



New South Wales

# Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The objects of this Bill are to—

- (a) amend the *Biodiversity Conservation Act 2016* (***the Act***) to reform the biodiversity offsets scheme and, in particular, to—
  - (i) establish the avoid, minimise and offset hierarchy as the key principle underpinning the framework for avoiding, minimising and offsetting the impact of proposed development, activity or clearing on biodiversity values, and
  - (ii) provide that the biodiversity offsets scheme will transition to net positive biodiversity outcomes and, for the purposes of giving effect to that objective, the Minister must make a strategy for the transitioning of the biodiversity offsets scheme to deliver net positive biodiversity outcomes, and
  - (iii) provide for standards against which developers must demonstrate measures taken to avoid and minimise the impact of proposed development, activity or clearing or land use on biodiversity values, and
  - (iv) require the concurrence of the Minister administering the Act (the ***Minister***) if a relevant authority proposes to impose conditions on State significant development consents and State significant infrastructure approvals other than conditions requiring the retirement of the same number and type of biodiversity credits as calculated in the relevant biodiversity development assessment report, except in particular circumstances, and
  - (v) improve the operation and administration of the Biodiversity Conservation Fund (the ***Fund***), including by—

- (A) requiring that each obligation to retire biodiversity credits for which a payment is made into the Fund be acquitted within 3 years and, if appropriate offsets are not secured within the 3 years, requiring the Biodiversity Conservation Trust to reach agreement with the Minister about how the obligation will be met,
- (B) clarifying the operation of the Fund to ensure that money paid into the Fund can be applied to deliver strategic and timely biodiversity outcomes when securing offsets, and
- (vi) enable the regulations to limit the ability of proponents to satisfy offset obligations by paying money into the Fund in particular circumstances, and
- (vii) establish public registers of the following—
  - (A) decisions to approve development, activity or clearing that is likely to have serious and irreversible impacts on biodiversity values,
  - (B) exemptions from the scheme granted by the Minister in connection with natural disasters or other exceptional circumstances,
  - (C) measures for avoiding and minimising impacts on biodiversity values set out in biodiversity development assessment reports and conditions of development consents and approvals, and
- (viii) enable the Environment Agency Head to issue directions to accredited persons relating to the preparation and modification of biodiversity assessment reports, and
- (ix) reduce administrative burden for small, low-impact developments by—
  - (A) enabling the regulations to provide for revised biodiversity offsets scheme entry thresholds for local development,
  - (B) enabling the regulations to provide for landholder-initiated biodiversity values map review process,
  - (C) allowing the Minister to exempt local development from the scheme in circumstances of natural disasters and other exceptional circumstances, and
- (x) make other minor administrative and consequential amendments, and
- (b) make related and consequential amendments to the *State Environmental Planning Policy (Biodiversity and Conservation) 2021*.

## Outline of provisions

**Clause 1** sets out the name, also called the short title, of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act.

## **Schedule 1      Amendment of Biodiversity Conservation Act 2016 No 63**

**Schedule 1[1]** amends section 1.3 to provide that the framework to avoid, minimise and offset the impacts of proposed development and land use change on biodiversity established under the Act is to reflect the avoid, minimise and offset hierarchy.

**Schedule 1[2]** amends section 1.6 to insert relevant definitions for the Act consequent on other amendments in Schedule 1. **Schedule 1[45] and [51]** make consequential amendments to section 7.13 and 7.15.

**Schedule 1[5]** amends section 5.5 to require the Environment Agency Head to consult with the Planning Agency Head and the Secretary of the Department of Primary Industries and Regional Development, or a relevant nominee, before the Minister enters into a biodiversity stewardship agreement. **Schedule 1[7]** makes a consequential amendment to section 5.9.

**Schedule 1[6]** amends section 5.8 to provide that a biodiversity assessment report accompanying an application to enter into a biodiversity stewardship agreement must comply with directions

given by the Environment Agency Head under proposed section 6.10A in relation to the preparation or modification of the report.

**Schedule 1[8]** 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.

**Schedule 1[10]** amends section 5.11 to provide that a biodiversity assessment report accompanying an application to vary a biodiversity stewardship agreement must comply with any directions given by the Environment Agency Head under proposed section 6.10A in relation to the preparation or modification of the report.

**Schedule 1[13]** amends section 6.2 to provide that one of the key elements of the biodiversity offsets scheme is that, as an alternative to a requirement under the scheme to retire biodiversity credits, a person may undertake prescribed biodiversity conservation measures or, in particular circumstances, pay an amount into the Fund.

**Schedule 1[14]** amends section 6.2 to recognise the avoid, minimise and offset hierarchy as the key principle for avoiding, minimising and offsetting impacts to biodiversity values when carrying out biodiversity assessments and preparing the reports under the scheme.

