

Submission  
No 14

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

**Organisation:** Local Government NSW (LGNSW)

**Date Received:** 6 September 2024

---

Our ref: R91/0146-04

6 September 2024

## Legislative Council Portfolio Committee No. 7 – Planning and Environment

### LGNSW submission: Inquiry into the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024

As the peak body for local government in NSW, representing NSW general purpose councils and related entities, Local Government NSW (LGNSW) welcomes the opportunity to provide comment to the inquiry into the *Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024*.

This submission is in draft form until endorsed by the LGNSW Board. The Committee is asked to consider this current version. If there are any changes following Board endorsement these will be separately provided to the Committee.

LGNSW welcomes the amendments of the Bill that align with our April 2023 [submission to the review of the BC Act](#). This includes the additional focus on avoiding and minimising biodiversity loss, restrictions on payments into the Biodiversity Conservation Fund and greater public transparency. Importantly, the proposal to amend entry thresholds for small, low impact local development has the potential to address many of the concerns of rural and regional communities about issues of over-regulation.

While LGNSW understands that this Bill is the first set of changes under the NSW Government's legislative reform program, in its current form, it misses the opportunity to introduce more meaningful change. Additional changes are needed to protect vulnerable species and reverse biodiversity decline at state and local level. This includes strengthening like-for-like rules for offsets to occur with the same LGA or region and introducing restrictions on clearing critically endangered ecological communities and vegetation where offsets are not available.

Biodiversity protections under other legislation must also be urgently strengthened, including closing loopholes with the *Biodiversity Conservation Act 2016* and ending the logging of native forests, in line with a resolution of the 2022 LGNSW Annual Conference.

For further information in relation to this feedback, please contact me on

Yours sincerely



Director Advocacy

# **LGNSW submission to the inquiry into the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill**

## **September 2024**

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing all NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

This submission is in draft form until endorsed by the LGNSW Board. The Committee is asked to consider this current version. If there are any changes following Board endorsement these will be separately provided to the Committee.

LGNSW's advocacy priorities include calling for greater protections for biodiversity, reflecting councils' commitment to conserving and enhancing biodiversity at a local and regional scale, as well as removing issues of over-regulation that result in undue barriers to regional development.

LGNSW welcomes the opportunity to provide feedback to the inquiry into the *Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024* (the Bill).

The Bill proposes to amend the *Biodiversity Conservation Act 2016* (BC Act) to implement a package of priority reforms to the Biodiversity Offsets Scheme (BOS), focusing on improving biodiversity outcomes, supporting a functioning biodiversity credit market, increasing scheme efficiency and transparency and balancing the application of the scheme with biodiversity risks.

LGNSW understands that further changes will be made to the *Biodiversity Conservation Regulation 2017* (BC Regulation) and to other legislation.

## **Response**

LGNSW welcomes the amendments of the Bill that align with our April 2023 [submission](#) to the review of the BC Act. This includes the additional focus on avoiding and minimising biodiversity loss, restrictions on payments into the Biodiversity Conservation Fund, greater public transparency, and additional flexibilities for small scale development. LGNSW also welcomes strengthening the objective of the BOS to be net positive and requiring an associated delivery strategy to be prepared.

However, additional action is needed to protect vulnerable species and reverse biodiversity decline at state and local level. This includes strengthening like-for-like rules for offsets to occur within the same local government area (LGA) or region and introducing restrictions on clearing critically endangered ecological communities (CEECs) and vegetation where offsets are not available. Biodiversity protections under

other legislation must also be urgently strengthened, including closing loopholes with the BC Act and ending the logging of native forests.

## Improving biodiversity outcomes

LGNSW welcomes the Bill transitioning the objective of the BOS from 'no net loss' to 'net positive' and introducing a statutory requirement to produce a strategy to deliver this. However, a baseline year should be set out in the BC Act or the forthcoming BC Regulations to measure 'net positive' against. This Net Positive Strategy should be delivered as soon as possible and should identify further changes to the BC Act and BC Regulations that will be required to reach net positive.

LGNSW also welcomes the Bill strengthening the avoid and minimise requirements for the BOS and biodiversity certification. This includes changes to the wording of the BC Act to require proponents to demonstrate *genuine* measures to avoid and minimise biodiversity impacts. The Bill enables the BC Regulation to introduce much needed principles and assessment standards that proponents must follow. However, there is currently no obligation within the BC Act to avoid and minimise impacts for proposals that do not meet the BOS threshold. This should be added to the BC Act to ensure all clearing and development reduces biodiversity impacts as much as possible.

The Bill enables higher assessment standards to be introduced for potential serious and irreversible impacts (SAIL) or other circumstances prescribed by the BC Regulations. Clear thresholds for SAIL must also be introduced as currently the assessment for SAIL is subjective and it is difficult for consent authorities to assess development applications (DAs) without standards to follow. There should be a requirement to review and update the SAIL thresholds regularly to respond to changes in the species or ecological community's conservation status.

