson Champions v The Hills Shire Council [2026] NSWCA 68

Read the full decision [here](#)

In *Fred Caterson Champions v The Hills Shire Council* (**Fred Caterson**), the Applicant alleged that the Council had failed to consider matters affecting or likely to affect the environment in accordance with its statutory obligation under s 5.5 of the EPA Act.

The Applicant sought to adduce an ecology report dealing with an owl population at the subject site to demonstrate that the Council had failed to make reasonable inquiries into relevant environmental matters – in particular the impact of the approved development on the native owl population.

The issue for determination turned on whether the expert evidence was necessary to determine if the impugned decisions were legally unreasonable.

Decision

The Court of Appeal determined that the Applicant's owl ecology report was admissible as it weighed on the issue of whether the Council had acted unreasonably by failing to make inquiries into matters affecting or likely to affect the environment pursuant to s 5.5 of the EPA Act.

Although substantial parts of the report did provide an assessment of merits, the Court found that it was also relevant to the inquiries that ought to have been undertaken. There was clear evidence before the Council of a pair of resident breeding Powerful Owls in the reserve adjacent to the subject site, and the report expressed that it would have been reasonable to conduct a more detailed assessment of the likely effect of the development on the pair, particularly from light spill on its habitat. Without the report, the Court would have no evidence before it about what inquiries an expert might undertake, which in this case lead to the conclusion that it was legally unreasonable not to make the asserted inquiry.

Key takeaway

The question of whether expert evidence will be admissible in judicial review proceedings requires a fine-grained analysis of the grounds of review, and the potential probity of the evidence to a fact in issue. It is not simply the case that such evidence not before the original decision maker will never be admitted in judicial review proceedings.

Court of Appeal dismisses objector's judicial review of Commissioner's determination to uphold appeal following section 34 agreement

Joseph v Spencer [2026] NSWCA 46

Read the full decision [here](#)

The Applicant, Mr Michael Joseph, commenced proceedings in the NSW Court of Appeal seeking judicial review and declaratory relief in relation to a decision of Commissioner Dickson granting development consent to a 2023 development application (**DA**) lodged by Ricardo and Jennifer Spencer for alterations and additions to their residence in Kiama. This was the second occasion on which Mr Joseph had sought to challenge the consent, having previously commenced proceedings in 2025.

The DA had initially been refused by Kiama Municipal Council, principally on the basis that it did not comply with clause 6.7 of the *Kiama Local Environmental Plan 2011* (**KLEP**). The Applicants appealed that refusal to Class 1 of the Land and Environment Court, and the matter proceeded to a conciliation conference pursuant to s 34AA of the *Land and Environment Court Act 1979* (**LEC Act**).

During the conciliation conference, the Spencers and Council reached agreement that the proposed development qualified as an exception to clause 6.7 of the KLEP. The parties subsequently entered into an agreement under s 34(3) of the LEC Act, being an agreement for a decision that the Court could have made in the proper exercise of its functions.

To assist the Court in determining whether the agreed outcome was within jurisdiction, the parties provided a jurisdictional note addressing the relevant statutory constraints. Commissioner Dickson was satisfied that the proposed decision was one the Court was empowered to make and accordingly granted development consent subject to the agreed conditions.

On 26 June 2025, Mr Joseph, who had objected to the DA, filed an amended summons with the Court of Appeal in which orders were sought for the Commissioner's decision to be set aside. Among other grounds, Mr Joseph alleged a denial of procedural fairness, abuse of process by Council, legal unreasonableness in the interpretation and application of clause 6.7 of the KLEP, error in the Commissioner's reliance on the jurisdictional note, and a failure to consider additional planning merits, including matters arising under clause 6.6 of the KLEP.



Decision

The Court of Appeal dismissed the proceedings.

In doing so, the Court held that:



Council was under no obligation to notify the Applicant of its revised position regarding clause 6.7 of the KLEP. Further, neither Council's change in approach nor Commissioner Dickson's interpretation of the provision involved any legal error ([92], [131]).



Objectors are not parties to the s 34 conciliation process and are not entitled to participate in, or influence, the terms upon which parties resolve proceedings through agreement ([42], [128]).