**Schedule 1[15]** inserts proposed section 6.2A, which requires the Minister to make a strategy for the transitioning of the biodiversity offsets scheme to deliver net positive biodiversity outcomes. The proposed section sets out the requirements for the strategy and its publication, amendment and annual review. **Schedule 1[70]** inserts proposed Schedule 9, Part 4, clause 5, which is a consequential transitional provision requiring the Minister to make the strategy as soon as practicable.

**Schedule 1[16]** inserts proposed section 6.3A, which defines the avoid, minimise and offset hierarchy for the purposes of the biodiversity offsets scheme. **Schedule 1[17]** makes a consequential amendment to section 6.4.

**Schedule 1[18]** omits section 6.4(3), which defines particular actions as biodiversity conservation measures to offset or compensate for impacts on biodiversity values after any steps taken to avoid or minimise those impacts.

**Schedule 1[20]** 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 biodiversity offsets scheme.

**Schedule 1[21]** 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.

**Schedule 1[22]** inserts proposed section 6.10A, which enables the Environment Agency Head to give an accredited person directions about the preparation or modification of a biodiversity assessment report if satisfied the accredited person is not complying with the accreditation scheme. **Schedule 1[35]** makes a consequential amendment to section 7.1 to update the definition of *biodiversity development assessment report*. **Schedule 1[56]** makes a consequential amendment to section 8.1, definition of *biodiversity certification assessment report*.

**Schedule 1[23]** amends section 6.12 to provide that a biodiversity development assessment report must set out and assess, in accordance with the biodiversity assessment method and the regulations, the genuine measures that the proponent of proposed development, activity or clearing has taken to avoid and minimise the impact of the proposed development, activity or clearing on biodiversity values of land in addition to the measures the proponent proposes to take.

**Schedule 1[24]** amends section 6.13 to provide that a biodiversity certification assessment report must set out and assess, in accordance with the biodiversity assessment method and the regulations, the genuine measures that the applicant for biodiversity certification has taken to

avoid and minimise the impact on biodiversity values of land in addition to the measures the applicant proposes to take.

**Schedule 1[26]** amends section 6.14 to provide that an accredited person may modify a biodiversity assessment report to comply with a direction given to the accredited person by the Environment Agency Head in relation to the report under proposed section 6.10A.

**Schedule 1[27]** substitutes section 6.15. The proposed section provides that the general requirement that a biodiversity assessment report must be certified as complying with the biodiversity assessment method as at a specific date and submitted within 14 days of that date does not apply to a biodiversity assessment report that has been modified to comply with a direction by the Environment Agency Head under proposed section 6.10A, unless the direction requires the accredited person to re-certify the report before submitting it. The proposed section further provides that a biodiversity assessment report cannot be certified and submitted in connection with an application if the accredited person has been given a direction in relation to the report until the direction is complied with or revoked. The proposed section provides that if the Environment Agency Head gives an accredited person a direction in relation to a report that has been submitted, the report is taken not to have been certified or submitted until the direction is complied with or revoked.

**Schedule 1[28]** amends section 6.16 to enable the regulations to provide for principles and assessment standards that apply in relation to measures to avoid and minimise biodiversity impacts.

**Schedule 1[30]** amends section 6.21 to enable the Environment Agency Head to determine the amount that a person must pay into the Biodiversity Stewardship Payments Fund before a first transfer of a biodiversity credit is registered if the Environment Agency Head considers the amount otherwise calculated under that section is inappropriate.

**Schedule 1[32]** inserts proposed Part 6, Division 5A, which provides that a person may, as an alternative to a requirement to retire biodiversity credits, undertake prescribed biodiversity conservation measures determined in accordance with the regulations.

**Schedule 1[33]** amends section 6.30 to provide that the regulations may prescribe circumstances in which a person must not satisfy a requirement to retire biodiversity credits by instead paying an amount into the Fund under that section.

**Schedule 1[34]** substitutes section 6.31. The proposed section clarifies the obligation of the Biodiversity Conservation Trust (the *Trust*) to apply money in the Fund in accordance with the Trust's objective under section 10.4. The proposed section clarifies that the Trust may, for each BCF offset biodiversity credit, apply money held in the Fund to—

- (a) retire a like-for-like biodiversity credit or another type of biodiversity credit provided for in the variation rules, or
- (b) apply an equivalent amount of money to secure other appropriate biodiversity offsets.

The proposed section requires 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. The proposed section clarifies that the Trust's liability is limited to amounts paid into the Fund under section 6.30 and that the Trust is not subject to any claim, action or demand by any person in relation to the Trust's obligations, other than the Minister enforcing an obligation to enter into or perform an agreement. **Schedule 1[19]** makes a consequential amendment to section 6.4. **Schedule 1[70]** inserts proposed Schedule 9, Part 4, clause 6, which is a consequential validation provision.

