Submission No 16

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

Organisation: NSW Minerals Council Ltd

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Legislative Council Inquiry, Portfolio Committee No 7 Planning and Environment - Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024

NSW Minerals Council Submission

Introduction

The NSW Government has introduced the *Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024* (the Bill). The NSW Minerals Council is grateful for the opportunity to provide a submission on the Bill to the Committee.

The NSW Minerals Council is the peak body representing the State's $23.6 billion mining industry. NSWMC provides a single, united voice on behalf of over 80 member companies across the mining, exploration, minerals processing and mining services industries.

This Bill has been introduced prematurely. The proposed amendments to the *Biodiversity Conservation Act 2016* (BC Act) have been developed by the NSW Government without consultation with community and stakeholders. The Bill is presented in isolation. No materials have been provided to the Committee, the community or stakeholders that show the full regulatory proposal, including why the changes are necessary and how they will be operationalised. Supporting information has not been provided which would allow assessment of the proposed amendments.

Committee should recommend that the NSW Government:

- Not progress the Bill without consultation which provides for feedback on the full regulatory proposal and consideration of that feedback by the NSW Government
- Develop and implement a consultation process including providing the community and stakeholders with written material that detail the full scope of the regulatory proposal
- Allow time for responses to be made and considered by the NSW Government
- Reconsider the need for a regulatory response and make changes accordingly.

There is no urgency to pass the Bill. It has been two years since the commencement of the statutory review of the BC Act. Legislation which is developed without consultation with industry, other stakeholders and the community is less likely to adequately address the issues of concern.

The opportunity to seek a wide range of views from those who use and benefit and are impacted by legislation inevitably leads to better laws, which are more likely to be supported/accepted by industry and community, to be more robust and less likely to require amendments because of consequences which could not be foreseen by the government.

Consultation on Review and Government Response

The NSW Government has tabled the Bill and proposes that the Committee process is an adequate form of consultation and that the details of the operation of the provisions proposed will become available through the consultation on the regulations to be undertaken when amendments have been made. No details of the regulation, or changes to other instruments necessary to operationalise the amendments is currently available.

This makes it impossible to assess the full regulatory proposal.

Importantly the amendments sought are not urgent. A delay into the first quarter of 2025 will have negligible impact, but potentially save time and resources in dealing with unforeseen consequences of these amendments over many years to come.

The Independent Review of the *Biodiversity Conservation Act 2016* (the Review) commenced in November 2022. Table 1 below sets out the formal opportunities for consultation on the Review and the NSW Government's response to the Review.

Despite the full process having been underway for almost two years, at no time has there been any consultation on proposals.

Table 1 - Review and response timeline

Date	Consultation	Format/materials
November 2022	Meetings with Independent Reviewer and Panel	Listening only.
28 February 2023	Discussion paper released	Issues only. No proposals for change shared.
21 April 2023	Submissions close	
24 August 2024	Independent Review of the BC Act tabled in Parliament	
8 March 2024	Industry and NGO round tables hosted by Department of Housing, Planning and Infrastructure (DHPI) and Local Land Services (LLS)	Listening only. No proposals for change shared.
17 July 2024	NSW Government response released	High level, does not identify which changes will be included in 2024 amendment legislation.
17 July 2024	Briefings on the Government's response (7 hours notice)	Slide pack, large group, short notice, Microsoft Teams call.
29 July 2024	Biodiversity Offsets scheme (BOS) Stakeholder Reference Group slide pack presented on Bill, advised Bill would be tabled in August 2024	Slide pack only, high level details, no materials provided prior to presentation.

13 August 2024	Bill provided at 5.00 pm to various stakeholders including NSWMC	Amendment Bill.
15 August 2024	Bill tabled	
27 August 2024	Briefing for industry associations by Department of Climate Change, Energy, the Environment and Water (DCCEEW)	Slide pack setting out BC Act amendments.

The NSW Better Regulation Guideline and accompanying Consultation Policy set out the expectations of the NSW Government when introducing new regulatory policy. The Guide includes the Principles for Better Regulation.

