



Environmental Defenders Office

19 September 2024

Portfolio Committee No. 7 – Planning and Environment
Parliament of New South Wales
NSW Parliament House
6 Macquarie Street
Sydney NSW 2000

By email: PortfolioCommittee7@parliament.nsw.gov.au

Dear Members of the Committee,

Response to Questions on Notice

Thank you for the opportunity to provide evidence to the inquiry into the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Amendment Bill 2024 on 12 September 2024. Please find below our response to the question on notice relating to consideration of the proposed new ‘avoid and mitigate register’ in planning decisions.

Inquiry Hearing transcript (12 September 2024, uncorrected proof)

The CHAIR: With the proposed register of the "avoid" and "mitigate" and how that works, what will it do? What does it mean? Yes, it will be great, and we might be able to see what people have done at a point in time. But I think there might have been a suggestion in a submission somewhere that perhaps it then needs to be a consideration for planning. What would that look like? Should it appear in the EP&A Act, or where does that go in terms of logistics?

CERIN LOANE: You could put it in the planning Act; you could probably put it in the Biodiversity Conservation Act as well, because it does talk to decisions that planning decision-makers make in parts 6 and 7 of the Biodiversity Conservation Act. I think it goes to the point I was making in the earlier line of questioning—it's good that we have the register and there's much more transparency around "avoid" and "mitigate". But to give proper application to the hierarchy, you need to then actually continue to avoid into the future.

The suggestion I had was, once they're identified in that register, do they then become no-go zones? Or is it an obligation on the decision-maker, either in the planning system or in the Biodiversity Conservation Act, that they cannot make decisions inconsistent with that register—or, at a minimum, at least consider the register? There does need to be that additional requirement in the legislation. We can take it on notice if you want some specific examples of exactly which provision you'd want to see it put into.

The CHAIR: That would be great, thank you.



EDO response

Recommendation 9 of EDO's submission recommends giving proper effect to the avoid and minimise hierarchy by:

- 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.

As requested, we provide examples of legislative amendments that could be implemented to give effect to this recommendation.

Option 1: Designating avoided areas as no-go zones

Implementing this recommendation is likely to require broader legislative and policy reform to the NSW environment and planning framework. For example:

- One way this recommendation could be implemented is in a manner contemplated by the Independent Review of the *Biodiversity Conservation Act 2016* (**BC Act**).¹ That Review recommended giving effect to 'no-go' areas (including avoided areas identified on a register) in the single spatial tool.
- An alternative option could be to establish protections for avoided land (e.g. development controls or prohibitions on development) in a State Environmental Planning Policy. For example, Chapter 13 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 imposes development controls on certain land identified in the Cumberland Plain Conservation Plan that has been identified as avoided land for the purpose of avoiding and minimising impacts to biodiversity from development in nominated areas. A similar mechanism could be used to establish controls on development in areas that are approved measures to avoid and minimise the impact of development, as identified on the proposed new register.

We note Option 2 below can deliver a similar outcome to 'no-go' zones, through a safeguard mechanism that acts as a 'red flag' and requires mandatory refusal of proposed impacts on approved measures for avoiding and minimising impacts.

Option 2: Explicitly requiring decision-makers to avoid future impacts in areas identified on the avoid and mitigate register

This could be given effect in a similar way to the provisions relating to serious and irreversible impacts, by mandating refusal of impacts on approved measures for avoiding and minimising impacts.

¹ 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>

One example of how this could be done is by insertion of a new provision (e.g. s7.16A) into the BC Act.

7.16A Proposed development or activity that impacts on approved measures for avoiding and minimising impacts on biodiversity values

(1) In this section, **approved measures for avoiding and minimising impacts on biodiversity values** means:

- (i) conditions of planning approvals and vegetation clearing approvals; or
- (ii) measures to avoid and minimise the impact of development, activity or clearing on biodiversity values of land

that are identified in a biodiversity development assessment report or an approval granted under the *Environmental Planning and Assessment Act 1979* and published on the public registers established under sections 9.7(1)(h1) and (h2).

