

Submission
No 32

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

Organisation: Umwelt (Australia) Pty Limited

Date Received: 6 September 2024



Our Ref: 30000_Umwelt_BC Act Amendment Bill Review_V1

6 September 2024

NSW Legislative Council's Portfolio Committee No. 7 – Planning and Environment

To whom it may concern

RE: Umwelt (Australia) Pty Limited - Submission on the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024

The NSW *Biodiversity Conservation Act 2016* (BC Act) commenced on 25 August 2017, establishing the Biodiversity Assessment Method (BAM). On 15 August 2024, the Minister for the Environment introduced to Parliament the Biodiversity Conservation Amendment (Biodiversity Offset Scheme) Bill 2024. The Bill proposes to reform the Biodiversity Offset Scheme (BOS) by strengthening the avoid and minimise requirements, improving biodiversity outcomes, supporting a functioning biodiversity credit market, increasing efficiency and transparency, and better balancing application of the BOS with biodiversity risks.

The Bill has been referred to the NSW Legislative Council's Portfolio Committee No. 7 – Planning and Environment (the Committee), for review and further public consultation.

Umwelt (Australia) Pty Limited (Umwelt) has a team of almost 50 ecologists operating in NSW across our Newcastle, Sydney, Orange and Canberra offices. Of these ecologists, 18 are Accredited BAM Assessors under the BOS with extensive experience applying the BAM for a range of projects and sectors, with projects ranging from small urban developments through to large resource projects, lengthy linear projects (road, rail, powerlines) and extremely large renewables projects (large windfarms and a renewable energy zone including hundreds of kilometres of assessment corridor).

Umwelt's NSW ecology team has frequently offered constructive feedback and advice to the relevant government departments on biodiversity impact assessment and offsetting, particularly in relation to ongoing policy and regulatory change for biodiversity over the last 20+ years. We have often provided this separate to any client commissioning, as we believe strongly in supporting government to fine-tune policy settings to achieve sustainable outcomes. We have reviewed the Bill and provide the following general feedback in relation to key issues we have identified, for further consideration by the Committee.

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1. Lack of Detail and Transparency on Proposed Changes

The Bill lacks detail on a number of aspects, which is necessary to facilitate proper public consultation. A number of supporting and key documents in the form of regulations, standards, principles and requirements have not been prepared, nor has the intention of such future supporting material been adequately explained. This makes the full implications of the Bill difficult to understand. For a number of aspects, it is not possible to separate the desired effect of the Bill from the likely full potential effect of the Bill, including potential unintended consequences.

Recommendation 1: Further details on the proposed changes to the BC Regulation, the BAM and supplementary documentation should be made publicly available to enable the proper consideration of the effect of the Bill.

2. Issues Associated with Restricting use of the Biodiversity Conservation Fund (BCF)

The proposed limitations on payment to the fund need to be further identified to promote consultation and transparency. It is not apparent from the Bill the level of restriction proposed to be implemented, making it difficult to foresee the implications of this amendment. If use of the fund is restricted, there could be perverse outcomes related to over-use and reliance on the variation rules (the entities impacted will not necessarily be the entities offset) and lack of disbursement of funds towards the proposed new strategic prescribed measures.

Recommendation 2: The use of the BCF should not be limited. If limitations are imposed appropriate provisions should be made to prevent associated perverse outcomes.

It is recommended that consideration is given for opportunities for investment in strategic prescribed conservation measures outside of the fund pathway (including updating and expanding the ancillary rules for Biodiversity Conservation Actions) and appropriate limitations are placed on the use of variation rules to ensure that retirement of credits from the market benefits the threatened species or community impacted.

3. Revision to Scheme Entry Thresholds

It is our experience that the existing BOS entry thresholds are generally appropriate, however if the intent of this revision results in genuine efficiencies for Part 4 projects with little or no impact on important biodiversity features, this may be a suitable amendment. Without the provision of further details, however, the consequences of this change cannot be adequately considered.

Recommendation 3: Further details on the changes to the BOS entry thresholds should be made publicly available to facilitate proper consideration of the effect of the Bill.

4. Further Regulation of Accredited Assessors and Invalidation of Certified Reports

It is understood that the Bill aims to enable the Environment Agency Head (EAH) to issue directions to accredited persons relating the Scheme for Accreditation and to the preparation and modification of biodiversity assessment reports. It is widely recognised that biodiversity assessments completed under the BOS are already held to a high and rigorous standard in a national context, being generally more substantial than the existing requirements for other Australian states and territories and the Commonwealth. Umwelt supports the need for professional practice and rigorous standards for the BOS.

Furthermore, the NSW Government should instead adequately address inconsistent advice and application of the BAM. The current abundance of directive, guideline and interpretive materials is excessive. In addition to the BAM (2020) document (established by Order), there are three operational manuals, general notes on survey requirements for hundreds of species in the BioNet Threatened Biodiversity Data Collection (TBDC) (which are often updated or populated without notice), seven formalised survey guideline documents (with more committed to), seven other published guides relating to the BAM, 30 Biodiversity Offset Scheme update newsletters, 53 BAM Update newsletters and 34 recorded webinars.

