



# GATEWAY REVIEW

## Justification Assessment

**Purpose:** To request that the Independent Planning Commission review the Gateway determination of the subject planning proposal, consider the information provided by Council and provide advice regarding the merit of the review request.

<b>Dept. Ref. No:</b>	GR-2022-26
<b>LGA</b>	Hornsby Shire Council
<b>LEP to be Amended:</b>	Hornsby Local Environmental Plan 2013
<b>Address/ Location:</b>	Hornsby local government area (Hornsby LGA)
<b>Proposal:</b>	Planning proposal to update Council's Vegetation (Terrestrial Biodiversity) Mapping (PP-2020-3920)
<b>Review request made by:</b>	<input checked="" type="checkbox"/> The Council
	<input type="checkbox"/> A proponent
<b>Reason for review:</b>	<input checked="" type="checkbox"/> A determination has been made that the planning proposal should not proceed.
	<input type="checkbox"/> A determination has been made that the planning proposal should be resubmitted to the Gateway.
	<input type="checkbox"/> A determination has been made that has imposed requirements (other than consultation requirements) or makes variations to the proposal that the proponent or council thinks should be reconsidered.

### Background information

<b>Details of the planning proposal</b>	<p><b>Planning proposal</b></p> <p>The planning proposal (<b>Attachment proposal</b>) seeks to update Hornsby Council's Biodiversity Map under Hornsby Local Environmental Plan (Hornsby LEP) 2013 to include identification of all vegetation communities (including local and common species), plus a 10 metre buffer. The proposal is supported by the 'Hornsby Vegetation Mapping Update 2017' prepared by Eco Logical Australia (ELA Report), with the last mapping update completed in 2008. A copy of the report is at <b>Attachment ELA</b>.</p> <p>The proposal seeks to amend the Hornsby LEP 2013 by:</p> <ul style="list-style-type: none"> <li>• Updating Hornsby LEP 2013 Terrestrial Biodiversity Map, and</li> <li>• Updating terminology in Hornsby LEP 2013 Clause 6.4 'Terrestrial Biodiversity' by replacing the term 'Terrestrial Biodiversity' with 'Environmentally Sensitive Land'</li> <li>• The stated objectives of the planning proposal are to:</li> <li>• Map all locally significant and common vegetation communities (in addition to the currently mapped Commonwealth, State and Regionally significant communities) as well as a 10m buffer, as Terrestrial Biodiversity.</li> <li>• Define all land mapped 'Terrestrial Biodiversity' as 'Environmentally Sensitive Land'; and</li> </ul>
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- Replace all references to ‘Terrestrial Biodiversity’ in Hornsby LEP 2013 (including the Dictionary) with ‘Environmentally Sensitive Land’. Council aims to make clear the application of the Codes SEPP and other complying development pathways.

### Hornsby LGA

- The Proposal applies to the entire LGA as it pertains to Clause 6.4 – Terrestrial Biodiversity of Hornsby LEP 2013, and the associated mapping.
- Hornsby Council proposes to rename areas identified as “Terrestrial Biodiversity” and “Biodiversity” in its mapping to “Environmentally Sensitive Land” (ESL).
- The term ‘Terrestrial Biodiversity’ will also be replaced with ‘Environmentally Sensitive Land’ within the LEP. This will affect Clause 6.4 and the standard definition.
- The new mapped areas are identified by the 2017 ELA Report, plus a 10-metre-wide buffer.
- The mapping identifies significant tracts of land throughout the Hornsby LGA. The majority of the land proposed to be mapped is classified as common or local species, and involves a 12,150 properties, whereas existing mapping affects approximately 1,250 properties. **Figures 1-4** below compares 2 map tiles in the LGA where the terrestrial biodiversity mapping has been expanded to include local and common vegetation communities. **Figure 5** contains a proposed map of the entire LGA.

