

Submission
No 43

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

Organisation: Nature Conservation Council of NSW
Date Received: 6 September 2024



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6 September 2024

Portfolio Committee 7 – Planning and Environment
Via online portal submission

To the Committee Chair,

Submission to the Inquiry into the Biodiversity Offsetting Amendment Bill 2024

The Nature Conservation Council of New South Wales (NCC) is the state's peak environment organisation. We represent over 200 environment groups across NSW. Together we are dedicated to protecting and conserving the wildlife, landscapes, and natural resources of NSW.

NCC welcomes the opportunity to contribute to long-overdue reform of the deeply problematic NSW Biodiversity Offsetting Scheme (BOS).

The diversity and character of native plants and animals in NSW is remarkable and inspiring. Our shared natural heritage has evolved over millions of years and should be treasured. **Too often, biodiversity offsetting legitimises an unacceptable legacy of destruction being left for future generations.**

Public confidence in the much-maligned BOS is low. Media and formal analysis have found conclusively that it is dysfunctional.

NCC is opposed to biodiversity offsetting. All biodiversity is unique and non-fungible. Achieving like-for-like offsets is difficult, and often impossible in practice. When time-lags between destruction, and the functional maturation of an offset are also considered, offsetting almost always delivers negative outcomes for nature.

Where biodiversity offsetting does occur, scheme design must follow best practice, be transparent, and include regular comprehensive evaluation of its implementation, ecological outcomes and cumulative impacts. Offsets should only be used as a last resort and should never be permitted in high biodiversity value areas, such as those with threatened species or ecological communities, or those that are important for maintaining landscape habitat connectivity.

The proposed reforms do not come close to this benchmark.

Despite NCC's opposition to biodiversity offsetting, the recommendations in this submission assume the continuation of the scheme and propose measures to make the scheme less harmful in the context of the current proposed amendments.

NCC welcomes the positive moves contained in this Bill, in particular:



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- the steps to strengthen the 'avoid, minimise, offset hierarchy',
- requirements for the Biodiversity Conservation Trust to acquit obligations within 3 years, and
- new registers that support accountability and transparency.

However, even with the current Bill's proposed amendments, species and ecological communities at risk of serious and irreversible impacts can, and will continue to be, approved for destruction. Many of the Bill's proposed reforms can be characterised as 'soft around the edges', with key details to be determined by regulations. Vague wording and exit clauses leave open the possibility for future Governments to undermine the already limited progress made by this Bill.

It is particularly disappointing to see that this Bill does not contain many of the recommendations relating to the BOS made in Dr Ken Henry's Independent Review of the Biodiversity Conservation Act (BC Act). While not supporting all of the panel's recommendations for the BOS, NCC believes that many of the recommendations can contribute to a reformed scheme improving results for nature.

NCC has identified priority areas where this Amendment Bill must be strengthened:

1. Amend the Act to require the Minister for the Environment to establish 'no-go zones' for development.
2. Amend the Act to give the Minister for the Environment call-in and concurrence powers in relation to developments which pose serious and irreversible impacts.
3. Amend the Act to ensure offsets are like-for-like and allow the Environment Agency Head to prohibit payments to the fund where like-for-like credits are not likely to be available.
4. Increase transparency and accountability across the BOS
5. Allow for rapid response to protect species after natural disasters and other significant events.

Some of NCC's recommendations, such as for an effective mitigation hierarchy, apply to the regulations which will follow the Amendment Bill's ascension. NCC hopes the Committee makes recommendations that will provide for a clear and strong regulatory framework.

The NSW Government made an election commitment to 'fix the BOS'. Without the changes proposed in this submission it will be hard to see how the scheme is 'fixed'.

Thank you for the opportunity to participate in this consultation.



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Your key contact point for further questions and correspondence is Jacquelyn Johnson, Executive Officer, available . We welcome further conversation on this matter.

