

Submission
No 35

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

Organisation: Humane Society International

Date Received: 6 September 2024



**HUMANE SOCIETY
INTERNATIONAL**

AUSTRALIA

Humane Society International Ltd

BIODIVERSITY CONSERVATION AMENDMENT (BIODIVERSITY OFFSETS SCHEME) BILL 2024

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About HSI Australia

Humane Society International (HSI) is one of the world's leading animal protection organisations and HSI Australia established our office in 1994. We work to create a humane and sustainable world for animals advocating across wildlife conservation and animal welfare policy areas.

Our vision is for a world where people treat animals and nature with respect and compassion.

Submitted to:

Portfolio Committee 7

NSW Parliament

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Executive Summary

Review after review has shown that the NSW Biodiversity Offsets Scheme is failing biodiversity. It has failed to drive protection of areas that can not withstand further loss, it has failed to deliver meaningful conservation gains in exchange for approved harm, and it has failed to contribute to better management of our wildlife and the places they call home.

Despite over a decade of tweaks and changes to various iterations of the offsets scheme, the system has been an inherent part of the ongoing decline in the state of environment in NSW. It is therefore extremely disappointing that the Government's *Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024 (Offsets Bill)* fails to substantially engage with the core problems with offsets in NSW and defers any potential benefits arising from the Offsets Bill to future regulation, the detail of which has not been provided.

If the Offsets Bill is to 'fix the Biodiversity Offset System', as committed to by the current NSW Government, much more fundamental reform is required. Humane Society International Australia makes the following recommendations to the Inquiry.

RECOMMENDATIONS

The key recommendations discussed in this submission are that the Offsets Bill should:

1. specify that in the short-term the Biodiversity Conservation Fund can only accept payments where the Biodiversity Conservation Trust has identified that appropriate direct, like for like offsets for a development are available.
2. set a clear deadline for the complete phase out of payments into the Biodiversity Conservation Fund.
3. require that any agreement with the Minister on how to expend funds held for three years or more by the Biodiversity Conservation Fund must deliver offsets that are directed towards the impacted entity in a timely manner.
4. include provisions to create clear upfront protections for those species and areas that can not withstand any further loss.
5. provide legislative guidance on how the proposed principles, standards and requirements will deliver better application of the mitigation hierarchy.
6. require all development assessment pathways to implement the mitigation hierarchy and deliver direct, like for like offsets for any residual impacts approved, including by maintaining the test of significance.
7. ensure that any exemptions relating to natural disasters should only be applied to declared disasters and there must be safeguards in place to ensure that impacts on threatened wildlife and ecological communities are appropriately considered.
8. provide legislated clarity on the definition of net positive outcomes and a timeline for the development of the strategy to deliver these outcomes.
9. incorporate other outstanding recommendations for improvements to the Biodiversity Offset Scheme as outlined in this submission.

Introduction

Humane Society International (**HSI**) Australia thanks the Portfolio Committee No. 7 – Planning and Environment (**Committee**) for the opportunity to comment on the inquiry into the *Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024 (Inquiry)*.

As Inquiry members will know, the 2024 *NSW Biodiversity Outlook Report*¹ painted a stark picture of declining biodiversity in NSW, with only one in two listed threatened species expected to survive in 100 years. Nearly all of the NSW environmental indicators are going backward, and deforestation has been identified as one of the key drivers of decline. Rather than slowing and reversing this loss, the current Biodiversity Offset Scheme (**BOS**) is facilitating this harm.

In December 2023, in its report on the biodiversity market, the Independent Pricing and Regulatory Tribunal (**IPART**)² identified that four out of every five development proponents acquitted their offset obligations by paying into the Biodiversity Conservation Fund (**Fund**) and that:

On average, proponents pay the Fund to transfer obligations for around 11,000 credits per year to the Trust. The Trust acquires these credits at a rate of approximately 2,200 credits per year. This suggests the Trust's credit obligations are growing more than 5 times faster than it can fulfill them. In 2022–23, the Trust's obligations grew 12 times faster than its rate of acquittal.

The real world consequences of this are that significant land clearing is occurring without any appropriate offsets in place and without any clear pathway to ensure that the harm arising from this land clearing will be adequately compensated for.

