

Submission
No 54

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

Organisation: Australian Climate and Biodiversity Foundation
Date Received: 17 September 2024



Australian Climate and Biodiversity Foundation submission on the *Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024*

17th September 2024

Portfolio Committee 7: Planning and Environment

Via email: PortfolioCommittee7@parliament.nsw.gov.au

To the Committee Chair,

I am pleased to welcome the opportunity for the Australian Climate and Biodiversity Foundation (ACBF) to engage with the Inquiry into the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024 ('the Bill'). We extend our thanks to the Chair for accepting this submission.

Our organisation has a strong interest in and a deep understanding of this subject matter.

I believe that the report and recommendations from the Henry Review continue to provide high-level guidance for the crucial task of reforming the Biodiversity Conservation Act 2016 (BCA) and other related legislative and regulatory instruments. Adhering to the recommendations of the Henry Review in full will result in improved outcomes for NSW's natural environment and enhance the effectiveness of the offsets scheme.

If you have any questions or additional requests, please contact ACBF's NSW State Government Advocate Wilson Harris on _____ or at _____

Lyndon Schneiders
Executive Director, ACBF



Background

The Australian Climate and Biodiversity Foundation (ACBF) is a not-for profit environment organisation that advocates for the rapid protection and restoration of Australia's native forests. We are committed to establishing new opportunities for protecting, managing, and generating income from our forests that benefits our environment, business, government, landholders, producers, and consumers, through the adoption of carbon and biodiversity credits.

Achieving this outcome requires economic, social, and environmental policy solutions that deliver long term funding for forest restoration and transition and support real jobs in forest management and a sustainable plantation industry based on purpose planted forests. We are committed to working with all stakeholders with a long-term interest in forests and forestry to deliver a triple win for Australia: a more stable climate, biodiversity that's protected and restored and new economic opportunities underpinning thriving communities.

Introduction

Reform to the NSW offsets scheme established through the *Biodiversity Conservation Act 2016* (BCA) is long overdue. Since its inception, it has faced routine criticism from all the stakeholders that regularly engage with it: developers, landholders, and environmentalists. Various reviews, inquiries and reports into its efficacy (2022 NSW Parliamentary Inquiry report into the integrity of biodiversity offsets¹, 2023 Independent Pricing and Regulatory Tribunal review into the biodiversity market² and 2023 Independent Review into the BCA led by Dr Ken Henry AC³) have all called for wide-reaching reform to achieve the biodiversity outcomes the BCA aims to deliver. Yet the state of NSW's environment continues to decline, with the most recent NSW Biodiversity Outlook Report indicating declines across most key indicators⁴. Business as usual will result in continued population declines and extinctions and continued uncertainty for landholders, the community and decision makers.

Whilst the proposed Bill is a step toward achieving a nature-positive NSW, which includes ensuring the biodiversity offsets scheme does not remain 'nature negative', ACBF believes addressing several critical shortcomings could make the Bill's efficacy far greater. If

¹ *Report into the Integrity of the NSW Biodiversity Offsets Scheme* (2022)

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>

² IPART, *Biodiversity Market Monitoring Annual Report 2022-23* (2023)

Available at: [Annual-Report-2022-23-Biodiversity-Market-Monitoring-December-2023.PDF \(nsw.gov.au\)](https://www.ipart.nsw.gov.au/annual-reports/2022-23-biodiversity-market-monitoring-december-2023.pdf)

³ *Independent Review of the Biodiversity Conservation Act 2016* (2023)

Available at:

<https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>

⁴ Department of Climate Change, Energy, Environment and Water (2024) *NSW Biodiversity Outlook Report 2024*

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>



adopted, these will more closely align the Bill with the key recommendations within the Henry Review.

Furthermore, amending the offsets scheme in NSW can also play an important part in streamlining development processes and providing some certainty and speed for decisions for developers and landholders.

Summary of ACBF recommendations for the *Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024*

1. Amend the Bill to embed the offsetting standards and guidance within it, which is currently being proposed for development in the regulation.
2. Amend the Bill to establish 'no-go zones' under certain circumstances to protect irreplaceable habitat from development (recommendation 8, 15, 24 Henry review).
3. Amend the Bill to formally establish a single spatial tool for data collection and reflect decisions made through the avoid, mitigate and offset hierarchy, as well as to reflect no-go zones (recommendation 8 & 9 Henry review)
4. Amend the Bill to give the Minister for the Environment call-in and concurrence powers concerning developments that pose serious and irreversible impacts (recommendation 13 & 14 Henry review).
5. Establish a definition for 'net positive offsets' and incorporate it within the strategy and/or Bill.
6. Amend section 6.2A (5) to require the Minister and any other relevant authority to undertake public consultation for any proposed changes to the net positive offsets strategy.
7. Amend the Bill to develop a statutory set of guidelines that proponents must adhere to in attempting to find like-for-like credits for a development proposal (recommendation 29 Henry review)
8. Develop the regulation to ensure the Environment Agency Head has power and responsibility in establishing circumstances where payments into the fund are not possible for acquitting offsetting requirements, especially in the case where like-for-like credits are not likely to be available due to impacted species and ecosystems from a proposal (recommendation 30 Henry review).
9. Make the Minister for the Environment, the sole decision-maker on the question of credit discounts for projects (recommendation 26 Henry Review). Barring this, the Minister for the Environment should at least have concurrence in any discounting decisions.
10. Amend the Bill to create an avenue for additional and relevant third-parties (besides landholders) to seek an amendment to the Biodiversity Values Map.