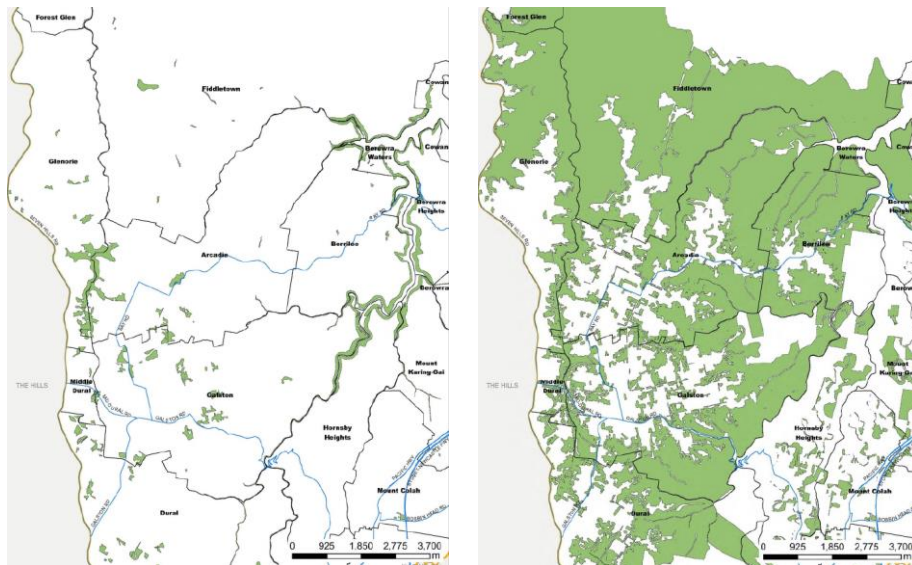


Figure 1 and 2: Existing and proposed terrestrial biodiversity mapping under HLEP 2013 for the mid-western area of Hornsby LGA.

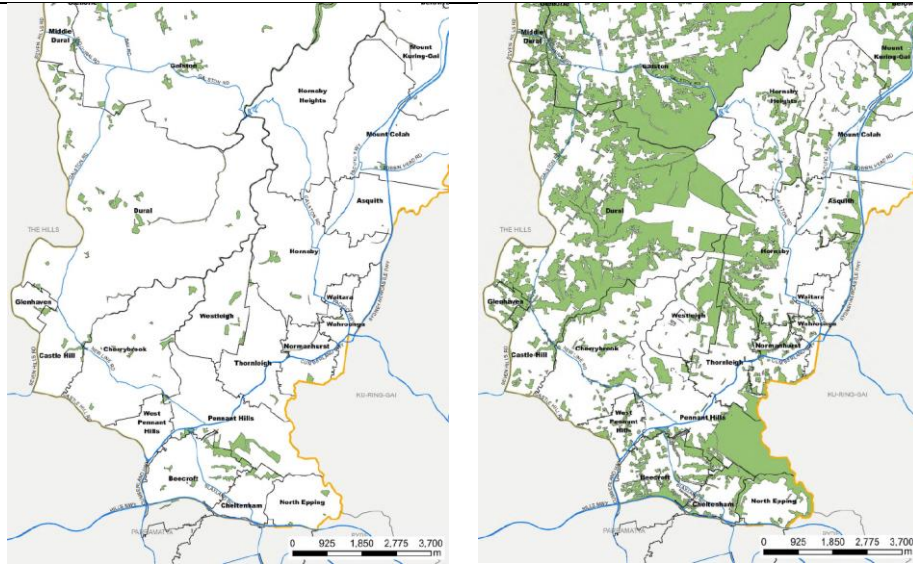


Figure 3 and 4: Existing and proposed terrestrial biodiversity mapping under HLEP 2013 for the southern area of Hornsby LGA.