- (2) The consent authority must refuse to grant consent under Part 4 of the *Environmental Planning and Assessment Act 1979*, in the case of an application for development consent to which this Division applies (other than for State significant development), if it is of the opinion that the proposed development is likely to have a negative impact on approved measures for avoiding and minimising impacts on biodiversity values.
- (3) If the Minister for Planning is of the opinion that proposed State significant development or State significant infrastructure that is the subject of an application to which this Division applies is likely to have a negative impact on approved measures for avoiding and minimising impacts on biodiversity values, the Minister—
 - (a) is required to take those impacts into consideration, and
 - (b) is required to determine whether there are any additional and appropriate measures that will minimise those impacts if consent or approval is to be granted.
- (4) If the determining authority is of the opinion that the proposed activity to which this Division applies is likely to have a negative impact on approved measures for avoiding and minimising impacts on biodiversity values, the determining authority—
 - (a) is required to take those impacts into consideration, and
 - (b) is required to determine whether there are any additional and appropriate measures that will minimise those impacts if the activity is to be carried out or approved.

In line with EDO's previous recommendations to apply the serious and irreversible impact safeguard consistently to all approval pathways, our strong recommendation would be to amend both section 7.16 of the BC Act and proposed section 7.16A above to require mandatory refusal for proposed State significant development or State significant infrastructure and Part 5 development.

Option 3: Make it a mandatory requirement for decision-makers to consider the avoid and minimise register when making approval decisions

This could be given effect by amendments to sections 7.13, 7.14 and 7.15 in Part 7, Division 4 of the BC Act.

One example of how this could be done is outlined below in red text below.

Division 4 Biodiversity assessment and offsets

7.13 Development other than State significant development or infrastructure

- (1) This section applies to an application for development consent under Part 4 of the *Environmental Planning and Assessment Act 1979* that is required under Division 2 to be accompanied by a biodiversity development assessment report, except—
 - (a) an application for development consent for State significant development, or
 - (b) an application for a complying development certificate.
- (2) The consent authority, when determining in accordance with the *Environmental Planning and Assessment Act 1979* any such application, is to take into consideration under that Act the likely impact of the proposed development on:
 - (a) biodiversity values as assessed in the biodiversity development assessment report that relates to the application; and
 - (b) measures for avoiding and minimising impacts on biodiversity values set out in relevant biodiversity development assessment reports and conditions of development consents and approvals published on the public registers established under sections 9.7(1)(h1) and (h2).

The consent authority may (but is not required to) further consider under that Act the likely impact of the proposed development on biodiversity values.

- (3) If the consent authority decides to grant consent and the biodiversity offsets scheme applies to the proposed development, the conditions of the consent must require the applicant to retire biodiversity credits to offset the residual impact on biodiversity values of the number and class specified in the report (subject to subsection (4)). The residual impact is the impact after the measures that are required to be carried out by the terms or conditions of the consent to avoid or minimise the impact on biodiversity values of the proposed development (being measures on which the report was based).

Note—

Division 6 of Part 6 enables a person who is required under this section to retire biodiversity credits to make a payment instead to the Biodiversity Conservation Fund of the value of the credits in accordance with the offsets payment calculator.

- (4) The consent authority may reduce or increase the number of biodiversity credits that would otherwise be required to be retired if the consent authority determines that the reduction or increase is justified having regard to the environmental, social and economic impacts of the proposed development. The consent authority must give reasons for a decision to reduce or increase the number of biodiversity credits.

- (5) A condition to retire biodiversity credits is required to be complied with before any development is carried out that would impact on biodiversity values. However, a consent to a concept development application may provide for a corresponding staged retirement of biodiversity credits before each stage of development is carried out and without the need for a further biodiversity development assessment report in connection with development applications for the subsequent stages of the development.
- (6) This section does not operate to limit the matters that a consent authority may take into consideration—
 - (a) in relation to the impact of proposed development on biodiversity values, the measures that a consent authority may require to avoid or minimise those impacts or the power of a consent authority to refuse to grant consent because of those impacts, or
 - (b) in deciding whether to reduce or increase the number of biodiversity credits to be retired.
- (7) If a consent authority fails to include a condition relating to the retirement of biodiversity credits required by this section (or fails to give reasons for a decision to reduce or increase the number of biodiversity credits), the Environment Agency Head may impose or vary that condition in accordance with this section in the same manner used by the consent authority in granting the development consent.

