

25 September 2024

Independent Pricing and Regulatory Tribunal
PO Box K35 Haymarket Post Shop
Sydney NSW 1240

Lodged online

Submission: Discussion Paper - 2023-24 Biodiversity Market Monitoring Review

Environmental Defenders Office (**EDO**) is a national community legal centre specialising in public interest environmental law, and our law reform experts have been long-engaged in biodiversity offsets policy analysis in NSW. Thank you for the opportunity to comment on the *Monitoring the NSW biodiversity credits market – Discussion Paper* dated 9 September 2024 (**Discussion Paper**). The Discussion Paper seeks input ahead of IPART's second-year review of the NSW biodiversity credits market (**the market**).

In response to the Discussion Paper and the ongoing monitoring of the market, our submission addresses two key issues:

- Overarching comments on the NSW biodiversity credits market
- Proposed changes to the Biodiversity Offsets Scheme (**BOS**)

As our comments are broad in nature, we have not responded to the specific questions set out in the Discussion Paper.

Overarching comments on the NSW biodiversity credits market

As highlighted in our submission to IPART in August 2023 ahead of its first-year report,¹ the market, as a component of the BOS, must contribute to the purpose of that Scheme including achieving no net loss, conserving biodiversity, and maintaining the diversity and quality of ecosystems and enhancing their capacity to adapt to change and provide for the needs of future generation. Indeed, this is the primary purpose of the market, which operates solely in the context of the *Biodiversity Conservation Act 2016* (**BC Act**) and the BOS.

Measures of success for the market must therefore be less about whether it is operating effectively in the usual way markets may be assessed, but whether the market is operating to **deliver biodiversity outcomes** as intended by the Scheme. As it undertakes its second-year review, IPART should continue to monitor the market with this lens and make recommendations accordingly. Any changes to how the

¹ See EDO, 'Submission to Monitoring the Biodiversity Credits Market in NSW - Issues Paper', 4 August 2023, https://www.ipart.nsw.gov.au/sites/default/files/cm9_documents/Online-Submission-Environmental-Defenders-Office-Name-suppressed-4-Aug-2023-091800442.PDF

market operates must not be at the expense of ecological integrity and must not drive further decline in biodiversity.

Proposed changes to the Biodiversity Offsets Scheme (BOS)

As noted in the Discussion Paper, the NSW Government has proposed major changes to the BOS with the introduction of the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024 (**the Bill**) to the NSW Parliament. IPART has indicated that its 2023-2024 Annual Report “*will consider any Government reforms under the NSW Plan for Nature, including the extent to which proposed actions address key findings and recommendations from our 2022-23 Annual Report*” (Discussion Paper, p 12).

To the extent that it assists, we **attach** a copy of our submission to the inquiry into the Bill (which provides an analysis of key elements of the Bill).

One of our key criticisms of the Bill is that it does not implement IPART’s recommendation to phase out the Biodiversity Conservation Fund pay-in option. The Bill does, however, attempt to put in place some safeguards intended to reduce over-reliance on this option - by amending section 6.30 of the BC Act to allow the regulations to prescribe circumstances in which a person must not satisfy a requirement to retire biodiversity credits by payments into the Fund. There is no further detail available at this stage on what limits may be included in the Regulations.

It is disappointing that the NSW Government has chosen not to implement IPART’s recommendation. The IPART Annual Report 2022-23 found:

Giving proponents the option to pay into the Biodiversity Conservation Fund means development proponents have a guaranteed supply of credits. Continuing to provide this option means biodiversity can be destroyed without offsetting, which is inconsistent with the purpose of the Scheme. It risks the extinction of species and ecosystems and undermines confidence in the Scheme.²

Nothing in the intervening year warrants any different finding – this statement still holds true, and **it is our strong view that IPART’s recommendation to phase out the Biodiversity Conservation Fund pay-in option is still appropriate.**

Our submission to the inquiry does engage with the proposal in the Bill and make recommendations for possible additional safeguards to the Biodiversity Conservation Fund pay-in option as interim measures but ultimately recommends that the Government introduce a legislative mechanism to phase out the option to pay into the Biodiversity Conservation Fund, as recommended by IPART.

The Discussion Paper also indicates that IPART will not seek to recommend further major changes in areas that are already undergoing change. However, we believe it should do so where it is of the view that the proposed changes are inadequate or fail to effectively implement IPART’s recommendations.

Should you have any questions regarding EDO’s submission, please contact Cerin Loane, Special Counsel, Nature on cerin.loane@edo.org.au.

Your sincerely
Environmental Defenders Office

Special Counsel, Nature

² IPART, Annual Report - 2022-23 Biodiversity Market Monitoring, December 2023
<https://www.ipart.nsw.gov.au/documents/annual-report/annual-report-2022-23-biodiversity-market-monitoring-december-2023>



Environmental
Defenders Office

**Submission on the Biodiversity Conservation
Amendment (Biodiversity Offsets Scheme) Bill 2024**

6 September 2024

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.


www.edo.org.au


Submitted to:

Parliament of New South Wales
Portfolio Committee No. 7 – Planning and Environment

Lodged [online](#).

For further information on this submission, please contact:


Head of Policy and Law Reform


Special Counsel, Nature

Acknowledgement

The EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations cultural heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as a person's right to freely determine their own political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the land.

A note on language

We acknowledge there is a legacy of writing about First Nations peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term First Nations peoples. We acknowledge that not all First Nations peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

First Laws is a term used to describe the laws that exist within First Nations. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. The EDO respects all First Laws and values their inherit and immeasurable worth. EDO recognises there are many different terms used throughout First Nations for what is understood in the Western world as First Laws.

Role of EDO

EDO is a non-Indigenous community legal centre that works alongside First Nations peoples around Australia and the Torres Strait Islands in their efforts to protect their Countries and cultural heritage from damage and destruction.

EDO has and continues to work with First Nations clients who have interacted with western laws, including litigation and engaging in western law reform processes.

Out of respect for First Nations self-determination, EDO has provided high-level key recommendations for western law reform to empower First Nations to protect their Countries and cultural heritage. These high-level recommendations comply with Australia's obligations under international law and provide respectful and effective protection of First Nations' Countries and cultural heritage.

EXECUTIVE SUMMARY

EDO welcomes the opportunity to make a submission on the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024. This Bill (together with other relevant reforms set out in the NSW Plan for Nature) is intended to deliver on the Labor Government's commitment to 'fix the Biodiversity Offsets Scheme' (BOS).

Generally, we support the intention of the Bill and welcome many of the proposed changes. Our submission highlights areas of the Bill that could be further strengthened and flags areas where further clarification and scrutiny is needed.

However, we stress upfront that the Bill does not go far enough to address key criticisms of the BOS. For example, the Bill does not do enough to:

- strengthen like-for-like requirements and limit variations rules and the use of indirect offsets (including in relation to other biodiversity conservation measures and payments into the Biodiversity Conservation Fund);
- set thresholds for where offsets should not be used; or
- embed in law a set of scientifically sound principles that govern the operation of the BOS.