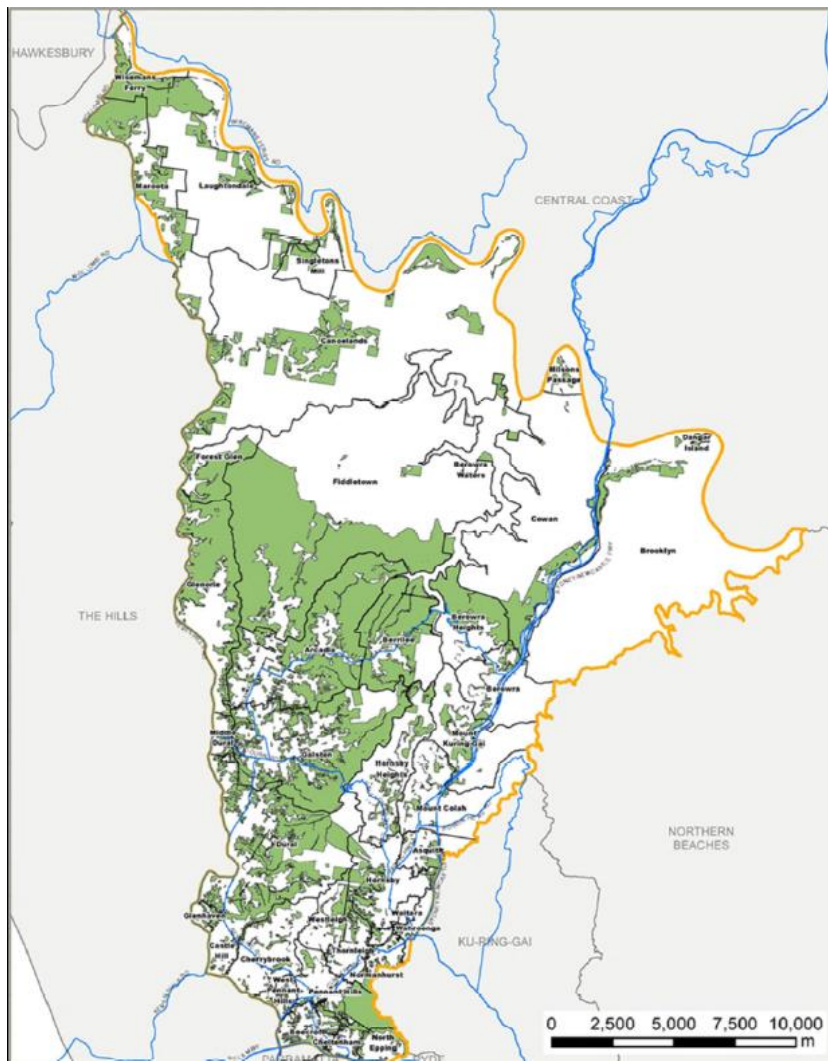


Figure 5: Proposed Terrestrial Biodiversity Map of Hornsby LGA.

Further comparisons are within the Gateway Determination Report (**Attachment Gateway Report**).