Numerous reviews in recent years have identified the role that the BOS is playing in driving declines in our native wildlife and the places they call home. Many of these reviews have focussed on 'making the market work', rather than whether the BOS has achieved the intended environmental outcomes, but all reviews have identified significant failings in the protection of nature in NSW. The NSW Government must take the opportunity presented by the Offsets Bill to implement measures that will immediately address the environmental harm being caused by the BOS, and ensure that the BOS transitions to a scheme that will support and facilitate the recovery of our threatened wildlife and the places they call home. This requires much more fundamental reform than that currently envisaged by the Offsets Bill.

This submission identifies priority areas for additions to the Offsets Bill and discusses areas where the proposed Offsets Bill should be amended or strengthened. In preparing this submission we have considered the following reviews and reports:

- NSW Government (2024) *NSW Plan for Nature - NSW Government response to the reviews of the Biodiversity Conservation Act 2016 and the native vegetation provisions of the Local Land Services Act 2013 (NSW Plan for Nature)*;³
- IPART (2023) *Biodiversity Market Monitoring Annual Report 2022–23 (IPART Report)*;

¹ Available at: <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Biodiversity/Biodiversity-Indicator-Program/nsw-biodiversity-outlook-report-2024-240126.pdf>

² IPART *Biodiversity Market Monitoring Annual Report 2022–23* December 2023. Available at: https://www.ipart.nsw.gov.au/sites/default/files/cm9_documents/Annual-Report-2022-23-Biodiversity-Market-Monitoring-December-2023.PDF

³ Available at: <https://www.nsw.gov.au/departments-and-agencies/the-cabinet-office/resources/nsw-plan-for-nature>

- Henry *et. al.* (2023) *Independent Review of the Biodiversity Conservation Act 2016 – Final Report (Henry Review)*;⁴
- New South Wales Parliament, Legislative Council, Portfolio Committee No. 7 *Integrity of the NSW Biodiversity Offsets Scheme*. Report no. 16 (**2022 Senate Inquiry**);⁵ and
- NSW Audit Office (2022) *Effectiveness of the Biodiversity Offsets Scheme (Audit Office Report)*.⁶

Biodiversity Conservation Fund

The IPART Report formed the view that:

“it is necessary to phase out the option for proponents to pay into the Fund to achieve the biodiversity conservation objectives associated with the market and the Scheme more broadly.”

This unequivocal recommendation reflects the fact that the existence of the Fund not only distorts the biodiversity market and prevents the operation of a supply and demand curve that would otherwise increase prices for increasingly rare offsets, it undermines the purpose of the *Biodiversity Conservation Act 2016 (BC Act)* to maintain a healthy, productive and resilient environment.

Unfortunately, rather than implement this recommendation, the Offsets Bill includes measures that risk further weakening the biodiversity outcomes achieved through the Fund.

ENSURE OFFSETS AVAILABILITY

While the amendments under Schedule 1 [33] of the Offsets Bill allow for regulations to prescribe circumstances where a person must not use the Fund, consultation undertaken on the Offsets Bill indicated that these regulations are intended to be used to encourage proponents to purchase credits from the market before paying directly into the Fund. They are not intended to include regulations that recognise that the Fund is failing to deliver the necessary biodiversity outcomes and should be phased out. This is wholly insufficient.

The Offsets Bill must specify that in the short-term the Fund can only accept payments where appropriate offsets for a development have been identified before payment is accepted. This was a key recommendation of the 2022 Senate Inquiry into the integrity of the BOS. Where offsets can not be identified upfront, the Fund should not accept payments and the proponent should be required to identify offsets directly or redesign their proposal to avoid the need for offsets. The Offsets Bill must also set a clear deadline for the complete phase out of payments into the Fund as recommended by the IPART Report.

ENSURE OFFSET APPROPRIATENESS

Proposed amendments under Schedule 1 [34] include the introduction of provisions requiring the Biodiversity Conservation Trust (**BCT**) to enter into an agreement with the Minister on how

⁴ Available at: <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/overview-of-biodiversity-reform/statutory-review-of-the-biodiversity-conservation-act-2016>

⁵ Available at: <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2822/Report%20No.%2016%20-%20PC%207%20-%20Integrity%20of%20the%20NSW%20Biodiversity%20Offsets%20Scheme.pdf>