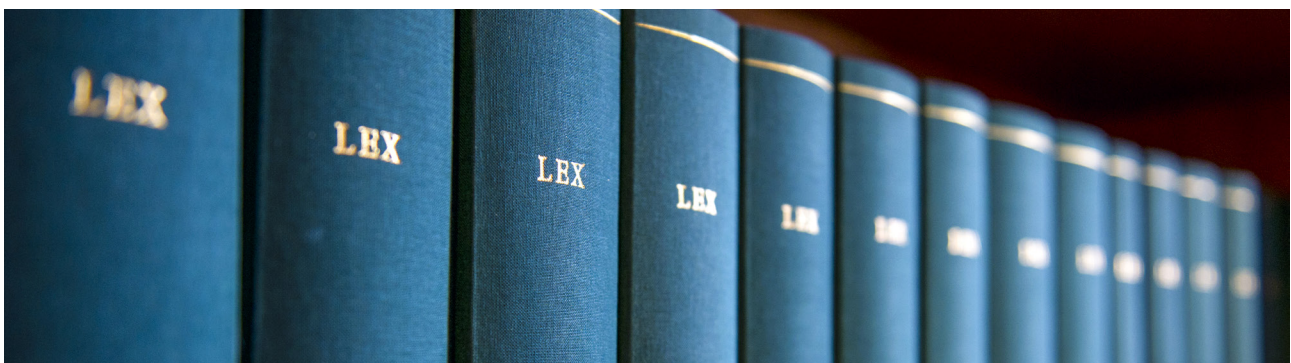
Commissioner Dickson was entitled to consider the jurisdictional note and was satisfied of all relevant jurisdictional matters necessary to make the agreed decision ([105] – [111]).

When disposing of proceedings under s 34(3) of the LEC Act, the Court's task is confined to determining whether the proposed decision falls within jurisdiction. It is not required to undertake a merits review of the agreed outcome or reconsider broader planning merits issues ([35], [140]).



Key takeaway

1. Objectors are not entitled to participate in, or be consulted about, negotiations and agreements reached between parties during a s 34 conciliation conference.
2. Jurisdictional notes are directed to identifying the statutory preconditions and constraints relevant to the Court's power to make an agreed decision.
3. In considering an agreement under s 34(3) of the LEC Act, the Court need only be satisfied that the proposed decision is one that it has jurisdiction to make. It is not required to determine whether the decision represents the preferable planning outcome.
4. The Court is not obliged to consider planning provisions that do not impose a prohibition or other jurisdictional constraint on the exercise of its power.



VPA rights may be compensable in NSW compulsory acquisitions

City of Parramatta Council v Transport for NSW [2026] NSWSC 294

Read the full decision [here](#)

As part of the expansion of the Sydney light rail network, Transport for NSW (**TfNSW**) compulsorily acquired a parcel of land on Hill Road, Wentworth Park. That land was subject to a voluntary planning agreement (**VPA**) entered into in November 2021 between the landowner, developer, and the City of Parramatta Council.

Under the VPA, the developer was required to dedicate parts of the land to the Council once certain works were completed, though the VPA imposed no obligation on the developer to carry out those works. The VPA was registered on the title to the land pursuant to section 7.6 of the EPA Act.

Following the acquisition in May 2024, the Council lodged a compensation claim with the Valuer General. Both the Valuer General and TfNSW denied that the Council held an interest in the acquired land within the meaning of the *Land Acquisition (Just Terms Compensation) Act 1991* (**Just Terms Act**) and rejected the claim. On this basis, TfNSW did not issue a compensation notice to Council as required by s 42 of the Just Terms Act. The Council sought judicial review of those decisions in the Supreme Court.

The decision

The threshold issue before the Court could determine the substantive dispute, was whether the existence of a ‘registered interest in land’ under s 42(2)(a) of the Just Terms Act is a jurisdictional fact, being an objective precondition that must exist before a decision-maker may lawfully exercise a statutory power. Justice Campbell answered in the affirmative.