The Bill does not address the BC Act's lack of focus on local biodiversity outcomes, such as the ability for clearing under the BOS to be offset elsewhere in the state. This is resulting in a net loss of biodiversity in many LGAs, in particular in areas that face high development pressure, such as urban and coastal areas, as credits can be retired in less costly locations. It is challenging for councils to successfully manage the habitat and populations of threatened species and it could lead to local extinction of species.

Changes should be made to the BC Act, BC Regulation and operation of the BOS to encourage offsets to be procured in the same LGA in which the vegetation was removed where possible, including strengthening the like-for-like rules. Species credit offsets should be like-for-like only and within the same subregion. The variation rules should include the requirement for a comprehensive 'reasonable efforts' test prior to allowing variation and substantial additional credit penalties should be applied as an effective deterrent.

To provide additional protections to vulnerable ecological communities, any clearing or impact on CEECs or habitats that build up over hundreds of years, for example hanging swamps, should automatically count as a SAIL and be prohibited. Additional incentives

should be considered to encourage proponents to avoid and minimise any form of biodiversity loss as the current offset requirements do not fully reflect the true impact. Offset prices should also account for the full biodiversity impact, taking into account time, risk and distance factors, as well as proportionally higher prices in urban areas where there is limited biodiversity remaining.

Other important changes that must be made to the BOS to improve biodiversity outcomes are set out in our BC Act submission, including increasing protections for wildlife corridors and climate refugia (pages 7, 13-14), better accounting for cumulative impacts (pages 29-30), and strengthening avoidance criteria for aquatic ecosystems (page 6).

### **Recommendations**

1. Set a baseline year in the BC Act or the BC Regulations to measure 'net positive' against.
2. Deliver the Net Positive Strategy as soon as possible and identify further changes to the BC Act and BC Regulations that will be required to reach net positive.
3. Include a requirement within the BC Act to avoid and minimise impacts for proposals that do not meet the BOS threshold.
4. Introduce clear thresholds for SAI and a requirement to review and update the thresholds regularly to respond to changes in the species or ecological community's conservation status.
5. Strengthen the like-for-like rules for offsets to occur within the same LGA or region where the development is taking place. Species credit offsets should be like-for-like only and within the same sub-region.
6. Introduce a requirement for a comprehensive 'reasonable efforts' test prior to allowing variation and apply substantial additional credit penalties.
7. Clearing critically endangered ecological communities or habitats that build up over hundreds of years should be prohibited.
8. Ensure offset prices account for the fuller biodiversity impact, including offset price multipliers to account for time, risk and distance factors, as well as proportionally higher prices in urban areas where there is limited biodiversity remaining.
9. Increase protections for wildlife corridors and climate refugia.
10. Improve the assessment of cumulative impacts.
11. Strengthen avoidance criteria for aquatic ecosystems.

## **Supporting a functioning biodiversity credit market**

Under the current system, proponents can make payments into the Biodiversity Conservation Fund (BCF) instead of purchasing and retiring biodiversity credits. This has become commonplace, with the NSW Audit Office reporting that between 2017-2022, around 340 development proponents made payments into the BCF, while fewer

than 27 acquitted obligations by purchasing and retiring credits.<sup>1</sup>

While LGNSW recognises that allowing BCF payments can avoid delays to development caused by a lack of available credits, there is a negative impact on biodiversity. There is a time lag between clearing and for the biodiversity gain to be ensured, and it facilitates clearing to occur where there may never be an equivalent offset available (see page 27 of LGNSW's BC Act Submission for more detail on the issues surrounding BCF payments).

LGNSW therefore welcomes that the Bill enables the BC Regulation to prescribe circumstances in which offset obligations cannot be met through payment into the BCF. The *Independent Review of the Biodiversity Conservation Act* recommended the BC Act be amended to require proponents to demonstrate steps to find like-for-like payments before a payment into the BCF is permitted<sup>2</sup>. Although this would support a functioning biodiversity credit market and reduce the biodiversity time lag in some cases, it does not address the issue that clearing can occur where the vegetation cannot be replaced elsewhere. Additional monitoring and protections should be introduced to prevent clearing where there is limited ability to offset the species or ecological communities, for example restrictions in the BC Act where there are no offset credits available to purchase.

The Bill requires BCF payments to be acquitted within three years, a reduction from the five-year timeframe the BCF currently aims to meet<sup>3</sup>. If appropriate credits are not secured within 3 years, the Biodiversity Conservation Trust (BCT) must agree with the Minister how the obligation will be met. LGNSW welcomes the introduction of a legislated timeframe but recommends this be reduced, for example to two years, to minimise the time lag between the clearing and biodiversity gain.

#### Recommendations

12. Introduce restrictions in the BC Act where there is limited ability to offset the species or ecological communities, for example when there are no offset credits available to purchase.
13. Reduce the timeframe for BCF payment to be acquitted to two years.