It also leaves many important elements and policy settings to the Regulation.

This Bill alone is not enough to satisfy the Government's election commitment to fix the BOS. Further action including additional changes to the BOS, updates to the Regulations, changes to the Biodiversity Assessment Method and review of intersecting legislation will be needed if the Government intends to comprehensively address the full gamut of concerns regarding the integrity of the BOS and its ability to deliver net positive environmental outcomes.

Our submission makes recommendations for changes that should be incorporated into this Bill to move us further towards that goal.

SUMMARY OF RECOMMENDATIONS

Recommendation 1: Set clear thresholds for where offsets cannot be used. This should include:

- mandating the refusal of applications with serious and irreversible impacts for all development and activities; and
- adopting 'no-go' zones where offsets are not available and impacts cannot be allowed to occur.

Recommendation 2: Legislate a set of science-based principles that govern the operation of the BOS.

Recommendation 3: Embed the overarching net positive standard into the BC Act with a clear definition.

Recommendation 4: Amend proposed section 6.2A(1) to provide that the biodiversity offsets scheme must deliver net positive biodiversity outcomes in accordance with this section (rather than transition to net positive).

Recommendation 5: Legislate a mechanism for the no net loss standard to no longer apply once the net positive transition strategy has been given effect.

Recommendation 6: Adopt safeguards in relation to the establishment of principles, standards and requirements for applying the avoid, mitigate and offset hierarchy, including a ‘non-regression clause’ in the BC Act preventing principles and standards to be weakened over time.

Recommendation 7: Correct inconsistent terminology in proposed section 6.3A.

Recommendation 8: Explicitly reference the avoid, minimise and offset hierarchy in proposed sections 6.12 (c) and 6.13(b1).

Recommendation 9: Give proper effect to the avoid and minimise hierarchy by implementing protections for avoided areas. This could include:

- Designating avoided areas as no-go zones;
- Explicitly requiring decision-makers to avoid future impacts in areas identified on the avoid and mitigate register; or
- At a minimum, make it a mandatory requirement for decision-makers to consider the avoid and minimise register when making approval decisions.

Recommendation 10: Establish a legislative mechanism to phase out the option to pay into the Biodiversity Conservation Fund.

Recommendation 11: In the interim, introduce legislative provisions to require the Trust to refuse to accept an offset liability where it would not be possible to obtain like-for-like offset.

Recommendation 12: Clarify, and if needed restrict, the scope to which the regulations can allow for the BCT to apply money from the BCF in substitution for a BCF offset biodiversity credit.

Recommendation 13: Remove provisions from the BC Act that allow the Regulations to prescribe biodiversity conservation measures and other actions as alternatives to the retirement of credits.

Recommendation 14: If prescribed biodiversity conservation measures (including ‘other actions’) are to remain an element of the BOS, safeguards should be introduced into the Bill. This could include:

- Specifying in legislation limited measures that would qualify as biodiversity conservation measures, being only measures that will yield direct and timely environmental outcomes.
- Limiting the use of such measures to meet offset requirements.

Recommendation 15: Remove ‘discounting’ provisions from the BC Act (section 7.14(3) and section 7.15(3)).

Recommendation 16: If ‘discounting’ provisions are to be retained, the following safeguards should be introduced:

- Environment Minister concurrence should be required under section 7.15, with respect to Part 5 activities as well.

- Under s7.14 both the Minister for Planning and Minister for the Environment should be required to provide reasons for decisions.

Recommendation 17: If prescribed development is going to be exempt from the requirements of a BDAR, the BC Act should provide for such prescribed development to require an alternative environmental assessment (such as a species impact statement) if the test of significance is met.

Recommendation 18: In addition to applications by landholders, the BC Act should allow the regulation to provide a process for third-parties to make applications to the Environment Agency Head to amend the Biodiversity Values Map.

Recommendation 19: Define the term ‘exceptional circumstances’ with clear limitations.

Recommendation 20: Retain oversight by the Minister for the Environment or Environment Agency Head (e.g. by streamlining rather than removing consultation and concurrence requirements) in the case of exceptional circumstances or natural disasters.

Recommendation 21: Apply the BOS to all Part 5 development that triggers the BOS thresholds.

INTRODUCTION

EDO welcomes the opportunity to make a submission on the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024 (**Bill**). This Bill (together with other relevant reforms set out in the NSW Plan for Nature) is intended to deliver on the Labor Government’s commitment to ‘fix the Biodiversity Offsets Scheme’.

EDO has closely engaged as an expert stakeholder in the development and implementation of the NSW Biodiversity Offsets Scheme (**BOS**). We have long-standing evidence-based views that the BOS does not align with best practice science-based biodiversity offsetting, permits an inappropriate level of variation, and does not contain the ecologically necessary limits to prevent extinctions.

For background, we direct the Committee to previous EDO submissions and reports that set out our ongoing concerns with the BOS:

- *Submissions on the NSW Biodiversity Law Reform Packages, 2016-17*;¹
- *Submission on proposed changes to Biodiversity Assessment Method, October 2019*;²
- *Submission to the inquiry into the integrity of the NSW Biodiversity Offsets Scheme, September 2021*;³
- *Defending the Unburnt: Offsetting our way to extinction, November 2022*;⁴

¹ See: <https://www.edo.org.au/publication/submissions-on-the-nsw-biodiversity-law-reform-package-2016/>

² See: https://www.edo.org.au/wp-content/uploads/2019/11/191015_EDO_submission_to_draft_BAM_2019.pdf

³ See: <https://www.edo.org.au/publication/submission-to-the-inquiry-into-the-integrity-of-the-nsw-biodiversity-offsets-scheme/>

⁴ See: <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Offsetting-our-way-to-extinction.pdf>

- *Submission to the Statutory Review of the native vegetation provisions (Part 5A and Schedule 5A and Schedule 5B) of the Local Land Services Act 2013*, 19 December 2022;⁵ and
- *Submission to the Statutory Review of the Biodiversity Conservation Act 2016*, 21 April 2023.⁶

We also direct the Committee to a number of independent reviews of the BOS:

- In August 2022, a report by the NSW Audit Office of New South Wales found:⁷
 - “DPE has not effectively designed core elements of the Scheme”.
 - “Key concerns around the Scheme’s transparency, sustainability and integrity are yet to be fully resolved”.
 - There is a “risk that biodiversity gains made through the Scheme will not be sufficient to offset losses resulting from development, and that the DPE will not be able to assess the Scheme’s overall effectiveness”.
- In August 2023, the Independent Review of the BC Act (**Henry Review**) concluded that that legislative reforms to the scheme should be guided by a number of key principles, including that some impacts are unacceptable and cannot be offset, the scheme should be nature positive, and there should be greater certainty that impacts can be offset with like-for-like credits.⁸
- In December 2023, the NSW Independent Pricing and Regulatory Tribunal (**IPART**) published its annual report on the performance of the NSW biodiversity credits market in 2022-23 and made a number of recommendations including that the option for development proponents to pay into the Biodiversity Conservation Fund should be phased out and the Biodiversity Conservation Trust should develop an appropriate strategy for reducing the backlog of unacquitted credits in the Biodiversity Conservation Fund.⁹

Finally, we highlight this Committee’s previous inquiry into the integrity of the NSW BOS, which reported in November 2022.¹⁰ That inquiry found multiple problems with the scheme and made 19 recommendations, including reform of the BOS to ensure it meets best practice principles for biodiversity offsetting.