	<p><b>Background</b></p> <ul style="list-style-type: none"> <li>• The proposal originated from a Council endorsed Mayoral Minute (<b>Attachment D</b>). The Mayoral Minute sought to highlight and protect Council’s tree canopy, update the vegetation mapping in accordance with the ELA Report, and to include a 10m buffer.</li> <li>• Council staff presented several vegetation-mapping options to the Council Meeting on 12 August 2020 (<b>Attachment I</b>). These options included: <ul style="list-style-type: none"> <li>○ Not mapping local and common communities and slightly expanding the existing Commonwealth, State and Regionally significant vegetation communities.</li> <li>○ Mapping local and common communities, expanding the threshold to identify all communities; or,</li> <li>○ Mapping local and common communities, but distinguishing National, State, Regional, and local/common species from one another in the mapping. A broader range of development was proposed to be permitted in areas mapped for local/common vegetation, than where national, state, and regional communities were identified.</li> </ul> </li> <li>• Council resolved to proceed with an alternative option to map local and common vegetation communities without differentiating between those of national, state, and regional significance.</li> <li>• The proposal would affect 12,150 properties, whereas current mapping affects 1,750 properties.</li> </ul>
<p><b>Reasons for Gateway determination</b></p>	<p>On 10 August 2022, the Department issued a Gateway determination (<b>Attachment Gateway</b>), which determined that the planning proposal should not proceed for the following reasons:</p> <ol style="list-style-type: none"> <li>1) <i>The Department does not support the broad inclusion of locally significant and common vegetation communities in the context of Clause 6.4 Terrestrial biodiversity LEP map. The Department does not support the grouping of such communities with other communities containing more significant conservation value; unless demonstrably linking and enhancing areas of Commonwealth, State or Regionally significant tracts of vegetation.</i></li> <li>2) <i>The Planning Proposal is not supported by a suitable economic analysis to allow Council and the public to fully understand the impacts on homeowners and local businesses. It is noted that the expansion of vegetation communities proposed to be mapped will affect over 12,000 properties.</i></li> <li>3) <i>The Planning Proposal will have a significant effect on the application of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008, as well as complying development pathways within State Environmental Planning Policy (Housing) 2021. The weakening of this development pathway is not fully justified in light of the vegetation communities to be mapped.</i></li> <li>4) <i>The Department does not support the replacement of the definition of ‘Terrestrial biodiversity’, being a standard definition under the Standard Instrument – Principal Local Environmental Plan</i></li> <li>5) <i>Council’s intention to enhance tree protection throughout its Local Government Area should be sought through other methods without expanding vegetation communities typically mapped under Clause 6.4 – Terrestrial biodiversity of Hornsby LEP 2013. This could be through an expansion of Council’s existing Tree Preservation Order within Council’s Development Control Plan.</i></li> <li>6) <i>Considering the unsupported mapping criteria explained above, and the lack of sound justification, the Planning Proposal does not give effect to the North District Plan in accordance with Section 3.8 of the Environmental Planning and Assessment Act 1979.</i></li> </ol>

Details of the Department's Gateway assessment are provided in the Department's Gateway assessment report (**Attachment Gateway report**).

## Council's views

### Details of justification

On 14 September 2022, Council endorsed a Mayoral Minute regarding the Gateway determination to not proceed (**Attachment E**). Council has stated that the proposed amendments hold significant local and State strategic merit.

The Department has received a Gateway review request (**Attachment Form and Attachment Request**) from Council in response to the Gateway determination that the planning proposal (PP-2020-3920) should not proceed.

The Department's *Local Environmental Plan Making Guideline* states that if the Gateway determination is either to not proceed or to resubmit the planning proposal, the proponent or Council has 42 calendar days from notification to request a review of this determination. Council's Gateway review request was lodged on 10 October 2022, which had been 28 calendar days from the date of the Gateway determination (dated 30 August 2022). It is to be noted that issues arose around the creation of a Gateway review request on the planning portal, however the Department has continued to process this application as it was requested via email 10 October 2022.

The Department's reasons for refusing the proposal are stated in bold below. Council's response to each reason for refusal is summarised below.

**1. The Department does not support the inclusion of local and common communities**

Council's response:

Council considers that all vegetation, including local and common communities, have high biodiversity significance. Inclusion of local and common vegetation communities would enhance protection of vegetation and give an appropriate level of consideration during the assessment of proposed development. Council notes that there is no consistent approach to mapping communities within an LEP.

**2. The Department has found there is a lack of sound economic analysis supporting the proposal**

Council's response:

Council acknowledges The Department's concern that there is a lack of economic analysis, however, does not agree that those concerns warrant refusal of the planning proposal, and state that further economic analysis could be undertaken if a Gateway determination was issued to proceed.

**3. The Department has determined that the proposal will have a significant effect on the application of the Codes SEPP, and other complying development pathways. The weakening of these pathways is not justified in the context of the local and common communities to be mapped.**

Council's response:

Council acknowledges that the intent of the proposal is to prevent complying development on land that is mapped in the updated report. Council has stated that this will "ensure protection from development", which is a key priority for Hornsby Council.