His Honour held that the question of whether a former owner had a registered interest in the land does not afford subjectivity or a reasonable difference of opinion – an interest is either registered, or it is not; it either appears on the Register, or it does not. It was not for TfNSW to go behind the Register and form its own view about whether a recorded interest is an ‘interest in land’. This is to be contrasted with the potentially subjective requirements in s 42(2)(b) and (c) of the Just Terms Act, which contemplates where a party was in lawful occupation of the land; and where a party, to the actual knowledge of the acquiring authority, had a compensable interest in the land.

Accordingly, TfNSW’s jurisdictional fact error gave rise to judicial review of the decision to deny the Council compensation.



Having answered the jurisdictional question, Justice Campbell turned to consider whether the Council's rights under the registered VPA constituted an 'interest in land' for the purposes of the Just Terms Act.

Section 4 of the Just Terms Act defines an 'interest of land' as follows:

'interest' in land means –

- a. a legal or equitable estate or interest in the land, or
- b. an easement, right, charge, power or privilege over, or in connection with, the land.

It was held that the Council did have a legal interest in land under limb (a) of the statutory definition, for the following reasons in particular:

1. Registration creates a statutory interest: While the categories of legal interests at common law are closed, Parliament may alter the general law through legislation. The interest in question was not a creature of the common law but of statute, giving rise to a statutory legal interest.
2. While the registration of the VPA did not of itself create a proprietary interest, the Council's right under its VPA was to the transfer of the land itself by dedication – this was a right in the land, even if contingent.
3. The VPA was a 'dealing' under the *Real Property Act 1900*, even though because it was not an immediate conveyance relating to the disposition, devolution or acquisition of land. The Court held that the statutory definition does not require a document to provide for the immediate disposition of land. Although contingent, the VPA was held to plainly "relate to" the disposition of land authorised by ss 7.4 and 7.6 of the EPA Act.
4. In response to TfNSW's argument that the VPA was insufficiently recorded on the folio, the Court held that the Registrar-General has discretion over noting statutory interests and the explicit reference to 'Planning Agreement pursuant to Section 7.6' on the title was sufficient to disclose the type of interest involved.

In summary, registration, taken with clauses requiring dedication of land, was found by the Court to give the Council a legally cognisable, proprietary interest in the land. That interest survived to the point of acquisition and was sufficient to attract compensation under the Just Terms Act.



Key takeaway

The decision reinforces the central importance of registration in the Torrens system. The decision makes clear that a VPA registered under s 7.6 of the EPA Act can ground a legal interest in land entitling the planning authority under the VPA to compensation upon acquisition, provided the underlying rights relate to the land itself rather than being purely personal obligations.

For acquiring authorities, the key message is one of caution: where an interest appears on the Register, the acquiring authority's obligation under s 42(2)(a) of the Just Terms Act may be engaged requiring the giving of a compensation notice.

For planning authorities, the decision underscores the value of prompt registration and careful drafting of VPAs, confirming that these steps can have significant practical consequences if the land is later compulsorily acquired.

Rescission of land sale contract because of vendor's innocent misrepresentation about impact of adjoining development on ocean views

Keci v Barnes [2026] NSWSC 521

Read the full decision [here](#)

In this case the Supreme Court of NSW rescinded a contract for the sale of a property and ordered the vendors to refund the purchasers' \$310,000 deposit, after finding that the selling agents' comments about the adjoining development and its impact on the ocean views were literally true as to the existing DA, but misleading in context.

The selling agents told the purchasers that there was an adjoining development subject of development consent for a nine-unit development which would not obstruct the views. However, the vendors knew there was also a much larger State Significant Development proposal for the adjoining land involving 100-120 dwellings. That proposal, if approved, carried a real-life risk of affecting the property's ocean views. This proposed development was not disclosed to the purchaser.

The decision

The Court found that the agents' comments to the purchasers carried an implied representation that the vendors knew of no material fact giving rise to a risk that the ocean views would be obstructed. That implication was false and that was enough to justify rescission of the contract.

Importantly, the Court found that the purchasers did not need to prove fraud. It was held that a contract can be rescinded for innocent misrepresentation where the representation materially induced the purchaser to enter into the contract. Further, the Court determined that while a vendor may not have a general duty to disclose every future possibility affecting land, once a vendor or agent chooses to speak about a matter, a half-truth can become a misrepresentation.