Sincerely

Jacqui Mumford

Chief Executive Officer

Nature Conservation Council of NSW



Summary of recommendations

1. Amend the Act to give the Minister for the Environment call-in powers in relation to serious and irreversible impacts, as outlined in the Henry report recommendations 13 and 14;
 - a. a call-in power to determine if a proposed local development or clearing would give rise to a serious and irreversible impact, and
 - b. a call-in power and concurrence role for major projects in determining serious and irreversible impacts.
2. Amend the Act to require the Minister for the Environment to develop a spatial tool that can identify 'no-go' areas for development, as outlined by the Henry Report, recommendation 8. This tool can be finalised by regulations following consultation with community and stakeholders.
3. That the regulations provide for a strong mitigation and conservation hierarchy which goes beyond requiring demonstrated steps to avoid and minimise, to conditions including rehabilitation, restoration, and enhancement of nature impacted by developments.
4. That the Act be amended to allow the Environment Agency Head or Environment Minister to publish a list of credit types where payment into the BCF will be refused, because credits are not available, and it is unlikely that a like-for-like offset will be achieved. Outside of the published list, this refusal power should also be administered on an ad-hoc basis where needed.
5. In the absence of the above, that the Act be amended to allow the BCF to expend funds on the conservation, rehabilitation, restoration and enhancement of the specific species or ecological communities impacted by developments where no like-for-like amendments are available when acquitting obligations.
6. Extend the timeframe for Environment Minister concurrence on variations to consent conditions and offset credit requirements for SSD and SSI from 14 to a minimum of 28 days, with powers for the Minister for the Environment to extend the deadline for consideration where necessary.
7. That a package of transparency measures to allow the community to see, understand and raise concerns about the extent and impact of biodiversity offsetting measures be created and maintained through the Amendment Bill.



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8. That the reformed scheme include mechanisms that proactively protect species and ecological communities harmed by significant events.

1. Introduction

Biodiversity offsetting is fundamentally nature negative.

Biodiversity offsetting is, fundamentally, nature negative. Offsets do not repair nature, and they do not result in 'biodiversity gains' because they destroy at least as much as they protect. Over time, offsetting frameworks have evolved to focus on facilitating development with little regard to whether genuine environmental outcomes are being delivered.¹

The NSW biodiversity offsetting system (hereafter referred to as the BOS) has delivered a market mechanism that enables project approval to be granted in almost every situation. Biodiversity has become a cost of doing business, not a decisive factor in whether a proposal should be permitted or refused. The reforms proposed by this Amendment Bill will not change business as usual.

We are reaching ecological tipping points and must change course.

The 2024 Biodiversity Outlook Report finds that 50% of threatened species will be extinct in NSW by 2100.² Species like the iconic koala are headed for extinction by 2050.

The current BOS only stops destruction if it is likely to issue the final blow and push a species or ecosystem to extinction. Even then, if the development is State Significant Development or State Significant Infrastructure, the Minister can legally permit activity likely to cause extinction. The proposed reforms do not 'fix' this failure in the scheme; only allowing the Minister to provide concurrence and conditions where a discount on credit requirements is sought. This is a small and relatively ineffective concession.

As the Independent Henry review panel found, "the Minister for the Environment must have a central role in determining development impacts that present, or contribute to, a risk of species extinction or ecosystem collapse". The Bill as proposed, does not ensure this.

Recommendation 1: Amend the Act to give the Minister for the Environment call-in powers in relation to serious and irreversible impacts, as outlined in the Henry report recommendations 13 and 14;

- a. a call-in power to determine if a proposed local development or clearing would give rise to a serious and irreversible impact; and
- b. a call-in power and concurrence role for major projects in determining serious and irreversible impacts.



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Even with best practice design and implementation, research shows biodiversity outcomes can still be far from certain.

Discussions around biodiversity offsetting too easily become weighed down by financial market and operational terminology - the price of offsets, supply, demand, trades, the application of the rules and to what extent loopholes are being used and abused. None of this information confirms actual ecological outcomes.

