

Submission
No 27

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

Organisation: Property Council of Australia

Date Received: 6 September 2024

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Ms Sue Higginson MLC
Chair
Portfolio Committee No. 7 – Planning and Environment
NSW Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Higginson,

The Property Council of Australia welcomes the opportunity to provide a submission to the Inquiry into the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024 (the Bill).

As Australia's peak representative of the property and construction industry, our members include investors, owners, managers and developers of property representing all asset classes across NSW. The property industry plays an important role in shaping the future of our cities and has a deep long-term interest in seeing them prosper as productive and sustainable places.

We support the broad intent of the Bill in protecting and enhancing environmental values and improving the operation of the Biodiversity Offsets Scheme (BOS). However, we are concerned about provisions in the Bill that if not clearly defined, have unforeseen negative impacts on both government and private sector development by providing additional barriers to approvals and increasing administrative requirements. This could jeopardise the State's commitment to the National Housing Accord, further increase delivery costs and timeframes on essential infrastructure and cause further delays to unlock the supply of industrial land to support growth.

The Property Council's comments and recommendations are summarised below, with further details on each provided in the attachment:

1. 'Net positive' should be defined in the *Biodiversity Conservation Act 2016* (NSW)(BC Act) to provide industry with certainty and to align with national commitments such as the 30 by 30 target.
2. Clear and objective guidance on what constitutes "avoid" and "minimise" is needed to ensure consistency in the application of the new hierarchy.
3. The "avoid" and "minimise" actions should only be applied once so there is a clear and conclusive resolution point within the development process.
4. There should be consistency in the terminology and definition of measures to avoid or minimise biodiversity impacts.
5. That the regulations should not extend the proposed Ministerial concurrence timeframe for state significant development and state significant infrastructure projects, rather

instead integrate any decisions to be made about the retirement of biodiversity credits with existing referral processes on biodiversity-related matters.

6. Options to offset impacts through payment into the Biodiversity Conservation Fund (BCF) should be retained as much as possible.
7. A grandfather clause should be introduced for existing approvals so that potential future modifications are not subject to assessment against more onerous requirements under the revised BOS.
8. Savings and transitional provisions should be introduced for biodiversity assessment reports that are currently under consideration at the time of the amended legislation being introduced.

We recognise that much of the detail about the proposed reforms will be prescribed in the regulations that will be developed once the Bill is passed. We welcome the opportunity for in-depth consultation on the development of the regulations and the strategy to transition the BOS to net positive outcomes, to ensure the implications of the proposed reforms are carefully considered and balanced against the aims of the legislation.

The Property Council thank the Portfolio Committee for the opportunity to provide a submission in response to this inquiry. If you have any questions about this submission, please contact NSW Policy Manager, Emma Thompson at _____ or by phone on _____

Yours sincerely,

Katie Stevenson
NSW Executive Director
Property Council of Australia

BIODIVERSITY CONSERVATION AMENDMENT (BIODIVERSITY OFFSETS SCHEME) BILL 2024 – PROPERTY COUNCIL RECOMMENDATIONS

1. The Bill does not propose to insert a definition of 'net positive' into the BC Act to replace the current 'no net loss' standard. Rather, it is proposed that the definition is included in a strategy that is to be prepared by the Environment Minister. Although 'net positive' is generally understood to mean that the environment is being repaired and regenerated, there is a risk that the absence of a statutory definition may cause uncertainty within the industry. Any definition should be supported by the development of key metrics and implementation of tools for the industry and government to measure and report on contributions at their respective levels.

In its current form, the proposal to transition the BOS to 'net positive' could potentially jeopardise NSW Government commitments to address housing supply concerns, deliver critical infrastructure and construction projects to support growth and transition to net zero, and undermine the incentive and cooperation required for private land conservation. A clear definition of 'net positive' is needed to signpost key approaches that need to be taken to halt and reverse nature loss while supporting sustainable growth and aligning with the Australian Government's commitment to the 30 by 30 target. The definition could include references to types of measures that can be used to contribute to net positive biodiversity outcomes. In addition to defining 'net positive', consideration needs to be given to the mechanisms that will measure impacts moving forward. Current practice is reliant on engaging consultants to undertake lengthy assessments, which may not be feasible for all developments in future.

