

Submission
No 41

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

Name: Jan Barham
Date Received: 9 September 2024

Jan Barham

Byron Shire Councillor 1999 – 2012 (Mayor 2004 -2012), MLC 2011 -2017 (The Greens)

Legislative Council Standing Committee No 7 Environment and Planning

September 2024

Submission – Biodiversity Conservation Amendment Bill Inquiry

Dear Chair and committee members,

Thank you for the opportunity to comment on this legislation, I hope I'm able to provide constructive input but advise I haven't had the opportunity to access expert advice.

I congratulate the Government for moving quickly on making changes and responding to Independent Review and applaud an increased role for First Nations engagement. However, I'm disappointed with the failure to deliver No Go zones or elevated authority for the Biodiversity Conservation Act and its objects.

My contribution is informed by personal and shared experiences of assessing Development Applications at a local level as a decision maker and a community activist. I'm currently reviewing a DA in Wategos Beach that will destroy an area of EPBC Critically Endangered Ecological Community, Littoral Rainforest, that is utilising BOS. It's a dual occupancy, with a build cost of \$28.7m that will destroy a small but significant area of Littoral Rainforest.

The '**death by a thousand cuts**' principle is real and especially in biodiversity hotspots where the ecological values are high and the pressure and risks are intense, magnified by the value, not the values. This applicant didn't self-refer to the Commonwealth and the council hasn't advised the state to consider a referral, but the community will and will also advocate for increased impact and offset scrutiny.

The current processes for 'protecting' and 'destroying' biodiversity are complex, everyone seems to agree on that. A major concern, that's overlooked is the impact on the community. They are disempowered by the confusing and opaque processes. The only stakeholders who fully understand appear to be the professional accredited assessors employed by applicants. I encourage the committee and the government to support comprehensive guides for community so their engagement with the development process is better informed and therefore more effective for the role of protecting our precious biodiversity.

I'm deeply disappointed that the Bill has failed to take on board the Independent Review recommendation that offers the most timely and effective means to halting further biodiversity decline, by protecting what we already know is precious and at risk.

Recommendation 8: *Amend the Act to enable the development of a single spatial tool to ensure primacy of biodiversity considerations, support nature positive outcomes, and identify 'no-go' areas. The tool should be made by the Minister for the Environment.*

There MUST be NO GO areas for offsetting, as identified high conservation value areas are at risk, are irreplaceable and must be protected.

To genuinely implement a Nature Positive Strategy, the halting of the destruction of known areas of high ecological value is an obvious and necessary mechanism.

The Commonwealth, [Nature Positive Plan 2022 plan](#) highlights protection of areas to be identified within a Regional Plan with the traffic light system, red / No Go areas. It's curious that the State hasn't taken this approach. The public deserve an explanation as to why the Independent Review has been ignored on this crucial issue.

<https://www.dcceew.gov.au/sites/default/files/documents/nature-positive-plan.pdf>

Regional planning

Regional plans can speed up decision-making while delivering nature positive outcomes at a landscape scale. Regional plans will be built around a three-level (traffic light) map, designed to pre-identify areas for protection, restoration and sustainable development. Regional plans will also identify priority areas for action and investment and help ensure Australia meets its biodiversity outcomes including the 30x30 target.

If areas and species already identified at risk of extinction are not protected and excluded from the folly of offsets, then future reports will continue to document the decline of biodiversity in NSW.

I also note that the language of Nature Positive being used in NSW differs from the international commitment and believe the exclusion of the term 'halting' is an unacceptable omission.

<https://www.naturepositive.org/about/the-initiative/>

What does 'Nature Positive' mean? (2022)

'Nature Positive' refers to halting and reversing biodiversity loss, through measurable gains in the health, abundance, diversity and resilience of species, ecosystems and processes. We are calling for all to take action to support the global goal of being nature positive by 2030, measured against a 2020 baseline.

NSW Plan for Nature - July 2024

<https://www.nsw.gov.au/sites/default/files/noindex/2024->

What does 'nature positive' mean?

Nature positive means the environment is being repaired and regenerated. This contrasts with traditional sustainability approaches, which have sought to minimise negative impacts by slowing or stabilising the rate of biodiversity loss.

Where is the statement about halting destruction and protecting what we know is precious?

In relation to the Bill, an Explanatory Note that identifies the amendments that are based on the [Independent Review](#) recommendations and those that address the recommendations of the LC Inquiry into the [Integrity of the NSW Biodiversity Offsets Scheme](#) would be useful. These reports and the submissions provide valuable information as to what is wrong with the current system and how it should / could be addressed.