Ultimately, the most important measure of efficacy of the BOS is the ecological outcomes it delivers. With every offset, there is a risk of allowing destruction of existing ecological values on the promise of a gain that may not materialise, or the incorrect assumption of averting future loss – a counterfactual that can never be proven definitively. In either case, the outcome is simple: net loss in biodiversity.

Across the world, biodiversity offsetting is widely applied but its effectiveness is rarely assessed. Research has variously found that the majority of offset projects result in ineffective offsets, that target species often don't benefit from offsets at all, and that the dependence on 'averted loss' is grossly over-estimated.^{3, 4,5}

Uncertainty about ecological outcomes under offsetting policies reinforces the importance of avoiding impacts in the first place. A working offsets scheme is one that puts a stop to unsustainable projects. If the BOS is to persist in NSW, anything less than internationally agreed best practice will fail to protect and restore nature.

We must identify which areas, species and ecological communities are too important to lose, and designate absolute protection. Offsetting should only be used as a last resort and not be permitted in high biodiversity value areas, such as those with threatened species or ecological communities, or that are important for maintaining landscape habitat connectivity.

2. Minimum amendments to improve reforms to the NSW BOS

Areas of high environmental value must be safeguarded by no-go zones.

Some species and ecosystems are unique and irreplaceable, and therefore not "offsetable". As the Independent Henry review panel found, "some impacts are unacceptable and cannot be offset". Yet the proposed amendments to the Act do not stop or prevent development application processes commencing in high value habitat, nor do they rule out the destruction of critical habitat through an offset transaction, except under very limited circumstances yet to be determined. This system also creates uncertainties for developers. Clear no-go zones would assist in providing more certainty as to where development can occur.



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We cannot protect our state's most valuable biodiversity without 'red lines' beyond which approval will be refused.

Biodiversity laws should prohibit development, and therefore rule out access to offsets in areas such as:

- key protected areas, including AOBVs and Ramsar wetlands
- lands subject to stewardship agreements and existing offset areas,
- critically important habitat and ecological communities,
- situations that disrupt the integrity of, or connectivity between, protected areas and areas subject to conservation agreements,
- situations that would result in local, regional or outright extinction, or are assessed to meet criteria for serious and irreversible impacts, including migratory routes, and
- climate refugia.

The Independent Henry review panel supported amending the Act to enable the creation of a single spatial tool to identify 'no-go' areas (recommendation 8).

Failing to apply no-go zones will undermine property-based measures proposed by this Amendment Bill, such as enhanced 'avoid and minimise' standards. Avoidance and minimising measures cannot be effective where development is permitted in areas of high biodiversity value. Once a piece of habitat is being used for a project, avoidance is limited to the bounds of the project's site.

No-go zones are an essential piece of the puzzle, and part of successfully implementing such zones will be publicly available mapping that shows areas where the loss of any biodiversity is prohibited.

Serious and irreversible impacts do not function as no-go zones.

The one 'no-go zone'-like provision in the BOS - the *Serious and Irreversible Impacts* test – can currently be interpreted subjectively by consent authorities and ignored for Major Projects and Strategic Biodiversity Certifications. As a mechanism to protect our most important and vulnerable biodiversity, the *Serious and Irreversible Impacts* test sets the bar incredibly low, only acting to stop clearing if a threatened species or ecological community is already in a state of severe decline, degradation, has very limited geographic distribution or is unlikely to respond to measures to improve habitat.

The *Serious and Irreversible Impacts* test may help stop extinction in the final hour, but it is certainly not a tool to protect and support nature to thrive and maintain resilience. While the Amendment Bill proposes to provide guidance in determining serious and irreversible impacts, the BOS needs more boundaries around where offsetting can and cannot be applied than this.



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Recommendation 2: Amend the Act to require the Minister for the Environment to develop a spatial tool that can identify ‘no-go’ areas for development, as outlined by the Henry report recommendation 8. This tool can be finalized by regulations following consultation with community and stakeholders.

Strong avoid and minimise provisions are key to whether the scheme could ever achieve a ‘net positive’ biodiversity outcome.

