

Submission  
No 36

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

**Organisation:** Wando Conservation and Cultural Centre Inc  
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## **Submission on the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024**

### **Wando Conservation and Cultural Centre**

Wando Conservation and Cultural Centre (Wando CCC) is a Maules Creek-based group established in 2015 to undertake advocacy and research for the protection of natural resources and Aboriginal cultural heritage in the Namoi Valley region, including Leard Forest where the Leard Forest Mining Precinct is situated. Wando CCC produces reports and submissions in relation to environmental and planning issues and matters arising from the operation of extractive industry in the region.

### **Introduction**

As the only dedicated environmental group in Narrabri and the Namoi Valley, Wando CCC is in a unique position to comment on the proposed amendments to the Biodiversity Conservation Act 2016. We are commenting from our experience of on-ground realities and with the benefit of considerable hindsight into the destruction of the Leard State Forest which gained approval on the basis of false and misleading maps that purported to represent poor quality vegetation as suitable like-for-like replacement of critically endangered White Box Grassy Woodland.

Through our own research and vigilance of the performance of government agencies in relation to the false and misleading offsets that led to the Maules Creek coal mine being approved, we are of the view that the proposed amendments have failed to address two very critical aspects of biodiversity offsets. While there are some commendable improvements that are proposed by the Environment Minister, the amendment avoids

strengthening punitive measures against non-compliance, and also is not sufficiently prescriptive about the level of transparency needed to underpin decision-making and public scrutiny.

## In summary: shortcomings of the proposed amendments

- The government has chosen not to give the *Biodiversity Conservation Act* primacy allowing it to be undermined by other legislation related to mining, native vegetation, land clearing and native forestry.
- The *Biodiversity Conservation Act* does not require decision makers to consider and apply the Precautionary Principle.
- Reforms must address climate change impacts, but do not draw any link between the climate change mitigation aspects of vegetation loss and the recovery horizon between the destruction of the vegetation and final restoration of a not like-for-like offset, which could be many decades long.
- Recommendation 25 of the Ken Henry Report was to establish ‘no-go’ areas but has not been adopted. Actions that will have irreversible impact to biodiversity should not be considered for offsetting. These areas should be identified and declared Areas of Outstanding Biodiversity Value to provide certainty as to areas that cannot be cleared.
- Recommendation 12 requires the retirement of more than the number of credits reflecting the residual impact of a development, this is not a requirement of the proposed Bill.
- The current system allows unrealistic hopes for rehabilitation to underpin biodiversity offsets which do not have substantiated scientific basis.
- The amendments do nothing to strengthen compliance with biodiversity offsets arrangements, such as Stop Work Orders which are currently available under the Act but their use is avoided by government.
- The amendments support the continued dysfunction apparent in the relationship between the Department of Planning and the Department of Environment.
- The amendments continue to permit the use of biodiversity offsets located far from impacted biodiversity areas.
- Use of offsets reduces connectivity and leads to isolation of nature reserves and habitat.

- It is unclear how the government will assure in perpetuity adequate resources for ongoing monitoring, managing, and reporting of biodiversity outcomes.

## Specific concerns ignored by the Amendment

### 1. Stop Work Orders

Stop work orders are enabled under Part 11, Division 2 of the Act. However, we are not aware of these powers to issue a stop work order ever being exercised by the Environment Minister. We are happy to be proven wrong on this point, and would appreciate if the Parliament can clarify in the legislation itself when the stop work orders should be exercised. For example, the economic value of many projects such as to trump any other considerations (eg mining projects), in which case we would appreciate it being made crystal clear by the Parliament whether to stop work orders do not apply such cases.

If the power to issue stop work orders is meaningless in the real world, this is a critical shortcoming of the legislation. There is no point having punitive measures in the legislation which cannot be exercised by the Minister for the Environment. Major extractive projects are regulated under cooperatives schemes in which several portfolios have responsibility. The Minister for planning is the lead regulator in relation to these extractive projects, with the exception of coal seam gas in which the lead regulator is the NSW Environment Protection Authority.

#### **Example. Maules Creek Coal non-compliance with biodiversity offset conditions**

Although we acknowledge that it is by no means a unique example of failed delivery of biodiversity offsets, the Maules Creek coal example is one with which we are intimately familiar. This example is known to me, and is certainly well known to the Minister for Environment herself. For those unfamiliar with this example, the facts are that Whitehaven coal was granted approval on the basis of highly contested biodiversity offsets which were neither like-for-like, nor capable of being improved from grassland to wood land within any timeframe that might have the ability to support the wildlife dependent on White Box Grassy Woodland.

Ultimately, after several extensions been granted by the Commonwealth, and sustained and final refusal of the New South Wales Biodiversity Conservation Trust, it was conceded by the New South Wales Government that the biodiversity offsets underpinning the Maules Creek approval do not satisfy the listing requirements under the EPBC Act. Despite the availability of power to issue stop work orders, obviously no politician would dare to invoke them. This does not need much explanation, as it is clear that the economic implications of stopping large mine would be huge.

Nevertheless, a large stick of that nature would be very effective tool if it were ever used.

Wando CCC has long argued that given the egregious nature of the false and misleading information that were provided to gain approval, the protracted, lengthy period in which fair-minded public servants were forced to continue the farce of considering Whitehaven's offsets, and a myriad of surrounding factors which point to a systemic failure of the biodiversity offsetting scheme, that some form of punitive measure should have been undertaken.

The fact that the available powers have not been used in this notorious case and others should have been addressed when considering amendments to the *Biodiversity Conservation Act*.