The community has been increasingly isolated from having meaningful input to the processes of biodiversity protection since biobanking was first introduced in 2008. Offsetting that enables destruction of significant biodiversity is contrary to the scientific rigour that

identifies biodiversity values and to the values of the many citizens who volunteer their time and energy to protect and preserve biodiversity.

I recognise that in some cases Government might argue that there are community priorities and Public Interest for infrastructure projects that require such destruction. If this is the case, it should be the exception, not the rule.

As it stands the provisions that allow biodiversity destruction and the compensation by way of offsets are mostly for commercial purposes and not for the public interest and not for the protection or enhancement of biodiversity.

I provide some key points of concern and some suggestions and hope that what results from this Bill, hopefully with further amendments, will deliver nature positive outcomes for NSW. However, I emphasise that the concept of offsets so far appears to be a misnomer and with a higher bar, I can only hope that the Bill is strengthened to deliver a better chance of success.

Key Points

1. Establishing **NO GO areas** –existing designations of Critically Endangered, High Ecological Value and BV Map identification provide guidance for areas that are irreplaceable and must be protected.

Recommendation 8: Amend the Act to enable the development of a single spatial tool to ensure primacy of biodiversity considerations, support nature positive outcomes, and identify 'no-go' areas. The tool should be made by the Minister for the Environment.

2. **Strengthening the Act and the Decision makers** – to truly commit to Nature Positive the Biodiversity Conservation Act needs to have greater authority in relation to other legislation and guide decision making across the whole of government. There must be guidance for decision makers of the importance of ESD and particularly the Precautionary Principle.

3. **Guidelines for assessment** need to be open and transparent for public scrutiny with full transparency of the assessment methods undertaken and how and where offsets are determined. Also a requirement for a comprehensive compliance **checklist** within the BDAR would be of great assistance. It's an unreasonable burden for councils and community to scrutinise the process, but in doing so, often locate omissions and flaws.

4. **Avoidance principle** – I support this but clarity is required, how is it going to be presented to illustrate a genuine commitment to avoid destruction. Previously in Environmental Impact Statements, options were presented and analysed. It's not enough to have statements. Overlays that indicate the scale and impact of options are essential.

5. **BAM** – include Climate Change impacts and wildlife corridors and clarify how BOS will meet local and or regional measurable biodiversity gains.

6. **BAM Review** - Clarify if and how a **review / modification of the BAM report and credits** occurs if flaws are revealed with the application and if re-calculation of credits is possible and if further public scrutiny and input is permitted.

7. Credits – the public need to know more about how credits are calculated and if offsets are delivering locally or regionally or not. More comprehensive information explaining 'like for like' is also essential for community confidence in the scheme.

8. Pre-lodgement assessment for EPBC and SAI - these issues are crucial to the design of an application and should be addressed prior to the lodgement of applications. Also in relation to SAI, I support the EDO submission to the BCA review Recommendation 21, that the standard for SAI should be amended to be **serious OR irreversible**, not 'and'. This should be amended in the Objects.

9. Require Local Government to report to the State any applications that impact on MNES and could be **EPBC Controlled Action**, to enable State consideration for referral.

10. The production of **Community Information packages** on the website to fully explain the process and the applicant responsibility in relation to the information required to be presented in an application, and needs to be collated to include

10.1 explanation of how the complex interplay of the various legislation and iterations of offsetting systems that are still being implemented operate. noting that zombie DA's still exist (see LH inquiry into Historical Consents)

10.2 the Guidelines that relate to the 'tests' for significance, particularly the SAI investigations.

10.3 the role of other legislation and particularly the EPBC Act and the MNES impact provisions. This appears to be given little prominence in the assessment process, despite it being a hierarchy that isn't adequately defined or understood. I have examples, Byron Bay Bypass, Wallum in Brunswick Heads, current DA in Wategos Beach.

10.4 Document requirements for applications, including clarity on the information required within a BDAR, eg. applications that define maps for tree retention and removal in all cases I've seen fail to overlay the Bushfire Regulation requirements that sometimes include APZ clearing of native vegetation or management requirements that involve vegetation clearance.

10.5 requirements under any other legislation that may impact including buffer requirements. There needs to be prescribed overlays included with BDARs.

10.6 clear guidance on survey and site investigation methods to identify the flora and fauna attributes and how they are required to be presented, sites should be required to map all F&F records on a site.