The Bill commits the BOS to requiring developers to take genuine steps to avoid and minimise impacts to nature. Standards will be set out in the regulations for assessments and evidence, thresholds and criteria. The content of these standards and their guidance material for project proponents will be extremely important for whether the scheme can become ‘net positive’ over time. Net positive means more nature in the future than we have now, therefore the mitigation hierarchy must include:

Obligations beyond no net loss: provisions should go beyond avoiding, minimising and offsetting the impact of proposed development, activity or clearing on biodiversity values. Developers should achieve at least a ‘no net loss’ and ideally a gain for biodiversity through a mitigation hierarchy that includes rehabilitation, restoration and enhancement. Such gains should be planned before damage occurs and should be implemented at an appropriate stage during the development process.

A view to impacts beyond the footprint of individual projects: the developer should lift their gaze beyond the single project and demonstrate actions to avoid and minimise harm to nature by supporting connectivity of habitat across and beyond development sites where possible, and recreating connectivity and resilience where necessary.

An enforced avoidance register: To give proper effect to these provisions, areas listed on the avoid and minimise register must continue to be avoided when making future decisions.

Recommendation 3: That the regulations provide for a strong mitigation and conservation hierarchy which goes beyond requiring demonstrated steps to avoid and minimise, to conditions including rehabilitation, restoration, and enhancement of nature impacted by developments.

Indirect offset payments into the Biodiversity Conservation Fund (BCF) must be limited to very few circumstances to avoid the trap of ‘trading in extinction’

It is becoming evident that policies which seek to achieve a net gain across a range of natural capital assets can lead to inappropriate substitution in which losses of one species or



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ecosystem are considered part of a 'net environmental gain' if compensated by gains in others.⁶ This disingenuous approach equates to greenwashing and must be prevented if this reform is going to stem the tide of NSW species becoming endangered.

As the Amendment Bill stands, "entities" at risk of serious and irreversible impact can still be approved for destruction. The Bill would allow the regulations to prescribe circumstances where the BCF cannot be used. However, there is no commitment to like-for-like transactions, only that the fund is a "genuine last resort" while retaining variation rules and prescribed biodiversity conservation measures. This is very concerning and is an immense missed opportunity.

Strong provisions which will allow the Minister, or Environment Agency Head to rule out payments to the BCF in lieu of direct offsets will go some way to preventing the NSW BOS from falling into the trap of continuing to allow extinctions under the guise of 'net gain'. Those conditions where payment into the fund must be refused include:

- Where it is unlikely that a like-for-like offset will become available
- Where it is unlikely that funding to purchase land for the national parks estate, establish other protected areas, or to support Indigenous ranger programs or Landcare groups, for example, will benefit the same biodiversity features and entities affected by the development.

The 2022 parliamentary inquiry into the BOS recommended that indirect offsets available under the scheme be reduced, and where indirect offsets do occur, the transparency around this mechanism be increased.⁷ The 2023 IPART review of the biodiversity credits market recommended that the Government phase out the BCF pay-in option,⁸ which would allow the "market" to better reflect the reality of the condition of NSW biodiversity. The Independent Henry review panel recommended that the Act be amended to allow the Environment Agency Head to publish a list of credit types for which payment into the Biodiversity Conservation Fund is not permitted, because they are not readily available on the market (Recommendation 30).

Evidently, from an ecosystem safety and market perspective, paying funds into the BCF in lieu of more direct offsets should be drastically wound down.

We note that there would be far less need to engage with the BCF if there were no-go zones in place which actively prevented development from going ahead in areas of high conservation value. This is what makes the failure to include either of these two measures in the Bill so concerning.

Recommendation 4: That the Act be amended to allow the Environment Agency Head or Environment Minister to publish a list of credit types where payment into the BCF will be refused, because credits are not available, and it is unlikely that a like-for-like offset will be



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achieved. Outside of the published list, this refusal power should also be administered on an ad-hoc basis where needed.