⁶ Available at: <https://www.audit.nsw.gov.au/our-work/reports/effectiveness-of-the-biodiversity-offsets-scheme>

the BCT will acquit its offset credit obligations if the offset payments have not been expended within three years after the payment was received. As drafted, these provisions create a risk of delivering significantly worse biodiversity outcomes in NSW, rather than addressing the *NSW Plan for Nature* commitment to improve the acquittal of offset credit obligations. The amendments would require payments to the Fund to be spent in line with the objects of the BCT, which is a much broader objective than the current requirement to acquit the specific credit obligations that generated the payments in the first instance. This is even after considering the current ability to apply variation rules, rules that we do not support and that are not adequately protecting biodiversity. The proposed changes significantly elevate the risk of trade-offs between species, where stewardship areas for easily offset species are prioritised above difficult to offset species, driving further decline of difficult to offset species.

When payments are not expended within three years, the requirement to enter into an agreement with the Minister on expending funds comes into effect. Under the proposed amendments, there are no constraints on the scope of how these funds are to be expended, meaning there is no requirement to spend the funds on matters that were negatively impacted by the original development. This is unacceptable. Nor is there a requirement for funds to be spent within a specified time period. There is also no apparent requirement to make these agreements publicly available, meaning the community and approval agencies will not be aware of how the offset system is being applied.

PHASE OUT THE FUND

Given the current significant delays in the BCT expending funds and the clear indication that direct, like for like offsets are simply not available for many of the payments that the Fund has already accepted, the Offsets Bill creates a significant risk of the BOS even further facilitating ongoing harm of threatened species and their habitat. The Fund must be phased out. In the period prior to the phase out of the Fund, the Fund should not be able to accept offset payments where direct, like for like offsets have not already been identified. In such cases, proponents must be required to identify their own offsets or redesign their projects to avoid the need for offsets. The BCT must be obligated to inform decision makers when direct, like for like offsets can not be delivered by the BCT and decision makers must not issue approvals that permit use of the Fund where they have been informed that BCT can not identify suitable offsets.

PAYMENTS TO FUND

Amendments under Schedule 1 [30] must explicitly require that the Environment Agency Head can not determine an amount payable that is less than that which would be identified under section 6.21(3) of the BC Act.

Mitigation hierarchy

We welcome the recognition in the Offsets Bill of the need to strengthen the application of the mitigation hierarchy in the BOS. Unfortunately, the measures proposed do not go far enough.

The most important component of the mitigation hierarchy is avoidance. There are some limitations in the existing system on the approval of Serious and Irreversible Impacts (SAIL) and the Offsets Bill proposes to introduce a concurrence for the Environment Agency Head in relation to decisions that are likely to significantly affect threatened species. However, the worsening state of the NSW environment clearly demonstrates that these tools are insufficient to halt and reverse biodiversity decline.

REQUIRE UPFRONT PROTECTIONS

Additional provisions to create clear protections for those species and areas that can not withstand any further loss must be included in the Offsets Bill. At a minimum, this would include:

- any areas of critically endangered and endangered ecological communities;
- critical habitat for critically endangered and endangered species;
- all areas where an approval would be responsible for a SAI;
- Areas of Outstanding Biodiversity Value (AOBVs);
- existing protected areas, stewardship sites and legally protected private land conservation sites;
- climate refugia; and
- areas that have been previously 'avoided' as part of an approved development's justification under the mitigation hierarchy.

Mapping these areas and legislating that they must be avoided would provide clear, upfront guidance for industry to better inform planning and investment decisions.

FURTHER STRENGTHEN THE MITIGATION HIERARCHY

While the codification of the mitigation hierarchy under proposed Schedule 1 [16] is welcome, the use of undefined language such as 'reasonable measures' and 'reasonable steps' does not improve certainty on what is required to ensure the adequate implementation of the hierarchy. Similarly, the undefined language under proposed Schedule 1 [23], [24] and [28] of 'genuine measures' is insufficient. We note the proposed introduction of regulations under Schedule 1 [28] to create principles and standards that will be used to determine the appropriate application of 'avoidance', but to ensure that the regulations deliver on the goal of better applying the avoidance framework in the BOS the legislation itself must include clear guidance on what is intended. This guidance must be expressed as an objective test against which the regulations (and ultimately decisions on the application of the mitigation hierarchy) can be assessed. In the absence of such guidance, the regulations could simply become a 'tick a box' exercise.