Principle 5 states that consultation with business, and the community, should inform regulatory development.

"Consultation may be necessary at several different points during a regulatory development process. Conducted early in the process, it can help to properly identify a perceived problem and determine viable regulatory or non regulatory options to deal with it. Consultation can help government fully understand all the risks and impacts of regulatory proposals and help identify any unintended consequences of those proposals." (NSW Treasury 2019)

The Consultation Policy states that,

"Ideally, consultation will help identify the problem, develop the options, assess the costs and benefits of options and determine the preferred approach." (NSW Treasury, 2009)

Consultation on the NSW Government's response to the BC Act Review recommendations has been minimal. Consultation undertaken has been to listen to the views of stakeholders. Neither the Independent Reviewer, nor the NSW Government consulted on proposed recommendations. There has been no transparent consideration of the costs and benefits of the proposals. The changes proposed by the Bill have been developed within government and were not subject to consultation with stakeholders. Stakeholders have been reassured that the NSW Government Response would be high level and would include proposals that would be subject to considerable further consultation.

Recommendation

- The Committee should recommend that the Government delay further progress of the Bill until proper consultation is undertaken on the proposals including:
    - Identifying the problems sought to be addressed.
    - Testing options, both regulatory and nonregulatory to resolve those issues with stakeholders.
    - Assessing the costs and benefits of any proposals.

  Only when this process has been completed should the NSW Government reconsider whether the amendments are necessary and make any changes to the Bill.

Concerns about the Bill

The Bill is premature given that a number of supporting and key documents in the form of regulations, standards, principles and requirements (Supporting Information) have not been prepared, nor the intention of these documents explained by the NSW Government.

Accordingly, the implications of the reformed BC Act framework cannot be properly understood.

Transition of the Biodiversity Offset Scheme to net positive biodiversity outcomes

Proposed amendment

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.

Transition of the BOS to a net positive standard is likely to have very minimal impact on the overall delivery of a nature positive strategy for NSW, given that clearing for development under the BOS is a small proportion of clearing in NSW and the scheme is already required to meet a no-net loss standard. Potentially it would have a very significant impact on development that is required to be assessed under the BOS, with implications for projects that produce economic growth and housing required by the state and underpin the renewable energy transformation.

The DCCEEW advise:

- It is not clear what standard is currently met by the BOS, net positive, not net loss of some other standard.
- The NSW Government was not clear whether it is the BOS that will need to meet the net positive standard or individual projects assessed under the BOS.
- The provisions of the Bill with regard to the transition of the BOS to nature positive are not required for the strategy to be developed.

The inclusion of this concept in the BC Act is premature and unnecessary. It is inappropriate to incorporate the preparation of this type of strategy into legislation as it requires a future action rather than a current requirement of the BC Act. It would instead be appropriate for the Minister to prepare a draft strategy, consult on the strategy and then make any necessary legislative amendments after the strategy is finalised.

It is not possible to assess the impacts of the proposed change, as:

- It is not clear what standard the Scheme currently meets. It may already be providing net positive outcomes.
- The Bill does not provide a definition of what “net positive biodiversity outcomes” means and the terminology can be interpreted in a multitude of ways
- It is not clear what the implications of the net positive strategy will have on individual project assessments, the BOS and how proponents will be required to apply the strategy to specific development, if at all.

Further, there is a risk that incorporating the transition to ‘net positive biodiversity outcomes’ concept in legislation, albeit that a strategy is to be prepared in the future, will be interpreted by decision makers and the public in a multitude of ways.

It could also create uncertainty for decision makers. For example, will some decision makers apply the net positive concept to current applications and their own interpretation of the terminology prior to the strategy being prepared and implemented by the Minister? Will objectors use the net positive concept to challenge project approval determinations?

Recommendations:

- Proposed section 6.2A is deleted
- The NSW Government should assess the standard currently met by the BOS before determining what further action needs to be taken.