It is unrealistic and inappropriate to expect an individual Accredited Assessor to be able to implement every relevant component of every relevant document without potential for error or accidental omission on every occasion. However, current expectations are that this plethora of documentation published by the NSW Government is understood and recalled by Accredited Assessors to ensure provision of consistent assessments and advice. The proposed 'Directions' in Section 6.10A would enable the delegate of the EAH to direct an Accredited Assessor to undertake certain actions. The directions must refer to the current Section 6.10, which itself relates to the Scheme for Accreditation. However, the 'Directions order' in proposed Section 6.10A has been constructed in a manner that, perhaps without intent, would enable the delegate of the EAH to direct the Accredited Assessor to undertake actions that extend well beyond the Scheme for Accreditation. For example, it is not unreasonable to interpret that the effect of proposed 6.10A on 6.10(4)(h)-(j) could include the delegate of the EAH having the power to direct an Accredited Assessor to re-work a Biodiversity Development Assessment Report (BDAR), or to re-work the survey effort or assessment underpinning the BDAR.

In our view, and in relation to the points above, the wording in proposed 6.10A has been constructed in this manner because either:

- a) It is intended that the delegate of the EAH should have such powers, OR
- b) Adequate regard was not given to the unintended consequences of such wording.

If it is not the intent of the amendment to provide such powers to the EAH, we recommend re-drafting the Bill to ensure such an unintended consequence cannot occur. We acknowledge that the intent may be to enforce particular standards to proponents who are unwilling to heed the advice of the Accredited Assessor and the NSW Government. If this is the case, we recommend the language is altered to reflect this.

If, however, the intent is to provide the power for the delegate of the EAH to direct what is in a technical document, such as a BDAR, we do not agree this is appropriate as it calls into question the validity of the Accredited Assessor certification process and it removes or potentially removes the ability of the decision maker to reasonably balance their assessment and decision. The nature of biodiversity assessment and ecological expertise can be subjective and necessarily varies between projects, locations and the relevant biodiversity features. The complexities of biodiversity over space and time means the BAM needs to be adaptable to different applications and with the expertise of the Accredited Assessor and the network of supporting experts they rely on as part of the project assessment. Biodiversity features are not fixed; rather, they are variable, as is the strict application of precise boundaries for plant community types (PCTs), threatened ecological communities (TECs) and footprints for threatened species polygons. It is not unusual for Accredited Assessors to disagree about some technical aspects of complex biodiversity assessments. Indeed, it is beneficial for different interpretations to be aired, discussed and resolved. 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. In some circumstances, a peer review can efficaciously assist the decision maker.

In summary, biodiversity features are not fixed in space or time, and species and ecosystems, including PCTs and TECs, are artificial human constructions that broadly represent the diversity of nature. We support a rigorous survey and assessment approach that drives for consistent approaches in execution and interpretation wherever possible. However, there remains a very important role for professional judgement and opinion, supported by appropriate consultation and justification. The use of a direction order to force the re-work of survey, assessment, or findings, is not appropriate, and removes the role for consultation, judgement and justification that enables the decision-maker to undertake a balanced assessment.

We recommend that the NSW Government consider improvements to the Scheme that would facilitate efficiency, consistency and practicability through provision of a single consolidated and updated BAM document which is efficacious to implement. The frequency of updates to databases that underpin the BAM should also be limited and managed through appropriate transitional provisions to allow the industry to plan and adapt to the changes.

The proposed Ministerial powers related to issuing of directions and invalidation of assessment reports prepared by Accredited Assessors have the potential for several adverse consequences including:

- Placing further unnecessary onus and stress on Accredited Assessors (please refer to the recent research findings on this matter published by the Ecological Consultants Association of NSW dated 20 August 2024).
- Removal of proponents' and Accredited Assessors' appeal rights (legal or otherwise), where disagreements on the application of the BAM arise with assessing agencies (many of which rely on the advice of non-accredited government staff).

It is unclear to what degree and how frequently these powers could be enacted. If Accredited Assessors are operating outside of the requirements of the BOS, there are already ample existing powers to sufficiently address concerns.

The NSW Government should also act to ensure that approval agencies are relying on experienced and qualified staff, accredited under Scheme, to assess and provide advice on SSD proposals.

In our experience, Accredited Assessors are being blocked from communicating with agency-employed threatened species Accountable Officers and are being required to accept the sometimes inaccurate predictions generated by government databases (as opposed to relying on site-specific contemporary data) and unreasonable requests made by non-accredited and inexperienced agency staff. While this is not the rule, it is frequent enough that it is having significant adverse impacts on the professional credibility and wellbeing of Accredited Assessors and is resulting in significant biodiversity related substantial time and cost implications for projects.

Recommendation 4: The wording of proposed Section 6.10A of the Bill should be reconsidered to ensure that the current Section 6.10(4)(h)-(j) of the BC Act does not extend the 'directions order' to include directions relating to the re-work, or the findings of, a BDAR and its supporting survey and assessment.

Recommendation 5: Regulation of Accredited Assessors should be consistent with accountability requirements for agency staff. Appeal rights should not be revoked through these legislative amendments.

Thank you for the opportunity to provide comment on the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024. We trust this information meets with your current requirements. Please do not hesitate to contact the undersigned should you require clarification or further information.

Travis Peake
Executive Manager – Ecology