Appropriate principles would include:⁷

- Offsets can not be permitted in certain areas (including those listed above);
- Biodiversity offsets must only be used as a last resort;
- Offsets must require an environmental gain against a static baseline;
- Offsets must be direct, like for like offsets;
- Time lags in securing offsets and gains should be minimised;
- Creating exemptions or reducing the size of offsets required for reasons not related to the environmental harm caused should not be permitted;
- Offsetting must achieve benefits that are legally protected in-perpetuity;
- Offsets must be truly additional;
- Offset frameworks must include monitoring and reporting requirements to track whether environmental outcomes are being delivered and to identify what will happen if

⁷ Further information on best practice offset principles are outlined in Environmental Defenders Office (2022) *Defending the Unburnt: Offsetting our way to extinction*, available at: <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Offsetting-our-way-to-extinction.pdf>

they are not; and

- Offset frameworks should build in mechanisms to respond to climate change and random events.

The principles, standards and requirements under proposed Schedule 1 [28] must be subject to 'no regression' provisions that require that any future changes to the principles, standards and requirements can only be approved if they deliver improved outcomes for nature.

We do not support the proposal to retain exemptions to the requirement to refuse to grant consent where a proposed development is likely to have SAIL. If these provisions are maintained they must refer to serious **or** irreversible impacts and the consideration of impacts must be expressed as an objective, rather than subjective, test.

ADDITIONAL MEASURES REQUIRED

The Offset Bill should be strengthened by implementing the following recommendations from the 2022 Senate Inquiry:

- offsets must result in genuinely additional gains to biodiversity that would not have occurred otherwise. This could be achieved by ensuring that offset gains are measured against a static baseline rather than the current declining baseline, and removing the averted loss measures on stewardship sites; and
- remove the option to use mine rehabilitation as an offset (also recommended in the Henry Review and supported in the *NSW Plan for Nature*).

Prescribed biodiversity conservation measures

HSI Australia does not support the use of prescribed biodiversity conservation measures. As proposed in the Offsets Bill, the prescribed biodiversity conservation measures could create an even weaker version of the existing 'biodiversity conservation measures'. Alternatives to the use of offsets should be avoided and the unavailability of offsets should be seen as an indication that an entity can not withstand any further loss and development should not be permitted. If prescribed biodiversity conservation measures are to be allowed, they should be constrained to only allowing activities that have been identified in a Recovery Plan or Saving our Species strategy as being a higher priority for an entity than an offset. This should be defined in the primary legislation and not deferred to regulation.

Net positive outcomes

We welcome the intention to move the BOS to delivering net positive biodiversity outcomes, but again the Offsets Bill does not go far enough in identifying what is intended by such language. It must be made clear that net positive biodiversity outcomes will require a net gain for each impacted entity through the use of direct, like for like offsets, including in relation to biodiversity certification, as well as delivering net positive outcomes from the BOS overall. This will both ensure that individual entities can not be traded off against each other (i.e. gains for one species can be used to justify losses for others) and that cumulative impacts are better considered. Additional amendments should be made to ensure that the current 'no net loss' standard for the biodiversity assessment method set out in the BC Act reflects the requirement to move to net positive outcomes.

A clear timeline for the completion of the proposed strategy to move to net positive (Schedule 1 [15]) must be set in legislation.

We are concerned that the Offsets Bill allows the Minister to amend the strategy at any time, without constraint. This means that any non-legislative commitments and timeframes in relation to delivering net positive outcomes can not be considered to have lasting effect and could be subject to inappropriate influence. The Minister should only be permitted to amend the strategy where the amendments will result in better biodiversity outcomes.

BOS exemptions

SMALLER/LOCAL DEVELOPMENTS

We are concerned by the proposal to introduce additional exemptions to the use of the BOS for smaller developments. We note the Henry Review recommendation regarding reducing the burden on local development but believe that the proposed approach is inconsistent with the ecological requirements to better protect and drive the recovery of threatened species and ecologically communities. Features such as the test of significance provide an important safeguard for threatened species and ecological communities that are not captured by other pathways, and maintaining the test of significance is important for addressing cumulative impacts of multiple smaller developments. Use of the BOS should be driven by the environmental consequences of a development, not the convenience of the developer and proposed Schedule 1 [38] should not be implemented.