Council argues that the impact on complying development should not prevent Council implementing its strategic intent to protect vegetation.

	<p><b>4. The Department does not support the replacement of standard definitions (Terrestrial Biodiversity to Environmentally Sensitive Land).</b>  <u>Council's response:</u>  Council has interpreted that complying development is not permitted on land mapped within its current 'Terrestrial Biodiversity' map under HLEP 2013. Council considers that locally significant and common vegetation communities should be classified as having high biodiversity significance, and mapped alongside Commonwealth, State and Regionally significant vegetation communities.</p> <p>Council mentions that 'abuse' of the complying development pathway has been publicised, and that this proposal provides more clarity to landowners.</p> <p><b>5. The Department has suggested that other methods for tree protection should be considered</b>  <u>Council's response:</u>  Council notes the other policies and strategies that can be utilised, but considers the Hornsby LEP as being the key instrument to ensure an appropriate amount of legislative weight is given when considering the vegetation that may be impacted by development.</p> <p><b>6. The Department has found that the proposal does not give effect to the North District Plan</b>  <u>Council's response:</u>  Council identifies that the Gateway determination does not provide specific priorities from the North District Plan that the proposal is inconsistent with.</p> <p>Council argues that there are priorities that provide strategic justification for advancing the planning proposal.</p> <p>The full justification is provided in <b>Attachment Request</b>.</p>																				
<p><b>Material provided in support of application / proposal</b></p>	<p>Council provided the following documents to support its Gateway determination review request:</p> <table border="1" data-bbox="336 1279 1422 1659"> <tr> <td><b>Attachment Form</b></td> <td>Gateway Determination Review Application Form</td> </tr> <tr> <td><b>Attachment Request</b></td> <td>Gateway Review Justification</td> </tr> <tr> <td><b>Attachment Cover</b></td> <td>Gateway Review Cover Letter</td> </tr> <tr> <td><b>Attachment Proposal</b></td> <td>Planning Proposal dated September 2020</td> </tr> <tr> <td><b>Attachment A</b></td> <td>Directors Report – 14 October 2020</td> </tr> <tr> <td><b>Attachment B</b></td> <td>General Meeting Minutes – 14 October 2020</td> </tr> <tr> <td><b>Attachment C</b></td> <td>Local Planning Panel Minutes 30 September 2020</td> </tr> </table> <p>For reference and consideration by the IPC, the following documents are also attached to this justification assessment report:</p> <table border="1" data-bbox="336 1798 1422 2033"> <tr> <td><b>Attachment Gateway</b></td> <td>Gateway determination issued by the Department – 30 August 2022</td> </tr> <tr> <td><b>Attachment Gateway report</b></td> <td>Gateway assessment report prepared by the Department</td> </tr> <tr> <td><b>Attachment ELA</b></td> <td>Vegetation mapping update report prepared by Eco Logical Australia – May 2017</td> </tr> </table>	<b>Attachment Form</b>	Gateway Determination Review Application Form	<b>Attachment Request</b>	Gateway Review Justification	<b>Attachment Cover</b>	Gateway Review Cover Letter	<b>Attachment Proposal</b>	Planning Proposal dated September 2020	<b>Attachment A</b>	Directors Report – 14 October 2020	<b>Attachment B</b>	General Meeting Minutes – 14 October 2020	<b>Attachment C</b>	Local Planning Panel Minutes 30 September 2020	<b>Attachment Gateway</b>	Gateway determination issued by the Department – 30 August 2022	<b>Attachment Gateway report</b>	Gateway assessment report prepared by the Department	<b>Attachment ELA</b>	Vegetation mapping update report prepared by Eco Logical Australia – May 2017
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<b>Attachment D</b>	Mayoral Minute – 11 December 2019
<b>Attachment E</b>	Mayoral Minute – 14 September 2022
<b>Attachment F</b>	Key Issues – Policy response – 25 May 2021
<b>Attachment G</b>	Letter to Council requesting Council to withdraw its proposal 2 March 2022
<b>Attachment H</b>	Letter from Mayor Ruddock to Minister Roberts – 4 April 2022
<b>Attachment I</b>	Council meeting options – 12 August 2020