Avoid, minimise and offset hierarchy

Proposed amendments

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

Provide for principles and assessment 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

The changes proposed in the Bill cannot be assessed without Supporting Information, which has not been provided, nor has the intention of these documents been explained by the NSW Government.

Reviewing only the amending provisions provided, it is not possible to assess the full proposal and assess the potential impact.

Mining projects extract fixed resources. Decisions in relation to avoidance have significant impact on the viability of the proposed project and reduce the value of the resource to the State of NSW.

Making balanced social, environmental and economic impacts of these projects should be within the discretion of the decision maker.

The concept of ‘reasonable’ measures to avoid impacts on biodiversity values and the taking of ‘reasonable’ steps to minimise impacts is not defined (see proposed section 6.3A). The wording should be revised to ‘reasonable and feasible’ measures which is a common concept applied under State Significant Development and State Significant Infrastructure project approvals and is well understood by stakeholders.

For example, the below definitions apply commonly in project approvals:

- Reasonable: Means applying judgement in arriving at a decision, taking into account: mitigation benefits, cost of mitigation versus benefits provided, community views and the nature and extent of potential improvements
- Feasible: Means what is possible and practical in the circumstances. Feasible relates to engineering considerations and what is practical to build or carry out
- Minimise: Implement all reasonable and feasible mitigation measures to reduce the impacts of the development.

Proposed sections 6.12 and 6.13 refer to “genuine measures” being identified in the relevant biodiversity development assessment reports (BDAR) and biodiversity certification assessment reports (BCAR) in the context of the AMO Hierarchy. For consistency, this should be amended to “reasonable and feasible measures” (see suggested definitions above).

Further, it is not clear what is meant by “genuine measures the proponent has taken to avoid and minimise” and “genuine measures the proponent proposes to take” in the context of a development proposal. Is this a requirement to consider genuine measures taken historically and in the future?

Further clarification is required.

The AMO Hierarchy is not legislated in any other State or Territory and is instead referred to in policies and applied during the assessment process. Inclusion in the BC Act:

- Heightens the risk of appeals being commenced by third parties; and
- Creates uncertainty for decision makers.

The risks are particularly relevant where Supporting Information has not been prepared or released concurrently with the legislative amendments.

Proposed section 6.16(1A) provides that the regulations may make provisions for Supporting Information in the form of ‘principles’ that apply to the taking of/proposed taking of genuine measures to avoid and minimise impacts on biodiversity values and potential assessment standards against which measures must be assessed.

It is not clear what role the principles will play compared to the assessment standards. It is not clear how the principles and standards will differ/have a different impact from requirements in the Biodiversity Assessment Method (BAM) with regard to avoidance.

These amendments have the potential to narrow the consent authority’s decision making discretion, which is contrary to the intention of the Plan for Nature not to retain Ecologically Sustainable Development (ESD) as the key principle for planning decisions.

Further a regulation making power creates an expectation that such principles and standards will be included in the regulations. If proper consideration has not been given to these concepts by the NSW Government, then they should not be included in the Bill.

The Supporting Information should come in the form of guidance rather than regulations and standards. The Supporting Information should be flexible enough to provide certainty to proponents and decision makers without being overly prescriptive. Legislating standards creates additional appeal risks for proponents and decision-makers, risks feasibility of projects being undertaken in NSW and should be avoided.

Reference to higher assessment standards for Serious and Irreversible Impacts (SAII) (section 6.16(1B)) should be deleted as it raises an expectation that these standards will be prescribed in circumstances where consequences of this are not understood.

Again, legislating standards is overly prescriptive, creates additional appeal risks for proponents and decision-makers, risks feasibility of projects being undertaken in NSW and should be avoided.

Recommendations:

- Further definitional guidance is required in relation to the terminology forming part of the avoid, minimise and offset hierarchy (AMO Hierarchy)

- The relevant provisions should be deferred until the Supporting Information has been released and the relevant stakeholders have had an opportunity to make submissions on the revised framework.

6.29A – Biodiversity conservation measures

Proposed Amendment

Proposed section 6.29A refers to the taking of biodiversity conservation measures in lieu of retiring biodiversity credits. The measures are to be determined in accordance with the regulations.