⁵ See: <https://www.edo.org.au/wp-content/uploads/2022/12/221219-LLS-Act-Review-EDO-submission.pdf>

⁶ <https://www.edo.org.au/wp-content/uploads/2023/04/230421-Biodiversity-Conservation-Act-Review-EDO-submission.pdf>

⁷ Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme*, 31 August 2022, available at <https://www.audit.nsw.gov.au/our-work/reports/effectiveness-of-the-biodiversity-offsets-scheme>

⁸ Independent Review of the Biodiversity Conservation Act 2016 – Final report, August 2023, <https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>

⁹ Independent Pricing and Regulatory Tribunal, ‘Biodiversity Market Monitoring Annual Report 2022–23’ December 2023, available at https://www.ipart.nsw.gov.au/sites/default/files/cm9_documents/Annual-Report-2022-23-Biodiversity-Market-Monitoring-December-2023.PDF

¹⁰ New South Wales Parliament, Legislative Council. Portfolio Committee No. 7 – ‘Integrity of the NSW Biodiversity Offsets Scheme’, Report no. 16, November 2022, <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2822/Report%20No.%2016%20-%20PC%207%20-%20Integrity%20of%20the%20NSW%20Biodiversity%20Offsets%20Scheme.pdf>

It is with the benefit of these previous reviews of the BOS that the Committee now comes to consider the Bill currently before it.

Generally, we support the intention of the Bill and welcome many of the proposed changes. Our submission highlights areas of the Bill that could be further strengthened and flags areas where further clarification and scrutiny is needed.

However, we stress upfront that the Bill does not go far enough to address key criticisms of the BOS, including many made by this Committee in the aforementioned inquiry. For example, the Bill does not do enough to:

- strength like-for-like requirements and limit variations rules and the use of indirect offsets (including in relation to other biodiversity conservation measures and payments into the Biodiversity Conservation Fund);
- set thresholds for where offsets should not be used; or
- embed in law a set of scientifically sound principles that govern the operation of the BOS.

It also leaves many important elements and policy settings to the Regulation.

Our submission responds to the Bill as follows:

Outstanding Issues

- **Additional safeguards for areas of high environmental value (red flags and/or no go zones)**
- **Legislated principles for biodiversity offsetting**

Response to Key Elements of the Bill

- **Transition to Net Positive**
- **Application of the ‘avoid, minimise and offset hierarchy’**
- **Changes to the Biodiversity Conservation Fund**
 - *Restrictions on payments into the BCF*
 - *Changes to the way the BCF can meet offset obligations*
- **Prescribed Biodiversity Conservation Measures**
- **Application of the BOS**
 - *Application of the BOS to Part 4 development – amending scheme entry thresholds*
 - *Exemptions for natural disasters and exceptional circumstances*
 - *Part 5 development*
- **New Registers**
- **Directions to accredited persons**
- **Other amendments**
- **Consequential and administrative amendments**

We understand that the Government is using this inquiry as the main process for public consultation on this Bill. For this reason, we include detailed feedback that could be addressed directly by Government-led amendments to the Bill. More broadly however, we welcome this Committee’s inquiry into the Bill and hope that through this process the Bill can be strengthened

to better respond to ongoing criticisms of the BOS and ensure the BOS delivers the environmental outcomes needed to ‘leave nature better off than we found it’.¹¹

OUTSTANDING ISSUES

In our response to the Bill, we highlight a number of opportunities to strengthen the proposed amendments in line with previous recommendations for reform and best practice (e.g. restricting prescribed biodiversity conservation measures, phasing out payments to the BCF and removing contentious ‘discounting’ provisions).

However, before we address the key elements of the Bill, we highlight two outstanding issues that are absent from the Bill entirely:

- Additional safeguards for areas of high environmental value (red flags and/or no go zones); and,
- Legislated principles for biodiversity offsetting.

Additional safeguards for areas of high environmental value (red flags and/or no go zones)

Biodiversity offsetting has become a prevalent feature of planning and development frameworks across Australia. It is often viewed, by governments and proponents, as a way of protecting the environment without restricting development. It essentially allows projects that might otherwise be restricted due to environmental impacts to move ahead. Concerningly, over time the environmental protections and ecological considerations in offsetting frameworks have been reduced to further facilitate development, moving away from best practice, with little regard to whether genuine environmental outcomes are being delivered.

Analysis of the BOS shows it is not delivering the environmental outcomes intended. Further, because the scheme has failed to set strict parameters on the use of offsets, based on ecological limits, we have a market that is not delivering environmental outcomes, a Fund that cannot acquit its offsets obligations and overreliance on indirect offset measures.

Offset schemes must recognise that there are ecological constraints to offsetting and some areas and entities are just not suitable for offsetting. This is particularly relevant to critical habitat and threatened species or communities that cannot withstand further loss.

The use of ‘red flags’ (such as the serious and irreversible impacts (**SAII**) safeguard in the *Biodiversity Conservation Act 2016 (BC Act)*) or ‘no go’ areas are essential to make it clear that there are certain matters in relation to which offsetting is not an appropriate strategy.

One simple change that could be made to the Bill to strengthen the existing SAII safeguard is to mandate the refusal of applications with SAII for all development and activities, not just Part 4 development (this would require changes to subsections 7.16(3) and (4) of the BC Act). This would be consistent with the previous recommendation of this Committee in its inquiry into the integrity

¹¹ ‘NSW Plan for Nature - NSW Government response to the reviews of the Biodiversity Conservation Act 2016 and the native vegetation provisions of the Local Land Services Act 2013’, p 3, <https://www.nsw.gov.au/departments-and-agencies/the-cabinet-office/resources/nsw-plan-for-nature>

of the BOS that “clear thresholds for where offsets should not be used are established, in order to protect threatened species and ecosystems that cannot be offset elsewhere”.¹²

Further, we must also identify and protect areas that are of such irreplaceable high value that offsets are not available and impacts cannot be allowed to occur. This will give clarity and certainty to project proponents. This is consistent with the findings of the Henry Review which found some impacts are unacceptable and cannot be offset, and such impacts should be identified as ‘no-go’ areas, where development cannot occur.¹³

Recommendation 1: Set clear thresholds for where offsets cannot be used. This should include:

- mandating the refusal of applications with serious and irreversible impacts for all development and activities; and
- adopting ‘no-go’ zones where offsets are not available and impacts cannot be allowed to occur.