11. Registers - expansion of the register system to include Agreements, Annual Reports and payment of TFD and retiring /sale of credits. It should be mandatory that all government agreements are fully open and transparent, including the implementation, monitoring and outcomes. My experience with LG Biobanking Agreements, now BSA, is that no implementation information is reported publicly. Case Study Byron Bay Bypass

12. Wildlife Corridors – the recognition of the key role of corridors requires strengthened legislative measures. The loss of areas vital for connectivity and threatened by climate change will continue to be degraded and result in further biodiversity decline unless given higher status. See LGSA BCA Review sub

13. Strengthening **compliance relating to unlawful clearing** in identified areas of HEV. Too often areas are degraded prior to applications being presented and despite requests for investigation or complaints, they are often not addressed.

14. Delete or amend the BCA Reg Clause 34 Certification provisions that allow for prior Part 3A Concept Plans to avoid contemporary environmental assessment. The process is secret and flawed. I recently tried to access the information presented to the Secretary by way of GIPA but it had been submitted under Legal Privilege. Also there is no public notification or opportunity for public submissions therefore no scrutiny. Case Study, Wallum.

15. Reporting on the BCA Independent Review – this is essential for community confidence in the reform of the BCA. The reporting of the Government’s response to the Independent Review is crucial for public confidence.

16. Transitional Arrangements and Regulations– there needs to be clarity as to what arrangements are being made to the BAM and if any other matters will be added to the Regulations, that aren’t highlighted in the Bill. Revised thresholds for BOS entry for local development, need to be based on ecological grounds, not scale or financially determined.

In 2016 the BCA 2R by Minister Speakman, espoused a more open and transparent process¹ but then the Regulations included, the ‘get out of contemporary assessment card’ with Clause 34 provisions. These are secret processes that allow old consents to be delivered, with unacceptable ecological impacts. Ecological disasters are about to happen, but could be avoided. Perhaps the draft Regulations should also be subject to a public exhibition and or an inquiry.

17. Consider how Biodiversity Stewardship Agreements could resolve some of the risks associated with zombie developments and avoid the foreseeable biodiversity loss in relation to old consents – refer to current LA Historical Consents Inquiry.

A related issue with local relevance but could have State wide implications

18. Rehabilitated Quarry Stewardship Agreements- consider BSA for rehabilitated quarry sites in HEV areas, to retain rehabilitation in perpetuity and establish credits. Otherwise the pursuit of a financial return may result in rezonings for residential or commercial development. In areas of high biodiversity eg. Broken Head Quarry, subject to EU² but will otherwise likely result in further biodiversity loss and require a nature positive outcome.

Conclusion

At the time, I wasn’t able to make a submission to the previous LC inquiry or the BCA review, despite initiating case study reviews that highlight inconsistencies and flaws in the process. I’m willing to provide any further detail if required.

I also make the point that the LGSA submission to the BCA review raised relevant points regarding the difficulties and concerns for local government in the application of BOS and how the BCA operates. Regrettably it appears that some of these points were overlooked in the Independent Review but are worthy of consideration.

¹ 2R BCA 2016 Minister Speakman

² DA97/465 consent issued by Minister, 1999 based on Commission of Inquiry recommendations. 2018 Enforceable Undertaking (EP&A) in 2018. and June 2024 Byron Shire Council refuses a Residential rezoning Planning Proposal. The applicants have applied to the State for a review.

I have listed concerns and suggestions and accept that some may already be included with the Bill and that some are possible without.

However, I appeal to the Government to produce the **Community Guides** on how to engage with the planning system as a **matter of urgency** as the current process is daunting and will no doubt still be in place for some time.

It's community volunteers who do so much to protect biodiversity; they make submissions, contribute to land repair groups and when required, they protest, often as a last resort when their concerns and commitment to the protection of nature are ignored.

We need to turn around the biodiversity decline and information is vital for empowerment and advocacy.

Thank you again for the opportunity to comment and I regret not having the time to produce a more detailed and comprehensive submission to the inquiry and to consult broadly. But, I've got submissions to do on proposals that will destroy my home. It's difficult to witness the destruction of biodiversity one application at a time as a result of poor legislation.

I've spent 35 years trying to protect my home and the 'death by a thousand cuts' is heartbreaking and it's a struggle to remain positive and I know many feel the same angst but like me continue to engage, hoping that positive change is coming.

Please take this opportunity to do what's needed, the Independent Review gives the guidance and authority. We can't afford to wait another five years for another review and more damning statistics on biodiversity loss, extinction is real and we are leaders at that.

***Please make the necessary amendments to give
NSW the best chance possible to be Nature Positive.***

Yours sincerely,

Jan Barham