Recommendation 5: In the absence of the above, that the Act be amended to allow the BCF to expend funds on the conservation, rehabilitation, restoration and enhancement of the specific species or ecological communities impacted by developments where no like-for-like amendments are available when acquitting obligations.

Ministerial concurrence must be given adequate time.

Where State Significant Developments and State Significant Infrastructure (SSD/SSI) require Ministerial concurrence due to variations in consent conditions, the proposed timeframe of 14 days until deemed concurrence is concerning.

Quick decisions in the interests of easing the path for development should not come at the cost of good decisions that ensure the safety of threatened and irreplaceable ecosystems. Whilst DPHI and DCCEEW may engage in relation to the development prior to the 14-day period, the 14-day timeframe is not substantial enough to allow for community scrutiny and engagement.

Recommendation 6: Extend the timeframe for Environment Minister concurrence on variations to consent conditions and offset credit requirements for SSD and SSI from 14 to a minimum of 28 days, with powers for the Minister for the Environment to extend the deadline for consideration where necessary.

Offset arrangements must be meaningfully transparent.

The Amendment Bill proposes some long sought-after transparency measures, including public registers which divulge all approvals likely to have serious and irreversible impacts, exemptions granted by the Minister, and measures taken by developers to avoid and minimise.

This transparency should go further, to include:

- the creation of an online map function which shows the location and key details of offset sites across the state.
- a list of all offset obligations being created under the Local Land Services Act, Environmental Planning and Assessment Act, the Biodiversity Conservation Act and the Vegetation SEPP in one central location, including fulfillment status information.
- regular monitoring, evaluation and reporting on ecological outcomes at BOS offset sites over the long term.



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- a regular snapshot with state-wide information about activity under the BOS.
- a process where third-parties can raise concerns about an offsetting assessment or decision that results in a review by the appropriate body – BCT or DPIE.

Going forward under the BOS, effective systems must be in place to monitor, evaluate and publicly report on the implementation of offsets under the scheme and ecological outcomes over time. Evaluation must not rely only on desktop analysis of scheme data, with all its explicit and implicit assumptions, but must also prioritise on-ground monitoring of real-world ecological outcomes.

Recommendation 7: That a package of transparency measures to allow the community to see, understand and raise concerns about the extent and impact of biodiversity offsetting measures be created and maintained through the Amendment Bill.

Biodiversity rules must be able to respond to climate induced disasters and protect species.

Climate change and associated impacts (such as more frequent and intense weather events) have a significant impact on biodiversity. Offset frameworks should build mechanisms responding to climate change and sudden events. The Amendment Bill proposes allowing the Minister to exempt local development from the scheme in circumstances of natural disasters and other exceptional circumstances. Appropriate limitations are important. Biodiversity is also affected by natural disasters, recently evidenced by the 2019-2020 Black Summer.

A reformed BOS must build in a response to climate change induced disasters and stochastic events, for example with a mechanism to ensure credit charge estimates can be reviewed following significant events, such as bushfires; or settings that build climate change risks into offsets calculations (e.g. increased offsetting ratios to hedge against increased bushfire risk).⁹

Recommendation 8: That the reformed scheme include mechanisms that proactively protect species and ecological communities harmed by significant events.

3. Next steps

Reform is urgent.

The regulations that go along with this Bill must be enacted as soon as feasible.



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Community consultation on the standards that will apply to avoid and minimise obligations, and the conditions under which payment into the BCF will be ruled out are critical in whether these reforms realise better outcomes for nature or signal a business-as-usual approach to offsetting to extinction.

No-go zones should be established as quickly as possible, so that they can feed into larger-scale plans that deliver restoration outcomes on a regional scale.

Purely economic and electoral imperatives can no longer supersede the preservation of nature.

A best practice BOS will accurately reflect scarcity of offset types, and prices will rise accordingly. When prices do rise, this must be understood as the scheme functioning as intended, providing a disincentive for destruction. Rhetoric suggesting that high prices for offsets is a reason to create work-arounds or allow payments to the BCF is misguided.