Legislated principles for biodiversity offsetting

As highlighted in numerous EDO submissions (see above), any biodiversity scheme must be underpinned by best practice biodiversity offsetting principles, including that:

- Biodiversity offsets must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts
- Offsets must be based on the ‘like for like’ principle
- Legislation and policy should set clear limits on the use of offsets
- Indirect offsets must be strictly limited
- Offsetting must achieve benefits in perpetuity
- Offsets must be designed to improve biodiversity outcomes
- Offsets must be additional
- Offset arrangements must be legally enforceable
- Offset frameworks should build in mechanisms to respond to climate change and stochastic events

Recommendation 2 of this committee’s inquiry into the integrity of the BOS recommended that “the NSW Government define a set of scientifically sound principles that govern the operation of the Biodiversity Offsets Scheme, and ensure these are embedded in the Biodiversity Conservation Act 2016”. The Bill does not give effect to this recommendation.

Recommendation 2: Legislate a set of science-based principles that govern the operation of the BOS.

¹² New South Wales Parliament, Legislative Council. Portfolio Committee No. 7 – ‘Integrity of the NSW Biodiversity Offsets Scheme’, Report no. 16, November 2022,

<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2822/Report%20No.%2016%20-%20PC%207%20-%20Integrity%20of%20the%20NSW%20Biodiversity%20Offsets%20Scheme.pdf>

¹³ Independent Review of the Biodiversity Conservation Act 2016 – Final report, August 2023,

<https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>

RESPONSE TO KEY ELEMENTS OF THE BILL

The Offsets Amendment Bill proposes changes to the BOS as follows:

- Schedule 1 of the Bill proposes changes to the *Biodiversity Conservation Act 2016* (**BC Act**)
- Schedule 2 of the Bill proposes changes to State Environmental Planning Policy (Biodiversity and Conservation) 2021 (**Biodiversity and Conservation SEPP**).

Our submission references both clauses of the Bill and sections of the BC Act.

This section of our submission responds to the following key elements of the Bill:

- **Transition to Net Positive**
- **Application of the ‘avoid, minimise and offset hierarchy’**
- **Changes to the Biodiversity Conservation Fund**
 - *Restrictions on payments into the BCF*
 - *Changes to the way the BCF can meet offset obligations*
- **Prescribed Biodiversity Conservation Measures**
- **Application of the BOS**
 - *Application of the BOS to Part 4 development – amending scheme entry thresholds*
 - *Exemptions for natural disasters and exceptional circumstances*
 - *Part 5 development*
- **New Registers**
- **Directions to accredited persons**
- **Other amendments**
- **Consequential and administrative amendments**

Transition to Net Positive

Overview

The NSW Plan for Nature commits to amend the BC Act to require the scheme to transition to overall ‘net positive’ outcomes over time, going beyond the current ‘no net loss’ standard. ‘No net loss’ is currently implemented via section 6.7(3)(b) of the BC Act which provides that when establishing the Biodiversity Assessment Method (BAM), the Minister is to adopt a standard that will result in no net loss of biodiversity in NSW.

The commitment to replace the ‘no net loss’ standard with a ‘net positive’ standard is generally consistent with the recommendations of the Independent Review of the BC Act (**Henry Review**)¹⁴ and previous recommendations made by EDO.

Analysis

Given the Government has made a policy decision to transition the BOS to a ‘net positive’ standard, it is somewhat unclear on the face of the Bill why amendments cannot be made at this

¹⁴ State of NSW and the Department of Planning and Environment, ‘Independent Review of the Biodiversity Conservation Act 2016 – Final Report’, August 2023, <https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>

time to simply implement this decision rather than require a transition strategy. The Minister's second reading speech indicates that a strategy is needed to set out how the scheme will transition to net positive, including targets, time frames and actions. We understand this is to allow further consideration of various issues in transitioning the scheme, including those raised by the Henry Review (e.g. setting a percentage figure for net gain).

Our key concerns with this approach are that:

- Net positive is not defined. It should be defined in the Bill so that there is a clear and indisputable legislative standard for the BOS.
- It will likely require future amendment of the BC Act to clearly embed the net positive standard into the BOS (nothing in the proposed amendments - other than the requirement to make a transition strategy - appears to do that now, for example, there is no proposal to replace no net loss in section 6.7(3)(b) of the BC Act).

If it is agreed a transition strategy is required (to set relevant targets, timeframes and actions) then the Bill can allow for that to happen, but it should as starting point clearly embed the net positive standard into the legislation at this time. We are generally of the view that the proposed amendments for developing a transition strategy are appropriate, noting they include a requirement for public consultation on the making (and amendment) of the transition strategy and that the strategy be made as soon as practicable after the commencement of the provisions.

Suggested improvements

One option for improving the Bill would be to explicitly embed the overarching net positive standard in the BC Act now with a clear definition, while allowing for a transition strategy to be developed that provides further detail on transitioning the scheme to meet that standard.

This could include:

- Adding a new subsection to 6.2 that provides that a key element of the BOS is the achievement of net positive outcomes (as implemented by the transition strategy prepared under 6.2A);
- A definition of net positive;
- Legislating a mechanism for the no net loss standard to no longer apply once the transition strategy has been given effect; and,
- Amend proposed section 6.2A(1) to provide that the biodiversity offsets scheme must deliver net positive biodiversity outcomes in accordance with this section (rather than transition to net positive). This should still allow for the process of developing a transition strategy to proceed.

Recommendation 3: Embed the overarching net positive standard into the BC Act with a clear definition.

Recommendation 4: Amend proposed section 6.2A(1) to provide that the biodiversity offsets scheme must deliver net positive biodiversity outcomes in accordance with this section (rather than transition to net positive).

Recommendation 5: Legislate a mechanism for the no net loss standard to no longer apply once the net positive transition strategy has been given effect.

Application of the ‘avoid, minimise and offset hierarchy’

Overview

The proposed Bill makes a series of amendments aimed at strengthening the legislative requirements for properly applying the ‘avoid, mitigate and offset hierarchy’ as part of the BOS.

Analysis

In general, EDO supports changes to better embed the ‘avoid, mitigate and offset hierarchy’ into the BOS. This aligns with best practice. However, we flag the following areas concerns and suggested improvements:

Principles, Standards and requirements for applying the avoid, mitigate and offset hierarchy

Proposed section 6.16 (1A) allows for the regulations to make provision about the following:

- principles that apply in relation to the taking, or proposed taking, of genuine measures to avoid and minimise impacts;
- standards (assessment standards) against which genuine measures to avoid and minimise impacts are to be assessed; and
- requirements for biodiversity assessment reports to include information demonstrating how those assessment standards have been met.

We agree that principles and standards can help in the application of the avoid, mitigate and offset hierarchy and suggest that these could potentially be included in the Bill itself rather than being left to the Regulation. Alternatively, we recommend that the Bill include a non-regression clause preventing principles and standards to be weakened over time.