NATURAL DISASTERS AND EXCEPTIONAL CIRCUMSTANCES

We are also concerned that the proposed Schedule 1 [41] provisions create far too broad an exemption for natural disasters or any circumstance that the Minister considers to be 'exceptional'. Natural disasters have a significant impact on the environment and the wholesale removal of environmental protections in such circumstances (including prohibitions on approving SAI and the proposed concurrence requirements for approving impacts on threatened entities), without any apparent assessment requirements, does not reflect the need to provide appropriate protections for threatened species and ecological communities at such times. The NSW Independent Bushfire Inquiry⁸ found that the NSW 2019-2020 bushfires burnt over 5.52 million hectares of land which is estimated to have impacted more than 290 threatened wildlife species and 680 threatened plant species.⁹ Our threatened wildlife also needs protection after natural disasters.

If the provisions are maintained, it should only be applied to declared disasters and there must be safeguards in place to ensure that impacts on threatened wildlife and ecological communities are appropriately considered. Any provisions must include explicit provisions that limit harm to the minimum necessary to respond to the natural disaster.

⁸ NSW Independent Bushfire Inquiry (2020) *Final Report of the NSW Bushfire Inquiry*. Available at <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/NSW-Bushfire-Inquiry-1630/Final-Report-of-the-NSW-Bushfire-Inquiry.pdf>

⁹ See for example NSW Department of Planning, Industry and Environment *Understanding the effects of the 2019-20 fires*. Available at <https://www.environment.nsw.gov.au/topics/parks-reserves-and-protected-areas/fire/park-recovery-and-rehabilitation/recovering-from-2019-20-fires/understanding-the-impact-of-the-2019-20-fires>

STATE SIGNIFICANT DEVELOPMENT OR INFRASTRUCTURE

We do not support proposed Schedule 1 [49], and the associated existing provisions in the BC Act, allowing a decision maker to bypass offset requirements. State significant developments and infrastructure are some of the projects that have the largest impact on biodiversity and a large number of projects are considered under this pathway. State significant developments and infrastructure should be subject to the same offset requirements as other development and there should be no ability to use alternative mechanisms or reduce the number of offsets required simply because a proposal has followed this assessment pathway.

If these provisions are maintained, proposed Schedule 1 [49] (3G) should be changed to so that if the Minister has not given the relevant authority notice of concurrence within the relevant period (14 days) then Minister is taken to have **refused** concurrence. Significant modifications to the BOS should not be implemented without explicit consideration and approval.

Public registers

We welcome the expansion of public registers. These are important mechanisms to better understand the operation of the BOS and to identify how and where the BOS is not being applied in the way prescribed by the biodiversity assessment method. Equally important will be the use of the information contained in these registers to better inform decision making. They can not be used to simply track extinction but should be used to update settings in the BOS where they identify significant environmental harms. The scope of public registers should be further expanded to capture the full list of public registers recommended in the various reviews of, and reports on, the BOS.

Other matters for consideration

- The Henry Review recommendation to “Provide consent authorities with a clear power to retrospectively apply the Biodiversity Offsets Scheme to a development application if there has been pre-emptive clearing under a clearing entitlement to avoid the scheme applying” was supported by the Government in the *NSW Plan for Nature* and should be included in the Offsets Bill to avoid the risk of accelerating unapproved clearing between now and when any further changes are made to the BC Act.
- We note that *NSW Plan for Nature* committed to give further consideration to the Henry Review recommendation to “Require proponents of Part 5 activities under the *Environmental Planning and Assessment Act 1979* to apply the Biodiversity Offsets Scheme if their proposed activity has impacts above the area threshold or affects land identified on the Biodiversity Values Map”. We recommend that that this recommendation is given effect through the Offsets Bill.
- The Audit Office Report identified the risk that Biodiversity Stewardship Agreement sites will not have sufficient funding to maintain biodiversity outcomes in-perpetuity and made a number of recommendations on how this could be addressed. The Offsets Bill should create a power for the Environment Agency Head to refuse to allow credits to be retired where there is a significant risk that the agreed credit price will not provide sufficient implementation and management funding for stewardship sites.
- The 2022 Senate Inquiry recommended “That the Department of Planning and Environment provide greater certainty for developers on the likely scale of biodiversity offsetting liabilities in the lead up to land rezoning decisions.” This should be given effect

by requiring that offsets for a rezoning proposal must be identified and committed to at the time of rezoning, rather than as part of subsequent developments.