Further detail is required as to what those measures may constitute and the nature of the proposed regulations.

Further, it is not clear how this provision will work with existing section 6.4(2) of the BC Act which refers to the biodiversity conservation measures and regulations regarding these measures.

Recommendation:

- Further information is required on the changes to the concept of Biodiversity Conservation Measures.

Biodiversity Conservation Fund

Proposed amendments

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.

Enable the regulations to limit the ability of proponents to satisfy offset obligations by paying money into the Fund in particular circumstances.

No details have been provided as to the circumstances where the ability to pay monies into the Biodiversity Conservation Fund (BCF) will be limited (see proposed section 6.30(2)).

The NSW Government has advised the Biodiversity Stakeholder Reference Group that it has commissioned The Centre for International Economics (CIE), to undertake a piece of work including considering the costs and benefits of restricting payments to the BCF. No further details of the CIE work have been made available.

Prior to CIE reporting, it should not be assumed that any restriction on payment to the BCF is appropriate.

DCCEEW advises that the intention is to use the restrictions to support the biodiversity credit market, and it is likely that restrictions will limit the payment to the BCF where credits are available on the market. There would be detrimental impacts from this approach which need to be properly considered by CIE in the assessment including:

- To retire the obligations accepted via the BOS, the BCF buys credits – i.e. it does not develop credits. To restrict payment into the BCF to only credits not readily available, would concentrate obligations accepted by the BCF in the higher risk credits and potentially reduce the portfolio effect currently achieved and increase the overall risk of the Fund.
- The administration of a scheme where the credit obligations that are accepted by the BCF fluctuate day to day would be very difficult and would provide a great deal of uncertainty about how and at what price a development can be offset.

The restrictions could allow sellers to behave unreasonably, unless there are rules around reasonable prices, such as exists in the *Ancillary rules: Reasonable steps to seek like-for-like biodiversity credits for the purpose of applying the variation rules*, which allow access to the variation rules where the seller is significantly above the market price. This would be necessary but add more complication to the administration of the restrictions.

Further if the amendment is directed to improving BCF functionality and achieving net positive, the proposed changes to the provisions relating to the requirement to apply the money in the Fund within a three year period (unless otherwise agreed with the Minister) and other proposed improvements to the processes around the Fund will achieve this.

Therefore, the limitations on payment into the Fund is unnecessary.

If the Fund is working well (which we understand the provisions in the Bill are intended to achieve), then there is no reason why it should not be open to all proponents to utilise if they choose to do so.

Recommendation:

- There should be no restrictions imposed on the use of the BCF through the Bill as it is not certain whether such restrictions will on balance be positive
- The work being undertaken by on behalf of DCCEEW should be informed by consultation with appropriate stakeholders to ensure that all of the costs and benefits of any proposed changes are considered in their analysis

Directions to accredited assessors

Proposed amendment

Enable the Environment Agency Head to issue directions to accredited persons relating to the preparation and modification of biodiversity assessment reports.

There are clearly issues with the process of undertaking biodiversity assessment in the development assessment process. There are frustrations from all sides with the process, including industry, assessors, regional assessing officers of DCCEEW and the Department of Housing, Planning and Infrastructure (DHPI).

The Biodiversity Assessment Method (BAM) attempts to provide a ruleset for assessment of biodiversity impacts, but ecology is variable and does not fit neatly into the strict confinements of the BAM. There needs to be capacity to discuss and agree on how to progress the assessment where it does not fit neatly into the method. However, this necessary engagement on biodiversity assessment is generally not forthcoming and the first opportunity for feedback is the DCCEEW submission on the finalised BDAR.

The BAM has become increasingly complex and there has been a significant emphasis on providing updates and supplementary material targeting accredited assessor compliance related to impact assessment and reporting. The release of updates is ad hoc and largely apply retrospectively making it difficult to get finality and certainty on projects with long assessment time frames.