Recommendation 6: Adopt safeguards in relation to the establishment of principles, standards and requirements for applying the avoid, mitigate and offset hierarchy, including a ‘non-regression clause’ in the BC Act preventing principles and standards to be weakened over time.

Inconsistent drafting

We note:

- When referring to the hierarchy, the Bill adopts the term ‘genuine measures’ in most instances, but the term ‘reasonable measures’ in section 6.3A (which is the key provision which defines the hierarchy principle). Consistent terminology should be used.
- There also inconsistency between the terms ‘steps’ and ‘measures’ in 6.3A.

These inconsistencies should be resolved before the Bill is passed.

Recommendation 7: Correct inconsistent terminology in proposed section 6.3A.

Consistent application of avoid, minimise and offset hierarchy

Sections 6.12 and 6.13 should be amended to specifically reference the avoid, minimise and offset hierarchy set out in section proposed 6.3A to ensure proper application of the hierarchy. For example (proposed new text underlined):

Section 6.12 Biodiversity development assessment report

Omit section 6.12(c). Insert instead—

(c) sets out and assesses, in accordance with the biodiversity assessment method and the regulations—

- (i) the genuine measures the proponent of the proposed development, activity or clearing has taken to avoid and minimise in accordance with the ***avoid, minimise and offset hierarchy*** the impact of the proposed development, activity or clearing on biodiversity values of the land, and
- (ii) the genuine measures the proponent of the proposed development, activity or clearing proposes to take to avoid and minimise in accordance with the ***avoid, minimise and offset hierarchy*** the impact of the proposed development, activity or clearing on biodiversity values of the land...

Section 6.13 Biodiversity certification assessment report

Insert after section 6.13(b)—

(b1) sets out and assesses, in accordance with the biodiversity assessment method and the regulations—

- (i) the genuine measures that the applicant for the proposed biodiversity certification has taken to avoid and minimise in accordance with the ***avoid, minimise and offset hierarchy*** the impacts on biodiversity values of the actions to which the biodiversity offsets scheme applies on the land proposed for biodiversity certification, and
- (ii) the genuine measures that the applicant for the proposed biodiversity certification proposes to take to avoid and minimise in accordance with the ***avoid, minimise and offset hierarchy*** the impacts on biodiversity values of the actions to which the biodiversity offsets scheme applies on the land proposed for biodiversity certification...

<p>Recommendation 8: Explicitly reference the avoid, minimise and offset hierarchy in proposed sections 6.12 (c) and 6.13(b1).</p>

Avoid and minimise register

We welcome the proposal to establish an avoid and minimise register as a way of improving transparency. However, we note there is currently no proposal to link this register to future decision making; that is, there is no obligation on decision makers to consider or continue to avoid areas listed on the register when making future decisions.

To give proper effect to the avoid and minimise hierarchy, areas that have been avoided for one development should continue to be avoided (otherwise the hierarchy has no real long-term application). This could be given effect by either:

- Designating avoided areas as no-go zones;
- Requiring decision-makers to avoid future impacts in areas identified on the register; or
- At a minimum, make it a mandatory requirement for decision-makers to consider the avoid and minimise register when making approval decisions.

Recommendation 9: Give proper effect to the avoid and minimise hierarchy by implementing protections for avoided areas. This could include:

- Designating avoided areas as no-go zones;
- Explicitly requiring decision-makers to avoid future impacts in areas identified on the avoid and mitigate register; or
- At a minimum, make it a mandatory requirement for decision-makers to consider the avoid and minimise register when making approval decisions.

Changes to the Biodiversity Conservation Fund

Overview

The BC Act currently allows for proponents to satisfy offsets obligations by making payments into the Biodiversity Conservation Fund (**BCF**). The Biodiversity Conservation Trust (**BCT**) is then responsible for securing biodiversity offsets on proponents' behalf. This process has been criticised as another form of indirect offset, allowing payment into the Fund in lieu of genuine, upfront offsets. While it is intended that the offset obligation will be acquitted by the BCT, consistent concerns have been raised about the delay in securing offsets (a proponent is able to act on a development approval once a payment is made as it has fulfilled its obligations), and the inability of the BCT to find suitable offsets in some instances.

The Bill makes a number of changes to how the Biodiversity Conservation Fund will operate:

- **Restrictions on payments into the BCF:** Changes to section 6.30 of the BC Act will allow for the regulations to prescribe circumstances in which a person must not satisfy a requirement to retire biodiversity credits by payments into the Fund. Consequential changes are made throughout the Bill based on this primary changes.
- **Changes to the way the BCF can meet offset obligations:** Changes to section 6.31 make changes to the way the BCT is able to use the BCF to meet offset obligations. Most notably, it introduces a new requirement for the BCT to meet its obligations in relation to each BCF offsets biodiversity credit within 3 years of the relevant amount having been deposited into the Fund, otherwise the Trust must enter into an agreement with the Minister about how the Trust will meet its obligations.

Analysis

Payments into the Fund

The ability for a proponent to discharge its offsets obligations by making a payment into the BCF is a widely criticised element of the BOS. Notably:

- In its Final Report on the integrity of the BOS, this Committee previously reported that:

Many stakeholders to this inquiry were concerned about the possibility the Trust may accept developers' payments into the Biodiversity Conservation Fund, but subsequently be unable to obtain the right type of credits to discharge the associated offset obligations. Where suitable credits are not sourced quickly, development impacts can occur before offsets are secured. Additionally, concerns were raised about the level of flexibility provided to the Trust in the type of credits it can acquire, as the Trust does not have to adhere to the like-for-like principle. Further, there is no statutory timeframe for the Trust to acquit its offset obligations.¹⁵

- In its audit of the effectiveness of the BOS, the NSW Audit Office found that credit supply issues create a risk that the BCF will not be able to continue to routinely acquit credits on a like-for-like basis.¹⁶
- IPART found that “The Fund pay-in option is popular amongst proponents... However, there is evidence that this option has allowed development to occur at the expense of establishing a well-functioning credits market and realising biodiversity outcomes”.¹⁷ It ultimately recommended that the option to pay into the BCF should be phased out.

The Bill does not implement IPART’s recommendation to phase out the option to pay into the BCF. Given the widespread concerns around the BCF being a problematic element of the BOS, this is disappointing.

The Bill does, however, attempt to put in place some safeguards intended to reduce over-reliance on this mechanism – by amending section 6.30 to allow the regulations to prescribe circumstances in which a person must not satisfy a requirement to retire biodiversity credits by payments into the Fund. There is no further detail on what limits may be included in the Regulations, but generally this tool to impose additional safeguards is supported.