## Assessment summary

<b>Department's assessment</b>	<p>The Department notes the justification provided by Council for the Gateway determination review. However, the Department's position remains unchanged and recommends that the planning proposal should not proceed. The key matters and reasoning behind this justification are considered below:</p> <ol style="list-style-type: none"> <li><b>1. The Department does not support the inclusion of local and common communities</b>  <u>The Department's response to Council:</u> <ul style="list-style-type: none"> <li>• Council has stated that mapping local and common vegetation communities as "Terrestrial Biodiversity" and renaming these "Environmentally Sensitive Land" would enhance their protection. The Department is has indicated that protection of existing vegetation, specifically local and common communities, is more appropriate through inclusion in Council's DCP.</li> <li>• The Department has formed the position that despite Council's intention to enhance tree protection, terrestrial biodiversity mapping within a standard instrument has never been a mechanism where all vegetation is mapped, and that the listing of local and common communities in the way proposed by Council does not align with the intention of terrestrial biodiversity mapping.</li> <li>• The Department has consistently applied vegetation mapping in recent times and offered alternative solutions to mapping such as mapping buffer areas.</li> <li>• The proposal also does not establish a sound argument to support the broadscale inclusion of local and common communities in a clause that is primarily used to identify more ecologically significant vegetation.</li> </ul> </li> <li><b>2. The Department has found there is a lack of sound economic analysis supporting the proposal</b>  <u>The Department's response to Council:</u> <ul style="list-style-type: none"> <li>• Council has stated that further economic analysis could be undertaken if a Gateway determination was issued to proceed. This underestimates the likely economic impact these changes will have to Hornsby residents and businesses.</li> <li>• It is anticipated that the consequences of this proposal could potentially have significant and widespread impacts, and even if this were the only issue with the proposal, it would be inappropriate to allow the proposal to proceed to Gateway before an economic analysis has been completed.</li> </ul> </li> <li><b>3. The Department has determined that the proposal will have a significant effect on the application of the Codes SEPP, and other complying development pathways. The weakening of these pathways is not justified in the context of the local and common communities to be mapped.</b></li> </ol>
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The Department's response to Council:

- Council's request states that this proposal will ensure protection from development and also argues that the impact on complying development should not prevent Council from implementing its strategic intent to protect vegetation.
- The Department is supportive of an update to Council's terrestrial biodiversity mapping, and acknowledges the intent to protect vegetation. However, the inclusion local and common vegetation communities, coupled with Council's intention to amend standard definitions and remove the application of complying development is not supported.
- Council was presented with options prior to the preparation of this planning proposal, one of which involved local and common communities being mapped but not having complying development pathways removed (**Attachment I**).
- This would ensure that trees are protected for vegetation communities with higher significance, but also allows for an added layer of consideration for local and common vegetation communities without the removal of a critical, cost-effective and diverse state development pathway that aids in the delivery of housing.

**4. The Department does not support the replacement of standard definitions (Terrestrial Biodiversity to Environmentally Sensitive Land).**

The Department's response to Council:

- Council has interpreted that complying development is currently not permitted on land mapped within its 'Terrestrial Biodiversity' map under HLEP 2013, and that the removal of complying development would limit the misuse of that development pathway.
- The Department is not supportive of the replacement of standard definitions and model clauses. These clauses provide certainty to landowners and developers across the state.
- The Department has offered to work with Council on the possibility of an additional map that includes local and common vegetation communities, and go through what terms and types of land that could be captured in that map, however Council has not accepted this offer.

