

Submission
No 44

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

Name: Mrs Ashley Bacales

Date Received: 6 September 2024

It is requested that further consideration be afforded to amendments to resolve issues associated with avoidance of impacts to biodiversity between Strategic Planning (Planning Proposals) and Development Applications (DA).

Currently, Planning Proposals generally require a Stage 1 Biodiversity Assessment Method (BAM) assessment, and in practice, a Biodiversity Development Assessment Report (BDAR) is often provided. This assessment is used to demonstrate avoidance of biodiversity impacts and establish the boundary of conservation land zonings at the Planning Proposal Stage.

Recent case law, such as in the case of *Planners North v Ballina Shire Council*, establishes that areas zoned for conservation cannot be considered avoidance areas at DA stage:

- *Planners North v Ballina Shire Council* [2021] NSWLEC 120 (*Planners North*):

173. ... Avoidance of the impact of a development on land presupposes that that development is otherwise permitted to be carried out on the land. If land is not permitted to be developed for a purpose, there can be no avoidance of the impact of a development that cannot be carried out on the land in any event.

This approach encourages proponents to seek rezoning areas of high biodiversity value for a development purpose (e.g. residential) so that they can avoid it at DA stage. This is a highly unsuitable planning outcome on account of deficiencies in the current version of the Biodiversity Conservation Act and not orderly strategic planning.

The following recommendations are provided as examples for your consideration, which may assist in alleviating this issue into the future:

1. Include a Section in the Biodiversity Conservation Act to the effect of:
 - a. Where a BDAR is submitted at Planning Proposal stage and avoidance areas have been established in accordance with the requirements of the Biodiversity Conservation Act and the Biodiversity Assessment Method, and where these avoidance areas have been zoned for conservation, these areas may be considered as avoidance areas at Development Application stage, provided that the BDAR submitted for the Planning Proposal is still current (within 5 years of finalisation).
2. Include amendments to the Biocertification process to enable Council to be able to assess and approve Biocertification Assessment Reports, but with limitations in alignment with those currently applicable to Council's approval of BDARs including:
 - a. The requirement to refuse a certification assessment report if an impact to a Serious and Irreversible Impact entity is likely to occur
 - b. Offsetting provisions are limited to the retirement of credits or payment in the Biodiversity Conservation Fund.