

Submission
No 2

**INQUIRY INTO BIODIVERSITY CONSERVATION
AMENDMENT (BIODIVERSITY OFFSETS SCHEME) BILL
2024**

Organisation: EMM Consulting Pty Ltd

Date Received: 3 September 2024

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

Re: Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024

To the Chair of the Committee,

EMM Consulting Pty Limited (EMM) appreciates the opportunity to provide comment on the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024 (Bill) which is currently before Parliament.

EMM is an Australian, employee-owned business operating from nine offices and various satellite locations across Australia and Canada. We work extensively on State significant development and State significant infrastructure projects, as well as regionally significant and local developments. We lead the preparation of environmental assessments and technical experts across a wide range of environmental disciplines, including a biodiversity team with 40 people, of which 16 are accredited assessors under the Biodiversity Assessment Method (BAM). We have extensive experience assessing projects for government and private industry proponents. Examples of our current projects include Snowy 2.0, Hunter Transmission Project and Oven Mountain Pumped Hydro Storage Project, which like many of the large projects that we work on, have complicated biodiversity assessment and offset requirements.

EMM supports the Bill, but not proposed directions powers

EMM is broadly supportive of the objects of this Bill, in particular:

- (a) establishing 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.
- (b) transitioning the biodiversity offsets scheme to net positive biodiversity outcomes.

New powers are also proposed to allow the Environment Agency head to issue directions to accredited assessors in relation to the preparation and modification of biodiversity assessment reports. EMM has strong concerns with regards to these proposed new powers.

The proposed direction powers

The Bill proposes insertion of section 6.10A, which would enable the Environment Agency Head (or delegate) to give directions to accredited assessors in relation to biodiversity assessment reports:

6.10A Directions to accredited persons in relation to biodiversity assessment reports

The Environment Agency Head may, by written order, give a direction to an accredited person in relation to the preparation or modification of a biodiversity assessment report if satisfied the accredited person is not complying with a requirement of the accreditation scheme referred to in section 6.10.

Notice of the direction must be given to the proponent or applicant to which the report relates (ss(2)) and regulations may be made (ss(3)) regarding:

- (a) the form and content of directions,
- (b) processes relating to compliance with, and enforcement of, directions,
- (c) notice and publication requirements, including requirements to—
 - i. give decision-makers and other relevant persons notice of directions, and
 - ii. include details of directions in relevant biodiversity assessment reports.
- (d) circumstances in which, or matters about which, directions must not be given.

The need for these powers is unclear and was not identified in the Independent Review

The second reading speech to the Bill simply states that the purpose of the directions is to “improve the quality and consistency of biodiversity assessments and reporting, leading to more efficient and timely decision-making throughout the planning process”.¹

The Independent Panel led by Dr Ken Henry AC carried out a comprehensive review of the *Biodiversity Conservation Act 2016* (BC Act). In its final report, the Panel did not identify deficiencies in the quality or consistency of the work carried out by accredited assessors. While the report encouraged measures to ensure the quality and integrity of biodiversity assessment reports, it also cautioned against too much discretion and the ability to set conditions outside the scheme, given the risk of undermining biodiversity outcomes and reducing confidence. While the Government response to the review identified the addition of directions powers, it provided no evidence or commentary to demonstrate what problems it seeks to address.² Therefore, the need for seeking these powers is ambiguous and unclear.

EMM is concerned that, contrary to the limited intent that has been disclosed, these powers will cause further red tape and reduce efficient and timely decision-making, reduce consistency of biodiversity assessments and reporting, and have significant reputational implications for accredited assessors, who act in good faith.

Directions will reduce, not increase consistency

The objective of the BAM is to ensure that consent authorities have clear and consistent information on the biodiversity impacts of a development and the gain (or offset amount) at conservation sites calculated in biodiversity credits.³ However, the scope of the directions that may be issued by the Environmental Agency Head (and delegates) in the application of the BAM is totally unrestrained by the Bill. There is no requirement that directions be consistent with the BAM, or the accreditation scheme.

Further given the complexity of natural and modified environments, many matters and circumstances are not fully addressed by the BAM. Directions regarding assessment approaches issued may not be consistent with the BAM, or could be inconsistent with other assessments. EMM regularly receives inconsistent advice on similar

¹ Legislative Council, 15 August 2024, the Hon. Penny Sharpe

² *NSW Plan for Nature*, NSW Government, published July 2024

³ Second reading speech to the Biodiversity Conservation Bill 2016. Legislative Assembly, 16 November 2016, Mr Mark Speakman

issues from different Biodiversity and Conservation Science (BCS) regional offices. There is a high risk that ad hoc directions will similarly be inconsistent, particularly as the power to issue directions could be delegated under section 14.4 of the BC Act. There is also the risk that government agencies may threaten the use of directions to seek to quell legitimate discussions of appropriate assessment methods to be applied in biodiversity assessment reports by accredited assessors, especially given that ecology assessment is complex and varies from site to site, and there is a lack of clarity in multiple areas of the BAM.

Therefore, ad hoc directions to individual assessors would not achieve the certainty or consistency required to support the objective of the BAM and may directly contradict this objective. EMM believes consistency and certainty would be better achieved by use of policies and guidelines, and regular updates to the BAM; measures which can already be efficiently deployed by the current framework. Policies, guidelines and updates to the BAM should be prepared with adequate consultation (consistent with the NSW Nature Plan) and transitional provisions to support ensure efficient and timely development and decision-making. However, if a direction power is required, it should not be able to be delegated.

Reputational implications for accredited assessors

The Bill provides that a direction can be issued if the Environmental Agency Head (or delegate) is satisfied that the accredited person is not complying with the requirements of the scheme. The personal nature of this threshold is unnecessary, has reputational implications, and calls into question the professional integrity of accredited assessors – including the vast majority who act in good faith. This is particularly concerning when there is no opportunity to provide comment prior to a direction being issued, or right of appeal after a direction is issued.

If a directions power is required:

- it should be on the basis that a *report* has not, or is not, being prepared in accordance with the scheme or the BAM, and
- the direction should be limited to an instruction to prepare or modify a report to ensure compliance with the scheme or the BAM.

The Bill suggests that the regulations may make provision relating to compliance and enforcement with directions. There is no evidence to suggest any additional compliance mechanism is required, and there is already a clear provision under section 6.10(4f) of the *Biodiversity Conservation Act 2016* (BC Act) for suspension or cancellation of accreditation for non-compliance with the BAM scheme requirements:

- (4) A scheme for the accreditation of persons under this section may (without limitation) include the following—
 - (f) the renewal, variation, suspension or cancellation of accreditation,

EMM appreciates the commitment of the NSW government to consult with industry and the community on these proposed changes. We would welcome any further opportunities to provide feedback and insights on these important reforms.

Yours sincerely

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