## Increasing scheme efficiency and transparency

LGNSW welcomes the additional transparency the Bill provides through the introduction of new public statutory registers on SAI, 'avoid and minimise' measures and ministerial exemptions granted (e.g. due to natural disasters). An additional register

<sup>1</sup> NSW Audit Office (2022) '*Effectiveness of the Biodiversity Offsets Scheme*', NSW Government,

<sup>2</sup> Independent panel 2023, *Independent Review of the Biodiversity Conservation Act 2016: Final Report*, NSW Government, Recommendation 29

<sup>3</sup> NSW Biodiversity Conservation Trust (2024), *Biodiversity Offsets Program Outcomes*, NSW Government, viewed 5 September 2024, <https://www.bct.nsw.gov.au/info/biodiversity-offsets-program-outcomes>.

should be published detailing BCF payments that were not acquitted within the legislated timeframe and how the obligations were met.

A requirement should also be placed on the BCT to monitor biodiversity gains and losses in LGAs and publish regular reports. The reports should highlight species and geographical areas of concern at state and local level and explain how the BCT are targeting these for protection.

LGNSW also welcomes the new power for the Environment Agency Head to issue directions to accredited persons to ensure the Biodiversity Assessment Method is applied consistently and to improve the quality of Biodiversity Development Assessment Reports (BDARs). Many councils receive poor quality BDARs with insufficient and incorrect information, and must engage in prolonged discussions with proponents to improve these, for example to reach adequate avoid and minimise measures.

#### **Recommendations**

14. Publish a statutory register detailing BCF payments that were not acquitted within the legislated timeframe and how the obligations were met.
15. Place a requirement on the BCT to publish regular reports which highlight species and geographical areas of concern at state and local level and explain how the BCT are targeting these for protection.

## **Balancing the application of the scheme with biodiversity risks**

The Bill enables the Regulations to revise the BOS entry thresholds for local development and will allow the Minister for Environment to exempt local development from the BOS due to natural disasters and other exceptional circumstances. Landholders will also be able to initiate reviews of the Biodiversity Values Map, in line with the process used for the Native Vegetation Regulatory Map. These are welcome changes as many rural and regional areas are struggling with excessive barriers to building housing, community infrastructure and industry to support development and job creation.

In particular, the proposal to amend entry thresholds for small, low impact local development has the potential to address many of the concerns of rural and regional communities about issues of over-regulation. However, these changes alone may not be sufficient to address the significant challenges with the BOS in rural and regional areas where offset costs are often disproportionate to the price of land, making many developments unviable. It is not feasible to pass this substantial cost onto purchasers, as happens in urban and coastal areas where the high demand for land means the offset costs form a much smaller proportion of the final price.

Additional flexibilities for some development in rural and regional areas should be looked at to support job creation, activate economic potential and support community aspirations while at the same time protecting the environment. Our BC Act submission



suggests mechanisms the government could explore including capping the cost of offsets in proportion to the cost of development or land price, timing of payments, and flexibility around credit purchase (page 24).

#### Recommendations

16. Consider flexibilities for rural and regional areas, such as capping the cost of offsets, timing of payments, and flexibility around credit purchase.

## Other legislation

There are a number of issues associated with other legislation that are leading to declining biodiversity and must be addressed urgently. The *Local Land Services Act 2013* (LLS Act) and *Rural Fire Services Act 1997* (RFS Act) have significantly less stringent biodiversity protections than the BC Act and in many cases, landholders are able to clear land with no or minimal approvals. Biodiversity protections under these acts should be strengthened to reduce excessive clearing. LGNSW's submission to the Statutory Review of Part 5A of the LLS Act<sup>4</sup> sets out recommendations to strengthen the approval pathways under the LLS Act.

Councils regularly see cases where landholders 'game' the system by clearing as much vegetation as possible under the LLS Act 'allowable activities' self-assessment pathway and the *Rural Boundary Clearing Code* prior to submitting a DA to avoid entering into the BOS or to reduce the offset requirement. LGNSW's BC Act submission recommends changes that could be made, for example introducing conditions in the BC Act for DAs submitted for land that has been cleared under other legislation in the past 12 months (see pages 32-33 for more detail).

LGNSW's BC Act submission sets out additional issues associated with continued logging and the *State Environmental Planning Policy (Biodiversity and Conservation) 2021* (BC SEPP)(see page 10). The logging of native forests is continuing to destroy important habitats and the NSW Government should create a strategy to end the practice as soon as possible. The two koala habitat protection chapters in the BC SEPP for urban and rural areas are highly problematic for councils and must be addressed urgently to allow councils to update their Koala Plans of Management and ensure koalas are receiving full protection.

#### Recommendations

17. Strengthen biodiversity protections under other legislation, including limiting allowable clearing without authorisation under the LLS Act and RFS Act.
18. Introduce conditions into the BC Act for development applications submitted for land that has been cleared under other legislation in the past 12 months.
19. Create a strategy to end native forest logging in NSW as soon as possible.
20. Consolidate the two chapters of the Biodiversity and Conservation SEPP

<sup>4</sup> LGNSW (December 2022) '[Submission to the Statutory Review of Part 5A of the LLS Act](#)'