7.14 State significant development or infrastructure

- (1) This section applies to an application for development consent for State significant development under Part 4 of the *Environmental Planning and Assessment Act 1979*, or an application for approval for State significant infrastructure under the *Environmental Planning and Assessment Act 1979*, Division 5.2, that is required under Division 2 to be accompanied by a biodiversity development assessment report.
- (2) The Minister for Planning, when determining in accordance with the *Environmental Planning and Assessment Act 1979* any such application, is to take into consideration under that Act the likely impact of the proposed development on:
 - (a) biodiversity values as assessed in the biodiversity development assessment report;
and
 - (b) measures for avoiding and minimising impacts on biodiversity values set out in relevant biodiversity development assessment reports and conditions of development consents and approvals published on the public registers establishing under sections 9.7(1)(h1) and (h2).

The Minister for Planning may (but is not required to) further consider under that Act the likely impact of the proposed development on biodiversity values.

- (3) If the Minister for Planning decides to grant consent or approval and the biodiversity offsets scheme applies to the proposed development, the conditions of the consent or approval may require the applicant to retire biodiversity credits to offset the residual impact on biodiversity values (whether of the number and class specified in the report

or other number and class). The residual impact is the impact after the measures that are required to be carried out by the terms or conditions of the consent or approval to avoid or minimise the impact on biodiversity values of the proposed development.

- (4) A condition to retire biodiversity credits is required to be complied with before any development is carried out that would impact on biodiversity values. If the retirement of particular biodiversity credits applies to a stage of the development, compliance with the condition for their retirement is postponed until it is proposed to carry out that stage of the development.
- (5) This section does not operate to limit the matters that the Minister for Planning may take into consideration in relation to the impact of proposed development on biodiversity values, the measures that the Minister may require to avoid or minimise those impacts or the power of the Minister to refuse to grant consent or approval because of those impacts.

7.15 Part 5 activity

- (1) This section applies to an environmental impact assessment under Part 5 of the *Environmental Planning and Assessment Act 1979* in respect of which the proponent has elected under Division 2 to obtain a biodiversity development assessment report.
- (2) The determining authority is to take into consideration under that Act the likely impact of the proposed activity on:
 - (a) biodiversity values as assessed in the biodiversity development assessment report; and
 - (b) measures for avoiding and minimising impacts on biodiversity values set out in relevant biodiversity development assessment reports and conditions of development consents and approvals published on the public registers establishing under sections 9.7(1)(h1) and (h2).
- (3) If the determining authority decides to carry out the activity or approve the carrying out of the activity and the biodiversity offsets scheme applies to the proposed activity, the conditions on which the activity is carried out or of the approval to carry out the activity may require the proponent to retire biodiversity credits to offset the residual impact on biodiversity values (whether of the number and class specified in the report or other number and class). The residual impact is the impact after the measures that are required to be carried out to avoid or minimise the impact on biodiversity values of the proposed activity.
- (4) If the number of biodiversity credits required to be retired is less than that specified in the biodiversity development assessment report, the determining authority is to give reasons for the decision to reduce the number of biodiversity credits.
- (5) A condition to retire biodiversity credits is required to be complied with before any activity is carried out that would impact on biodiversity values. If the retirement of particular biodiversity credits applies to a stage of the activity, compliance with the condition for their retirement is postponed until the carrying out of that stage of the activity.

- (6) This section does not operate to limit the matters that the determining authority may take into consideration in relation to the impact of any proposed activity on biodiversity values, the measures that the determining authority may require to avoid or minimise those impacts or the power of the determining authority to refuse to proceed with the activity or to grant approval for the activity because of those impacts.

Please contact Cerin Loane on _____ for any further assistance in relation to this matter.

Yours sincerely,

Environmental Defenders Office

Cerin Loane

Special Counsel, Nature