Recommendation: An objective definition of 'net positive' with a clear baseline should be included in the BC Act to ensure that industry can contribute to this target with confidence.

2. We generally support formalising the avoid, minimise and offset hierarchy as this reflects the current practice of the Land and Environment Court, and acknowledge there may be subsequent changes to the Biodiversity Assessment Method (BAM) required. However, there is a potential risk that particularly in greenfield areas, the developable area of sites could be significantly reduced and thereby hamper the industry's ability to increase the supply of industrial zoned land to support employment growth and deliver on key priorities such as meeting housing targets under the National Housing Accord. In addition, there are concerns that applying the hierarchy on a site-specific basis during the development assessment process may create a risk of prioritising the retention of lower value conservation areas at a site-specific level as opposed to having a more holistic, landscape scale consideration of protecting more important conservation areas.

The "avoid" exercise should be conclusively resolved at the rezoning stage so that future land use is clear and can be efficiently utilised to its highest and best use. Guidance in the regulations should be clear that once the "avoid" exercise has been undertaken and resolved, it should not be revisited except in cases where new serious and irreversible impacts are discovered at the development assessment stage. "Minimising" should involve making reasonable and practicable accommodations in the design process to lessen the biodiversity impact of a proposal and should also be conclusively resolved as early as possible in the planning process.

The proposed avoid, minimise and offset hierarchy requires proponents to take "all reasonable measures" to avoid or minimise impacts, whereas biodiversity assessment reports will need to assess "genuine measures". Consistency between these definitions is required to avoid confusion for industry and assessors alike, as what is truly reasonable or genuine will vary in the context of an individual site or development proposal.

Recommendation: The regulations should provide clear guidance on what constitutes "avoid" and "minimise" activities so that principles are applied consistently across the state, with a clearly defined threshold of what must be avoided.

Recommendations:

- The regulations should use consistent terminology for measures taken to avoid or minimise biodiversity impacts and include a clear and objective definition for whichever term is adopted.
 - "Avoid" and "minimise" actions should only be applied once (either at the rezoning of part of a development application, not both) so there is a clear and conclusive resolution point within the development process.
3. We are concerned about the proposed changes to offsetting conditions for state significant development and state significant infrastructure projects, especially where concurrence from the Minister is required. By allowing the regulations to prescribe timeframes for the Minister to decide to give concurrence and provide notice beyond the 14 days proposed in the new section 7.14(3C), there is a risk that approval timeframes may be drawn out further and compromise the timely delivery of government priorities.

Recommendation: That the regulations do not extend the proposed Ministerial concurrence timeframe outlined in the proposed section 7.14(3C) or instead integrate any decisions to be made about the retirement of biodiversity credits with existing referral processes on biodiversity-related matters.

4. We are concerned about limits on payments into the BCF are being foreshadowed in future changes to the regulations. The option to offset impacts through payment into the BCF should be retained as much as possible to help facilitate the timely delivery of new housing and employment projects. It is likely to remain a preferred offsetting pathway for developers, even despite its higher cost, because of the relative certainty and simplicity it offers. We support ongoing work by the NSW Government to make private land conservation more attractive to landholders, and to action any findings of the Independent Pricing and Regulatory Tribunal's review of the biodiversity credits market.

Recommendation: Retain the option to offset impacts through payment into the Biodiversity Conservation Fund.

5. We broadly support the proposed changes to section 6.8 of the BC Act to provide that the BAM may include provisions of a savings or transitional nature consequent on the amendment or replacement of the BAM. To help manage developer risk and avoid retroactive changes that

could lead to unexpected costs and delays, we recommend including a grandfather clause for approvals granted prior to the commencement of any changes. This will ensure that future modifications are not subject to assessment against more onerous requirements under the revised BOS. In addition, we note that the Bill in its current form is silent on any savings and transitional provisions for biodiversity assessment reports that are currently under consideration.

Recommendations:

- A grandfather clause should be introduced to ensure modifications of existing approvals (including rezonings and current submissions) are not subject to new requirements under the revised BOS.
- The Bill should be amended to include savings and transitional provisions for biodiversity assessment reports currently under consideration.