There has not been a joint approach to understanding the causes of the significant amount of disagreement between accredited assessors and DCCEEW in relation to the content of the BDAR or collaboration on how to resolve these issues. There is considerable goodwill from assessors and industry to work together with the Government to resolve these issues.

Providing the power for the environment agency to simply direct what is in a BDAR is not an appropriate solution to the issue of how the many subjective decisions are made and applied during the development of the BAM and genuine disagreement about matters that are unclear and need to be left to the consent authority to decide (possibly with assistance of an independent expert).

It is not clear why these directions are required given existing protections in the BC Act and the accreditation scheme (including certification provisions (see section 6.15), ability for the Department to request additional information in relation to a BDAR during the project application assessment period and the suspension or cancellation of accreditation if there is a non-compliance with the BOS.

There is no requirement for the Department to have attempted to resolve issues in contention through the independent means, including the use of independent experts. Many of the issues which bounce contentious in relation to the development of biodiversity assessment reports are subjective and require discussion, additional expertise and agreement - they are not suited to simple directions.

There is no ability to seek a review or appeal of a direction – if the provisions relating to directions are kept in the BC Amendment Bill a right for the assessor to seek a review and appeal the direction should be added to the Bill.

The BAM may be open to different interpretations, and it is more appropriate for additional information to be provided during the project application assessment process (similar to all other technical assessments) rather than by direction/order.

There are no provisions which set out the consequences of non-compliance with a direction. Proposed section 6.10A(3) makes provision for the regulations to provide for processes relating to compliance and enforcement of directions.

However, the regulations should be published at the same time as the BC Amendment Bill so that the consequences of the BC Amendment Bill can be fully understood.

Recommendations:

- The proposed provisions should be deleted given that they will result in further red-tape, delays and uncertainty to the assessments of applications and do not resolve the key issues with biodiversity assessment

- The Government should consult with accredited assessors (both private and government employed), industry and the Department of Housing, Planning and Industry (DHPI) to gain a shared understanding of the issues in relation to biodiversity assessment and work together on appropriate solutions

- If the provisions remain in the Bill they should be amended to

    - Identify a narrow set of circumstances where directions can be issued.
    - Require an independent process to attempt to resolve issues - for instance the engagement of an independent expert assessor - before the direction is issued
    - A requirement that the regulation make provision for appeal of a decision in a timely way.

Registers

Proposed amendment

Establish public registers of the following:

- Decisions to approve development, activity or clearing that is likely to have serious and irreversible impacts on biodiversity values.
- Exemptions from the scheme granted by the Minister in connection with natural disasters or other exceptional circumstances.
- Measures for avoiding and minimising impacts on biodiversity values set out in biodiversity development assessment reports and conditions of development consents and approvals.

There is no reason provided for the establishment of the registers. It is not clear what purpose they will have. The establishment of registers (for decisions approving or refusing development with impacts on SAII, and for avoid and minimise measures and biodiversity conservation measures) under the BC Act are unnecessary, overly administratively burdensome on proponents and the NSW Government and have the potential to create confusion particularly where the recordings in the register may not provide the full context for the relevant matter.

Better context is provided in the assessment reports and decisions linked to the relevant SSD, SSI or Part 4 development consent.

As currently drafted, the registers may be required to include information about existing approvals granted with SAII (and those refused with SAII) as well as existing conditions requiring biodiversity conservation measures and measures to avoid and minimise.

This would be administratively burdensome and unnecessary. It would need to be updated where there are modifications of approvals and could easily become confusing. It is not clear how the registers will be maintained and what process there will be for review and correction of inaccuracies.

Recommendation:

- Delete the requirement for the additional registers.

Savings and transitional provisions

DCCEEW has advised verbally that savings and transitionals will be included in the regulation and that most of the amendments will not take effect until the regulation is made.

In order to assess the Bill there should be information available in relation to the intention in relation to application of the amendments.

Recommendation:

- Information in relation to the NSW Government's proposals with regard to savings and transitional arrangements should be provided.

NSW Minerals Council
6 October 2024

References

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