In terms of how the Regulations could operate, based on our discussions with the NSW Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) we understand that the intention is not to stop a payment into the fund outright in certain circumstances (e.g. where like-for-like is not available), but rather to require the proponent to look for credits on the

¹⁵ New South Wales Parliament, Legislative Council, Portfolio Committee No. 7 – ‘Integrity of the NSW Biodiversity Offsets Scheme’, Report no. 16, November 2022, <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2822/Report%20No.%2016%20-%20PC%207%20-%20Integrity%20of%20the%20NSW%20Biodiversity%20Offsets%20Scheme.pdf>

¹⁶ Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme*, 31 August 2022, available at <https://www.audit.nsw.gov.au/our-work/reports/effectiveness-of-the-biodiversity-offsets-scheme>

¹⁷ Independent Pricing and Regulatory Tribunal, ‘Biodiversity Market Monitoring Annual Report 2022–23’ December 2023, available at https://www.ipart.nsw.gov.au/sites/default/files/cm9_documents/Annual-Report-2022-23-Biodiversity-Market-Monitoring-December-2023.PDF

market first (presumably to stop this mechanism being used as the default, primary mechanism for offsets). This is supported.

However, we recommend that the Regulations should clearly identify types of credit obligations that cannot be fulfilled via payment into the Fund – particularly in circumstances where it is clear that an entity is so scarce that a suitable offset would not be available. This could provide a feedback loop which would allow the BCT to limit the acceptance of payments in circumstances where an obligation cannot be fulfilled, addressing the clear problem that has been identified at present with the BCT not in a position to acquit its offset obligations.

Using the Regulations in this way would be generally consistent with the previous recommendation of this Committee:

Recommendation 5 – That the Biodiversity Conservation Trust:

- *urgently implement an application and review process for developer payments into the Biodiversity Conservation Fund to ensure proponents have exhausted all other private market avenues prior to paying into the Fund, and*
- *in the event credit supply is unavailable on the market, have a process to demonstrate that genuine like-for-like offset credits will be available, and there is a plan to bring those credits online, prior to receiving payments.*

A complimentary safeguard would be to enable the Trust to refuse to accept an offset liability where it would not be possible to obtain like-for-like offset.

Recommendation 10: Establish a legislative mechanism to phase out the option to pay into the Biodiversity Conservation Fund.

Recommendation 11: In the interim, introduce legislative provisions to require the Trust to refuse to accept an offset liability where it would not be possible to obtain like-for-like offset.

Changes to the way the BCF can meet offset obligations

The Bill also makes changes (to section 6.31) intended to provide greater certainty around the ability of the BCT to acquit its offsets obligations. Specifically, the proposed changes will require the Trust to meet its obligations in relation to each BCF offset biodiversity credit within 3 years of the relevant amount having been deposited into the Fund, otherwise the Trust must enter into an agreement with the Minister about how the Trust will meet its obligations.

While it is promising that the Bill is attempting to address ongoing concerns about the BCT's ability to acquit its offsets obligations, it is unclear on the face of the provisions if the BCF will be able to adopt alternative (and less robust) means of fulfilling its obligations after the three-year period (e.g. is it the intention of the Government to create alternative means in the Regulation - as allowed by section 6.31). Further detail on how these changes will be used in practice would assist. At a minimum, the Bill should clarify, and if needed restrict, the scope to which the regulations can allow for the BCT to apply money from the BCF in substitution for a BCF offset biodiversity credit.

Recommendation 12: Clarify, and if needed restrict, the scope to which the regulations can allow for the BCT to apply money from the BCF in substitution for a BCF offset biodiversity credit.

Prescribed Biodiversity Conservation Measures

Overview

The Bill proposes amendments to sections 6.2 and 6.4 and a new 6.29A to allow for a person to undertake ‘prescribed biodiversity conservation measures’ as an alternative to a requirement to retire biodiversity credits.

Analysis

Our understanding is that these changes are intended to clarify current policy and move certain aspects of the legislation to the Regulation. However, most notably, the Bill continues to allow for ‘prescribed biodiversity conservation measures’, including ‘other actions’ and payments to the BCF (see above), as an alternative to the retirement of biodiversity credits.

This aspect of the BOS has been criticised as it inconsistent with the fundamental principle of ‘like-for-like’ which should underpin best practice offsetting and inconsistent with the recommendation of this Committee that ‘indirect offsets available under the scheme are reduced, and, where [indirect offsets do] occur, the transparency around this mechanism is increased’. We note potential differences in opinion as to whether an available biodiversity conservation measure can be described as ‘direct’ or ‘indirect’. We use the term ‘indirect’ here to mean any biodiversity conservation measures that is not the retirement of biodiversity credits.

The Bill makes no attempt to rectify this key flaw of the BOS – even reducing transparency by deferring all substantial detail about ‘other actions’ the Regulation (by the removal of s6.4(3)). There is no limitation on what the Regulations may prescribe as ‘biodiversity conservation measures’ or ‘other actions’ and no limits on the use of biodiversity conservation measures that are not the retirement of credits to fulfil offset requirements.

This is deeply disappointing, and it is difficult to see how the Government has met its election commitment to ‘fix the biodiversity offsets scheme’ if it has failed to address this significant flaw in the BOS.

In order to bring the BOS in line with best practice, the Bill should remove provisions that allow for the Regulations to prescribe biodiversity conservation measures and other actions; only allowing for offset obligations to be fulfilled through the retirement of like for like credits.

If prescribed biodiversity conservation measures (including ‘other actions’) are to remain an element of the BOS, safeguards should be introduced into the Bill. This should include:

- Specifying in legislation limited measures that would qualify as biodiversity conservation measures, being only measures that will yield direct and timely environmental outcomes.

- Limiting the use of such measures to meet offset requirements. For example, both the Federal EPBC Act Environmental Offsets Policy¹⁸ and Queensland Environmental Offsets Policy¹⁹ cap the use of indirect offsets to 10% (that is, only 10% of offsets obligations can be met using indirect offsets).

Recommendation 13: Remove provisions from the BC Act that allow the Regulations to prescribe biodiversity conservation measures and other actions as alternatives to the retirement of credits.

Recommendation 14: If prescribed biodiversity conservation measures (including ‘other actions’) are to remain an element of the BOS, safeguards should be introduced into the Bill. This could include:

- Specifying in legislation limited measures that would qualify as biodiversity conservation measures, being only measures that will yield direct and timely environmental outcomes.
- Limiting the use of such measures to meet offset requirements.

Ministerial concurrence for ‘discounting’ offset requirements

Overview

Provisions in the BC Act currently allow for certain decision-makers to ‘vary’ or ‘discount’ the number and class of biodiversity credits required to be retired by a proponent, for example:

- Section 7.14(3) allows the Minister for Planning to discount credit obligations for state significant development and state significant infrastructure.
- Section 7.15(3) allows a determining authority to discount credit obligations for Part 5 development (that has opted into the BOS).

The Bill proposes a new requirement under section 7.14 for the Minister for Planning to obtain the concurrence of the Minister for the Environment if it is proposed to reduce in any way then number of biodiversity credits of one or more classes required to be retired (for state significant development and state significant infrastructure).

It appears the Bill does not create an equivalent concurrence process for Part 5 development despite section 7.15(3) allowing a determining authority to discount credits under that section.

Analysis

EDO has consistently raised concerns that the ‘discounting’ provisions in sections 7.14 and 7.15 of the BC Act should be removed, as they undermine the integrity of the BOS. There are no parameters around the exercise of this discretion, including no requirement that the decision be science-based. We maintain our position on this.