## 2. Stewardship sites that become national parks or State Conservation Areas

Regulation 6.21 of the *Biodiversity Conservation Regulations 2017* provides that any person or body responsible for the care, control or management of the former biodiversity stewardship site "may continue to be paid out of the Biodiversity Stewardship Payments Fund". Lack of transparency and accountability around the financial arrangements is deeply concerning to us. We are of the view that these arrangements have not been adequately, if at all, addressed under the Amendment.

### **Example. Boggabri Coal offset transfer to NPWS**

Recently, the community has learned that some conservation agreements for biodiversity offsets of the Leard State Forest have so satisfied the NSW Government that it has now entered into financial and land ownership arrangements involving the New South Wales National Parks and Wildlife Service. Several concerns arise from the transfer of biodiversity offsets to the NPWS recently, as advised by Boggabri Coal to the Boggabri Coal Community Consultative Committee.

This transfer of ownership to the state would lead us to believe that the land concerned would now be open to the public. However, this does not appear to be the case. Even though these offsets have now been reportedly transferred to the public estate, for reasons unexplained the areas continue to be off-limits to the public, raising questions about the ongoing level of control that the mining company has over the land.

The wording of regulation 6.21 seems to suggest that NPWS may continue to pay the mining company for stewardship, but there is no transparency around the commercial arrangements. This is unacceptable. It is not in keeping with the spirit and promise of the Amendment, which purports to "increase scheme efficiency and transparency". Indeed, the economics underpinning biodiversity offsetting is highly opaque and secrecy has prevented efficiency and transparency throughout the history of biodiversity offsetting in this State.

It is an unhealthy context in which economic decisions are made under the influence of political lobbying and directed by a cabinet rather than through a process of transparent economic management and sound environmental assessment. We would like to see a commitment to making these matters more visible so that the public can independently scrutinise such key economic variables as the cost of stewardship, the performance of stewardship, and the overall legitimacy of claims on the Biodiversity Stewardship Payments Fund.

## NSW Audit Office report on the Effectiveness of Biodiversity Offsets

The amendments purport to satisfy the recommendations of the Ken Henry report, but in many aspects have failed to address the findings of the New South Wales auditor-general in the 2022 report [Effectiveness of the Biodiversity Offsets Scheme](#).

As a result, the act will continue to lack safeguards against potential conflicts and risks to credit supply. The auditor general made 11 recommendations to the Department of Planning and Biodiversity Conservation Trust. It is curious and incongruous, therefore, that the amendments to the Act are not the responsibility of those agencies, although we firmly believe they should be. You can't expect improvements in the outcomes of the biodiversity offsets scheme if the legislative amendments are being undertaken by an agency which we do not perceive to have the main responsibility.

We know, for example, that the passage of biodiversity offsets through the approval process is undertaken by the Department of Planning and the BCT.

Other recommendations included improving the operation and transparency of the market and credit supply. However, this transparency will never happen if there is no legislated obligation to provide maps of a requisite level of detail and make them publicly available for scrutiny and comments by independent experts and the public at large. It will also never happen when the economic arrangements between mining companies and the government in relation to the offsets are treated as commercial in confidence and therefore never experience the cleansing light of public scrutiny.

The auditor general also criticised the biodiversity offsets payment calculator. Calculators have been highly criticised and they are highly opaque instruments.

The Report stated:

“In 2020–21 the BCT used an unpublished version of the calculator to estimate its liabilities for its acquired offset obligations because the published version had not been updated by DPE with more recent market data. In doing so, the BCT recorded a loss against its provision for developer payments of around \$11.5 million in

2019–20 and around \$600,000 in 2020–21. The continued use of the calculator creates a risk that the Biodiversity Conservation Fund will not have sufficient funds for the BCT to meet these obligations on a like-for-like basis in the future.”

Recommendations were made, in a 2020 review commissioned by the Department of Planning to replace the calculator with a developer-charges system, and for responsibility of this to be transferred to the BCT. As of 2022 this had not yet occurred. We cannot see evidence of commitment to this measure.

## Second Independent Review of the EPBC Act

The [Second Independent Review of the EPBC Act](#) (Graeme Samuel statutory review) (2020) called for legislation that incentivises the delivery and public disclosure of environmental outcomes, rather than simply regulatory compliance, to reduce environmental risks and improve accountability. While we believe that strength and compliance is necessary, incentives are also necessary. However the balance between punitive measures and incentives has not been properly weighed. The incentive to overstate the biodiversity value of proposed offsets is of such a great economic value, measured in decades of economic gain to proponents and to a lesser degree to the State in the form of royalties, that it is difficult to see how a proper balance can be struck without strengthening of stop work powers (discussed above).

## Conclusion

While the promises to implement a register of offsets, much overdue, could help to prevent the same offsets being used for multiple projects, this is really tinkering around the edges in the effort to instill much overdue oversight into the Biodiversity Offsets Scheme. While broad-brush attempts have been made under the current Amendment to improve matters, some of the most important functions enabling biodiversity offsetting have been left up to bureaucrats’ discretion, and key underpinnings such as mapping, public access to verify offsets are as described by proponents, the offset calculator, punitive measures for non-compliance, and what to do if there simply are no offsets, are not dealt with adequately, if at all.

Like the Commonwealth Government’s so-called Nature Positive laws, the Amendments will fail to achieve no net loss of habitats and species. We are disappointed that the experiences of failed offset schemes like those which enabled the destruction of the Leard State Forest have not been properly considered. However, we are hopeful that our concerns will be considered and remain available to provide more details of our experience with the NSW Biodiversity Offset Scheme at any time.

**6<sup>th</sup> September 2024**