**Schedule 1[38]** amends section 7.2 to provide that the regulations may prescribe particular development requiring development consent under the *Environmental Planning and Assessment Act 1979*, Part 4 as not being development or an activity that is likely to significantly affect threatened species within the meaning of the Act, section 7.2(1)(a), resulting in the application

being exempt from the requirement to be accompanied by a biodiversity development assessment report.

**Schedule 1[40]** amends section 7.4 to enable the regulations to establish a process for landholders to apply to the Environment Agency Head to amend biodiversity values maps relating to the biodiversity offsets scheme threshold.

**Schedule 1[41]** amends section 7.7 to enable the Minister to exempt particular applications for development consent under the *Environmental Planning and Assessment Act 1979*, Part 4 from the requirement to be accompanied by a biodiversity development assessment report for the purposes of expediting the application in connection with a natural disaster or in other exceptional circumstances.

**Schedule 1[42] and [43]** amend section 7.11 to provide that consultation with the Minister under that section is not required in relation to an application for which another Minister is the consent or determining authority if the application does not need to be accompanied by a biodiversity development assessment report because of an exemption relating to a natural disaster or other exceptional circumstances.

**Schedule 1[44]** amends section 7.12 to provide that the concurrence of the Environment Agency Head under that section is not required in relation to an application for which the consent authority or determining authority is not a Minister if the application does not need to be accompanied by a biodiversity development assessment report because of an exemption relating to a natural disaster or other exceptional circumstances.

**Schedule 1[46] and [47]** amend section 7.13 to provide that the consent to an application for development consent that provides for the staged development of a site or for separate parts of a site may provide for a corresponding staged retirement of biodiversity credits before each stage of development is carried out.

**Schedule 1[49]** amends section 7.14 to provide that—

- (a) generally, if an application for development consent for State significant development or approval for State significant infrastructure must be accompanied by a biodiversity development assessment report, the conditions of the consent or approval must require the retirement of biodiversity credits to offset the residual impact on biodiversity values of the number and class specified in the report, and
- (b) despite the general requirement, if the relevant authority is satisfied that it is justified in the circumstances—
  - (i) the relevant authority may, with the concurrence of the Minister, impose a condition other than to retire the number and class of biodiversity credits, or
  - (ii) the relevant authority may, without the concurrence of the Minister, increase the number of biodiversity credits of one or more classes that would otherwise be required to be retired provided the relevant authority does not reduce the number of any other class of biodiversity credits that would otherwise be required to be retired.

The amendment further provides for the matters the Minister must have regard to when deciding whether to give concurrence in relation to a proposed condition, and that the concurrence can be given with or without conditions. The amendment also enables the regulations to make further provision about processes relating to concurrence and the effect of conditions of concurrence.

**Schedule 1[52]** amends section 7.16 to provide that the requirement to refuse an application for development consent for proposed development that is likely to have serious and irreversible impacts on biodiversity values does not apply if the application does not need to be accompanied by a biodiversity development assessment report because of an exemption relating to a natural disaster or other exceptional circumstances.

**Schedule 1[55]** amends section 7.17, consequent on other amendments in Schedule 1, to provide that an application for modification of development consents or approvals must be accompanied

by biodiversity development assessment reports in circumstances where the application would be required to be accompanied by a report if it were a new application.

**Schedule 1[59]** amends section 9.1 to require public consultation on the strategy to transition the biodiversity offsets scheme to net positive under proposed section 6.2A.

**Schedule 1[60] and [61]** amend section 9.7 to require public registers be kept in relation to the following—

- (a) orders made by the Minister to exempt particular applications for development consent from the requirement to be accompanied by a biodiversity development assessment report in connection with a natural disaster or other exceptional circumstances,
- (b) decisions to grant consents or approvals, or modifications of consents or approvals, for development, activity or clearing that likely has serious and irreversible impacts on biodiversity values,
- (c) conditions of approvals that require biodiversity conservation measures be taken to offset the residual impact of the relevant development, activity or clearing on biodiversity values,
- (d) measures to avoid and minimise the impact of development, activity or clearing on biodiversity values of land that are—
  - (i) set out in a relevant biodiversity development assessment report as measures a proponent has taken or will take, or
  - (ii) required to be taken as a condition of a planning approval or vegetation clearing approval.

**Schedule 1[62]** amends section 9.7 to insert relevant definitions consequent on Schedule 1[60] and [61].

**Schedule 1[63]** substitutes section 9.11 to enable the regulations to make further provision about the public registers, including the form and content of the registers and requirements to give relevant information for the purposes of the registers.

**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.

## **Schedule 2      Amendment of State Environmental Planning Policy (Biodiversity and Conservation) 2021**

**Schedule 2[1]** amends section 2.2 to update the definition of *biodiversity development assessment report* consequent on Schedule 1[22].

**Schedule 2[2]** amends section 2.15 to omit a particular note, consequent on amendments in Schedule 1.