2

Legislative amendments

Building (Approvals and Practitioners) Bill 2026

Purpose

The *Building (Approvals and Practitioners) Bill 2026* was introduced into NSW Parliament in May 2026 and seeks to create a new consolidated legislative framework to govern the oversight and approval of building work in NSW. Among other matters, the Bill:

- would require certain building work (**Registered Work**) to be carried out only by registered persons. In particular, the Bill proposes a new duty of care to be imposed on those registered persons to take reasonable care to avoid economic loss because of construction defects to Registered Work
- proposes to remove provisions regarding the issue and effect of construction certificates and occupation certificates from the EPA Act, with replacement provisions to be contained in the new *Building (Approvals and Practitioners) Act*. Under this new legislation, construction certificates would be called 'building approvals', while occupation certificates would be called 'completion approvals'. There will be appeal rights against the refusal of a building approval or completion approval
- would require a 'prefabricated building' (defined to include components of a building 'manufactured away from the building site', but defined not to include a 'moveable dwelling') to obtain a 'building approval', and
- will amend the *Local Government Act 1993* to delete the definitions of 'manufactured home' and 'manufactured home estate', and the requirement to obtain a section 68 approval for manufactured homes will be removed.

You can track the progress of the Bill [here](#).

Energy Legislation Amendment (Prioritising Renewable Energy) Bill 2026

On 6 May 2026 the NSW Government introduced the *Energy Legislation Amendment (Prioritising Renewable Energy) Bill 2025* to amend the *Electricity Supply Act 1995* (**ES Act**) and the EPA Act. The Bill aims to accelerate the delivery of energy projects in NSW particularly renewables generation, battery storage and transmission infrastructure projects, addressing identified delays which can be experienced in the NSW planning system. The Bill also proposes to amend the EPA Act to enable the Energy Minister to recommend that the Planning Minister declare certain projects as State Significant infrastructure.

Read more [here](#).



3

Other industry news

NSW Cultural Fire Strategy

In a landmark first, cultural burning as a vital Aboriginal practice is being recognised through the Cultural Fire Strategy. This Strategy will simplify processes, improve coordination and support cultural fire across NSW, responding to the recommendations from the Bushfire Inquiry and contribute to commitments made under the NSW Closing the Gap Priority Reforms and the National Agreement on Closing the Gap.

Read more [here](#).



Implementing environmental reforms

The Commonwealth Government has announced that it will provide funding to implement significant reforms to the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) including:

1. \$39.5 million over two years from 2026-27 for the Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) and the Clean Energy Regulator to continue administering the Nature Repair Market
2. \$28 million over two years from 2026-27 for DCCEEW and the Department of Agriculture, Fisheries and Forestry to work with impacted States to develop approval pathways aimed at allowing existing forestry operations under Regional Forest Agreements to continue under the reformed environmental laws
3. \$13.2 million over two years from 2026-27 for DCCEEW to establish the Restoration Contributions Holder, and
4. ongoing funding to establish the new National Environmental Protection Agency as a statutory agency from 1 July 2026.

In addition, funding will be provided to accelerate and streamline approvals processes, including:

1. \$105.9 million over four years from 2026-27 for DCCEEW and the National Environmental Protection Agency (**NEPA**) to modernise environmental information (including through the use of artificial intelligence) to improve user experience and enable simpler, faster environmental approvals
2. \$47.6 million over four years from 2026-27 to progress bilateral agreements with states and territories, to enable states to conduct assessments and approvals on the Commonwealth's behalf
3. \$26.4 million over four years from 2026-27 for DCCEEW and NEPA to work with states and territories to develop new bioregional plans and strategic assessments, which will fast-track environmental approvals in priority areas including housing, critical minerals and renewable energy, and
4. funding to support states and territories to implement bioregional plans and strategic assessments in priority areas.



Housing Delivery Authority review finalised as Government updates HDA criteria framework

The NSW Government has released the 12-month review of the Housing Delivery Authority (**HDA**). The review made 6 recommendations, with some implemented immediately through changes to the EOI criteria with other operational changes to be implemented over time.

Read more [here](#).



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