It has been unequivocally found that most people want to see more done to protect the environment.¹⁰

All efforts must be taken to protect intact habitat while we accelerate the uptake of clean renewable energy and storage, and develop transmission infrastructure to connect these new assets to the grid.

The biggest threat to nature is climate change. Renewable energy is the best way to transition our energy grid off aging fossil fuels, address climate change and safeguard nature. In most cases, action on climate change supports biodiversity goals. However, as the renewable energy transition gathers pace, we must acknowledge challenges and coherently manage conflicting objectives. Strong nature and planning laws are critical to this.

A sensitive, consultative, and strategic approach must be taken to ensure energy projects are sited in areas of the lowest biodiversity values and avoid mapped areas where development is prohibited, along with a hierarchy for decision-making focussing on avoidance of high value sites on public and private land. The research required to understand and act on impacts to species and habitats must be done, and a mitigation and conservation hierarchy must be enforced.

Research suggests that with appropriate policy and regulatory controls, we can continue to pursue the crucial climate intervention of transitioning our energy systems and protect areas that are rich in biodiversity.¹¹ Standards and guidance have been developed to support projects to minimise nature impacts, and maximising renewable potential.¹²



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Note: The NSW Alliance for Nature consists of organisations including the National Parks Association of NSW, Humane Society International, the Wilderness Society, International Fund for Animal Welfare, the Total Environment Centre, WIRES, and the Nature Conservation Council of NSW. Together these organisations wish to see the fast implementation of a biodiversity offsets scheme that aligns with established best practice principles. For more information on the Alliance for Nature NSW's vision for a nature positive NSW, see [this report](#).

¹ See, for example, Nature Conservation Council of NSW, Paradise lost: The weakening and widening of NSW biodiversity offsetting schemes, 2005-2016, 2016, available at https://assets.nationbuilder.com/natureorg/legacy_url/2417/bio-offsettingreport_v14.pdf?1630462684 This report examines the evolution of biodiversity offsetting schemes in NSW between 2005 and 2016, when the current framework was first proposed.

² 2024 NSW Biodiversity Outlook Report, available [here](#)

³ May, J., Hobbs, R. J., & Valentine, L. E. 2017, Are offsets effective? An evaluation of recent environmental offsets in Western Australia, *Biological Conservation*, vol. 206, pp 249-257 available [here](#)

⁴ Lindemeyer et al, 2017, The anatomy of a failed offset, *Biological Conservation*, Vol. 210A, pp 286 – 292, available [here](#).

⁵ Gibbons, P. et al, 2017, Outcomes from 10 years of biodiversity offsetting, *Global Change Biology*, available [here](#).

⁶ Treweek, J., Bull, J. & Ten Kate, K. 2023, 'Nature positive' must incorporate, not undermine, the mitigation hierarchy. *Nature, Ecology and Evolution*, 8:1 available [here](#).

⁷ <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2822>

⁸ https://www.ipart.nsw.gov.au/sites/default/files/cm9_documents/Media-Release-Making-the-biodiversity-credits-market-work-for-NSW-19-December-2023.PDF

⁹ <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Offsetting-our-way-to-extinction.pdf>

¹⁰ See <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Offsetting-our-way-to-extinction.pdf> and https://biodiversitycouncil.org.au/media/uploads/2023_6/202305_biodiversity_concerns_survey_report.pdf and https://www.nature.org.au/polling_shows_record_support_for_stronger_nature_protection_laws

¹¹ Dunnet, S. 2022, Does renewable energy threaten efforts to conserve biodiversity on land?, *Carbon Brief*, available online at <https://www.carbonbrief.org/guest-post-does-renewable-energy-threaten-efforts-to-conserve-biodiversity-on-land/>

¹² Bennun, L.; van Bochove, J.; Ng, C.; Fletcher, C.; Wilson, D; Phair, N. & Carbone, G. Mitigating biodiversity impacts associated with solar and wind energy development, IUCN, available online at <https://portals.iucn.org/library/node/49283>