However, if the ‘discounting’ provisions are to remain the introduction of concurrence requirements is a much-needed safeguard. We submit that similar provisions should be added to

¹⁸ <https://www.dcceew.gov.au/environment/epbc/publications/epbc-act-environmental-offsets-policy>

¹⁹ https://www.des.qld.gov.au/policies?a=272936:policy_registry/envoff-offsets-policy.pdf

section 7.15, requiring the Minister for the Environment’s concurrence in the case of Part 5 activities as well, given discounting is available under s7.15. We also suggest that under s7.14 both the Minister for Planning and Minister for the Environment be required to provide reasons for decisions (consistent with the requirement for Part 5 determining authorities in section 7.15(4)) of the BC Act).

Recommendation 15: Remove ‘discounting’ provisions from the BC Act (section 7.14(3) and section 7.15(3)).

Recommendation 16: If ‘discounting’ provisions are to be retained, the following safeguards should be introduced:

- Environment Minister concurrence should be required under section 7.15, with respect to Part 5 activities as well.
- Under s7.14 both the Minister for Planning and Minister for the Environment should be required to provide reasons for decisions.

Application of the BOS

The Bill proposes to make changes to how the BOS applies to certain local development applications.

The Minister, in her second reading speech, stated:

Ken Henry made several recommendations that considered how the scheme could apply more reasonably to local development. The bill, through new section 7.2 (3), will allow for scheme entry thresholds to be revised through subsequent regulatory amendments so we can reduce the regulatory burden on lower impact local development, including in regional areas. It is important for the scheme to apply sensibly, especially in regional areas. I note the many mayors who have come to talk to me in relation to the matter. We will consider these changes in consultation with local government and with communities. The bill, through new sections 7.7 (3) and (4), 7.11 (2A) (a), 7.16 (2A) (b) and 7.17 (2) (c) (ii), introduces a new power that enables the Minister for the Environment to provide exemptions from the scheme for local development in exceptional circumstances or in response to natural disasters.

This section of our submission considers:

- Application of the BOS to Part 4 development – amending scheme entry thresholds (proposed changes to s 7.2 and 7.4)
- Exemptions for natural disasters and exceptional circumstances (proposed changes to s 7.7)
- Part 5 development (not addressed by the Bill).

Application of the BOS to Part 4 development – amending scheme entry thresholds

Overview

The Bill proposes changes that will affect scheme entry requirements, meaning that the BOS will not apply for certain development approval applications. Specifically:

- Proposed amendments to section 7.2 allow the regulations to prescribe particular Part 4 development under the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) as not likely to significantly affect threatened species or ecological communities within the meaning of the Act (**test of significance**).
- Proposed amendments to section 7.4 enabling the regulations to provide for landholder-initiated biodiversity values map review process (s 7.4),

Analysis

Regulations to override the ‘test of significance’

The ‘test of significance’ is a long-standing feature in NSW environment and planning law used to determine whether a proposal is likely to significantly affect threatened species or ecological communities and relevant environmental assessment requirements. It is used as a ‘trigger’ as to whether the BOS applies to Part 4 development.

The amendment to 7.2 appears to remove the ‘test of significance’ as a trigger for any Part 4 development prescribed in the Regulation. We understand further consideration will also be given to other BOS triggers (e.g. area threshold and the Biodiversity Values Map) as the Regulations are developed.

While the Minister’s rationale for this change is to reduce regulatory burden on lower impact local development, there does not appear to be any restrictions on the type of Part 4 development that can be prescribed in the Regulations. This runs the risk that the Regulation could be used to ‘override’ the test of significance more broadly. While a proposal may be picked up by one of the BOS threshold triggers (e.g. area threshold and the Biodiversity Values Map), there is still a risk that some proposals that may have impacts will slip through the cracks if the ‘test of significance’ does not apply. The consequence of this is that it will not be subject to specific environmental assessment requirements, other than the general requirements for a consent authority to consider environmental impacts under s 4.15 of the EP&A Act. The test of significance has been used as a tool for ensuring significant impacts on threatened species and ecological communities are properly assessed and turning it off entirely without any ‘stop-gap’ seems excessive.

If the Minister is concerned about the regulatory burden of the BOS, an alternative could be for the Bill to provide that for certain prescribed development a BDAR is not required (and the BOS does not apply) but that an alternative environmental assessment (such as a species impact statement) is required if the test of significance is met. This would be consistent with the previous requirements for Part 4 development (see former s78A of the EP&A Act) and the current requirements for Part 5 development (that does not opt in to the BOS).

Recommendation 17: If prescribed development is going to be exempt from the requirements of a BDAR, the BC Act should provide for such prescribed development to require an alternative

environmental assessment (such as a species impact statement) if the test of significance is met.

Landholder review of Biodiversity Values Map

One other proposed change that will affect the application of BOS thresholds is proposed new section 7.4(4) which provides that the regulations may make provision about applications by landholders to the Environment Agency Head to amend the Biodiversity Values Map. While the provision envisages that the Regulation could provide for consultation and the publication of decisions on applications, this is not guaranteed. The Bill could be amended to provide that the Regulation must provide for this if any such provisions are made.

Further, to counter any perception that this change favours proponents of development over the environment or public interest, consideration should be given to providing an equivalent process for third parties to request amendments to the Biodiversity Values Map. For example, local environment groups have significant knowledge about their local areas and are well-placed to pick up any errors in the map or identify areas that should be included on the map.

Recommendation 18: In addition to applications by landholders, the BC Act should allow the regulation to provide a process for third-parties to make applications to the Environment Agency Head to amend the Biodiversity Values Map.

Exemptions for natural disasters and exceptional circumstances

Overview

As noted above, the Bill proposes a new power that enables the Minister for the Environment to provide exemptions from the BOS for local development in exceptional circumstances or in response to natural disasters – namely a BDAR will not be required (see proposed changes to section 7.7) and consultation with or concurrence of the Minister for the Environment is not required to be obtained if the development is likely to significantly affect threatened species (see proposed changes to sections 7.11 and 7.12).

Analysis

Exceptional circumstances not defined

The Bill does not define or seek to limit what could constitute exceptional circumstances. While the Bill does include some safeguards (such as requirements for the Minister to set out reasons for making the order, including the Minister’s consideration of the facilitation of ecologically sustainable development) – the power is quite broad. The NSW Plan for Nature and Minister’s second reading speech provide no further indication as to the type of circumstances the Government has intended this new power to. As drafted, the new power has the potential to be used to exempt certain developments or industries from the BOS.

Recommendation 19: Define the term ‘exceptional circumstances’ with clear limitations.