**5. The Department has suggested that other methods for tree protection should be considered**

The Department's response to Council:

- Council considers the Hornsby LEP as being the key instrument to ensure an appropriate amount of legislative weight is given during development assessment.
- The Department notes that Council has other methods to protect trees from development, including Council's Tree and Vegetation Preservation sections within Hornsby Development Control Plan, and the possibility of a separate map to identify local and common species in Hornsby LEP.
- Notwithstanding that Council could also update the Commonwealth, State and Regionally significant vegetation communities mapping for the LGA.

**6. The Department has found that the proposal does not give effect to the North District Plan**

The Department's response to Council:



- The Department acknowledges that the intention of the proposal is to enhance the protection of vegetation throughout the LGA, and can be consistent with numerous objectives and priorities of the North District Plan.
- However, consistency with the North District Plan is reliant on accurate and appropriate information, including striking a balance between local values and state-led policies.
- Specifically, the Department has formed the view that the grouping of local and common communities with more significant vegetation is not appropriate for inclusion in the terrestrial biodiversity map, nor is it appropriate to remove the application of complying development for local and common communities.
- As stated previously in this report, it has never been the intent to incorporate these communities within a terrestrial biodiversity map in a standard LEP.
- The proposal may set a precedent for mapping of local and common communities to preclude complying development. A precedent would have significant impacts across the State, delaying the assessment of low-impact development proposals. This would undermine the intention of the Exempt and Complying Development Codes SEPP.
- If the proposal were to proceed, it would set a policy position within the Department whereby multiple Council's may seek to take the same approach. This could remove complying development for tens of thousands of property owners across the State.

#### Comments from Planning Policy

- The Gateway determination assessment involved obtaining comments from various policy sections of the Department, with the response at **Attachment F**. The Metro North team reached out to the Housing Policy and Codes teams to confirm that previous comments remained relevant.
- Housing Policy and the Codes team have confirmed previous comments from 25 May 2021 still stand, with Housing Policy adding the following comments:
  - The Gateway Determination Review Report prepared by Hornsby Council does not address the relationship between the proposed policy and the Housing SEPP.
  - Section 80 of the Housing SEPP specifies that the seniors housing provisions of the Housing SEPP do not apply on land described in Schedule 3 Environmentally sensitive land.
  - It is noted that Schedule 3 does not include land identified as 'terrestrial biodiversity' as environmentally sensitive land for the purposes of the Housing SEPP. However, changing the title of clause 6.4 of the Hornsby LEP 2013 to 'environmentally sensitive land' may create confusion regarding the application of the seniors housing provisions under the Housing SEPP, and is not supported.
  - The planning proposal seeks to group locally significant and common tree species with recognised commonwealth, state and regionally significant vegetation, by including all categories as 'terrestrial biodiversity' under clause 6.4 of the Hornsby LEP 2013. This will result in the exclusion of land containing locally significant or common trees from accessing the complying development pathway.
  - This is not supported, as it may unnecessarily impact on the ability to undertake certain diverse and affordable housing types as complying development under the Housing SEPP. The Housing SEPP allows certain development to be undertaken as complying development. This is an

	<p>important pathway as it facilitates the timely and cost-efficient delivery of housing.</p> <p><b>Recommendation</b>  The Department recommends that the planning proposal should not proceed.  The Department has been consistent in its approach and reiterates that there are opportunities for Council to collaborate with the Department on a new proposal that may be supported.</p>
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**COMMISSION'S RECOMMENDATION**

**Reason for review: A determination has been made that has imposed requirements (other than consultation requirements) or makes variations to the proposal that the proponent or council thinks should be reconsidered.**

<b>Recommendation</b>	<input type="checkbox"/>	The planning proposal should not proceed past Gateway.
	<input type="checkbox"/>	<input type="checkbox"/> no amendments are suggested to original determination.
	<input type="checkbox"/>	<input type="checkbox"/> amendments are suggested to the original determination.
	<input type="checkbox"/>	The planning proposal should proceed past Gateway in accordance with the original Determination.