Safeguards for the environment

There does not appear to be any additional environmental assessment requirements or environmental protections put in place in circumstances where the BOS is exempt from applying due to natural disasters or exceptional circumstances. While we understand the rationale in wanting to help communities build back after a natural disaster, it is not just communities that are affected by these types of events. Threatened species, ecological communities and ecosystems are also greatly affected. In 2019-2020 bushfires burnt over 5.52 million hectares of land in NSW,²⁰ impacting the habitat of more than 293 threatened animals and 680 threatened plants.²¹ Protecting remaining and recovering areas is critical for securing the future of many threatened species, sustaining important ecosystem services and helping impacted ecosystems and landscapes to recover post-disaster. EDO has made the case that our laws need to be able to respond effectively to natural disasters to ensure adequate protection for wildlife and ecosystems.²² Simply ‘switching off’ key biodiversity assessment and impact mitigation measures runs counter to that argument. We note if the scheme is ‘switched off’ then:

- the SAIL safeguard does also not apply to affected development; and,
- the Bill proposes to remove existing consultation and concurrence requirements under sections 7.11 and 7.12 for development is likely to significantly affect threatened species.

If the BOS is ‘switched off’ in these circumstances, there must still be safeguards in place to ensure that impacts on threatened species and ecological communities are adequately considered. Retaining some level of oversight by the Minister for the Environment or Environment Agency Head (e.g. by streamlining rather than removing consultation and concurrence requirements in the case of exceptional circumstances or natural disasters as currently proposed could be one way to achieve this).

Recommendation 20: Retain oversight by the Minister for the Environment or Environment Agency Head (e.g. by streamlining rather than removing consultation and concurrence requirements) in the case of exceptional circumstances or natural disasters.

Part 5 development

Overview

Currently, the BOS is not mandated for Part 5 activities (being activities regulated under Part 5 of the EP&A Act, other than State significant infrastructure. A proponent of Part 5 development may elect to ‘opt-in’ and apply the BAM.

The Bill does not propose any changes to how the BAM applies to Part 5 development.

²⁰NSW Independent Bushfire Inquiry, *Final Report of the NSW Bushfire Inquiry*, 31 July 2020, available at <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/NSW-Bushfire-Inquiry-1630/Final-Report-of-the-NSW-Bushfire-Inquiry.pdf>

²¹ See NSW Department of Planning, Industry and Environment, *Understanding the effects of the 2019–20 fires*, available at <https://www.environment.nsw.gov.au/topics/parks-reserves-and-protected-areas/fire/park-recovery-and-rehabilitation/recovering-from-2019-20-fires/understanding-the-impact-of-the-2019-20-fires>

²² See EDO, ‘Defending the Unburnt - Wildlife can’t wait: Ensuring timely protection of our threatened biodiversity’, November 2022, <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Wildlife-cant-wait.pdf>

Analysis

The Independent Review of the BC Act noted that the process for Part 5 activities has resulted in inconsistent biodiversity outcomes and recommended that the BOS be applied to Part 5 activities (in the usual way, where they meet the BOS thresholds).²³ In the NSW Plan for Nature the Government has indicated that it would give further consideration to this recommendation.

Recommendation 21: Apply the BOS to all Part 5 development that triggers the BOS thresholds.

New Registers

Overview

The Bill proposes to introduce new provisions into section 9.7 of the BC Act requiring new public registers to be established, as a way of improving transparency. The new registers must record:

- decisions to approve or modify development, activity or clearing that is likely to have serious and irreversible impacts on biodiversity values (**SAll decision register**);
- measures for avoiding and minimising impacts on biodiversity values set out in BDARs and conditions of development consents and approvals (**avoid and minimise register**);
- approved offsets obligations and progress towards meeting these obligations (**offsets obligations register**); and,
- orders made by the Minister to exempt particular development applications from the BOS in connection with natural disasters or other exceptional circumstances (**exemptions register**).

Analysis

In general, we welcome establishment of new registers as a way of improving transparency around the BOS.

As raised earlier in our submission, we note there is currently no proposal to link the avoid and mitigate register to future decision making; that is, there is no obligation on decision makers to consider or continue to avoid areas listed on the register when making future decisions. We have made recommendations above for how the Bill might be able to do that, to better give effect to the give proper effect to the avoid and minimise hierarchy.

We also note that if our recommendations to strengthen SAll provisions (by mandating refusal of SAll for state significant development, state significant infrastructure and Part 5 activities) are implemented, the need for the SAll register would be redundant.

²³ Independent Review of the Biodiversity Conservation Act 2016 – Final report, August 2023, <https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>

Directions to accredited persons

Overview

The Bill introduces new powers that allow the Minister for the Environment to issue directions to accredited persons in relation to the preparation or modification of biodiversity assessment reports. We understand that this is proposed to address problems encountered in practice arising from disagreements about the BOS and Biodiversity Assessment Method (**BAM**) are to be applied. This mechanism allows the Minister to clarify and direct accredited persons on the proper application of the scheme.

Analysis

In general, we support this proposed change as a way of ensuring consistent application of the BAM. We note that the key change giving effect to this provision is proposed new s 6.10A and there are subsequent amendments to the BC Act made elsewhere by the Bill (e.g. [6] (s5.8), [10] 5.11(7)), [26] (s6.14), [27] (s6.15), [35] (s7.1), [56] (s8.1).

Other amendments

Overview

The Bill makes a number of other amendments that provide for

- **Staged retirement of credits** - Schedule 1[46] and [47] (s 7.13): The Bill amends section 7.13 to provide that the consent to an application for development consent that provides for the staged development of a site may provide for a corresponding staged retirement of biodiversity credits.
- **Transitional arrangement for Biodiversity Assessment Method**: Schedule 1[21] (s.6.8) amends section 6.8 to provide that the biodiversity assessment method may include provisions of a savings or transitional nature consequent on the amendment or replacement of the biodiversity assessment method.
- **Biodiversity Stewardship Agreement consultation**: Schedule 1[8] (s5.11): The Bill amends section 5.11 to provide that the Minister must not agree to a variation of a biodiversity stewardship agreement that increases the area of the biodiversity stewardship site without obtaining the consent of, or consulting with, any person who would have had to give consent, or be consulted with, if the additional land had been included in the original agreement.
- **Fees** - Schedule 1[20] (s 6.6): The Bill amends section 6.6 to provide that the regulations may authorise the Environment Agency Head to charge prescribed fees for services provided in relation to the BOS.
- **Modification applications** - Schedule 1 [55] (s7.17): The Bill amends section 7.17 as a consequence of other amendments in Schedule 1.

Analysis

Based on our preliminary review of these sections we have no immediate concerns with these changes, but welcome this Committee's scrutiny of the provisions to ensure there are no perverse outcomes that have not been identified.

Consequential and administrative amendments

Overview

The Outline of Provisions provides that Schedule 1 [3], [4], [9], [11], [12], [25], [29], [31], [36], [37], [39], [48], [50], [53], [54], [57], [58] and [64]–[69] make minor law revision amendments, including updating formatting and references, and omitting redundant definitions and particular notes.

Analysis

We have reviewed these provisions and agree that they provide minor law revision amendments. We have no concerns with the changes proposed by these clauses of the Bill.