Discussion on the core components of the Bill

- **Proposed integration of the ‘avoid, minimise and offset hierarchy’ into the Bill**

Schedule 6.3A of the Bill establishes the Avoid, Minimise and Offset hierarchy into the legislation.

“For the purposes of the biodiversity offsets scheme, the avoid, minimise and offset hierarchy is the principle that avoiding, minimising and offsetting the impacts of actions on biodiversity values be approached as follows–

(a) the proponent of the action first takes all reasonable measures to avoid the impacts of the action on biodiversity values,

(b) after taking all reasonable measures under paragraph (a), the proponent then takes all reasonable steps to minimise the impacts that have not been avoided,

(c) having taken the measures under paragraph (b), the proponent then takes biodiversity conservation measures under the biodiversity offsets scheme to offset or compensate for any residual impact on biodiversity values.”

Formalising this hierarchy within the Bill is a welcome step; however, the language used (‘reasonable measures’) is not as strong or prescriptive as recommendation 22 from the Henry Review which suggests decision-makers *“amend the Act to require a standard of genuine and demonstrable steps to avoid and minimise impacts”*. 6.3A, in its current form, does not provide genuine and direct steps; it only requires ‘reasonable measures’ taken by developers, which is highly discretionary.

6.16B provides scope to develop those standards and measures, but it has deferred these to the Regulation rather than to be embedded within the Act, which is the suggestion of the Henry Review. Embedding these standards and procedures within the Act is preferable.



Establishing the 'avoid and minimise' public register under 9.7(1)(h2) addresses recommendation 15 of the Henry Review. However, there is currently no proposal to link the 'avoid and mitigate register' to future decision-making; decision-makers are not obligated to consider or continue to avoid areas listed on the register when making future decisions. This is detailed in recommendations 25 of the Henry Review and is an essential step required to ensure critical areas of NSW are protected into the future.

Recommendations

- 1. Amend the Bill to embed the offsetting standards and guidance within it, which is currently being proposed for development in the regulation.**
- 2. Amend the Bill to establish 'no-go zones' under certain circumstances to protect important habitat from development (recommendation 8, 15, 24 Henry review).**
- 3. Amend the Bill to formally establish a single spatial tool for data collection and reflect decisions made through the avoid, mitigate and offset hierarchy, as well as to reflect no-go zones (recommendation 8 & 9 Henry review)**
- 4. Amend the Bill to give the Minister for the Environment call-in and concurrence powers concerning developments that pose serious and irreversible impacts (recommendation 13 & 14 Henry review).**

- **Move to Net Positive offsetting in NSW**

ACBF welcomes the inclusion of the creation of a strategy for net positive offsets to be developed within the Bill, which aligns with Recommendation 11 of the Henry Review. Net positive offsets, with clear guidelines and standards for their appropriate use, are a stepping stone towards nature positive (recommendation 1 Henry review).

6.2A(2) is a positive step, and ACBF welcomes the proposal for the Minister for the Environment to develop a net positive offsets strategy. ACBF recommends that the Minister engage with the Biodiversity Conservation Advisory Panel whilst undertaking this work (recommendation 2 and 4 Henry review). Given the public consultation requirement for developing this strategy, the ministerial discretion to amend the strategy at any point (6.2A (5)) is inconsistent and needs to be revised. We recommend amending this to require the Minister and any other relevant authority to run consultations on any proposed changes to the net positive offsets strategy.



Furthermore, net positive is not defined, whereas recommendation 12 of the Henry Review recommends establishing a minimum % increase that an offset would have to provide to nature. Enforcing the standard of 'net positive offsets' becomes difficult and open to interpretation without clearly defined parameters for what net positive means. We implore the government to consider including a definition within the final Bill. ACBF also supports the decision to provide the Environmental Agency Head the crucial role of ensuring annual reviews of the net positive transition strategy to determine its efficacy (recommendation 5 Henry review).

Recommendations

- 5. Establish a definition for 'net positive offsets' and incorporate within the strategy and/or Bill (recommendation 12 Henry review).**
- 6. Amend section 6.2A (5) to require the Minister and any other relevant authority to undertake public consultation for any proposed changes to the net positive offsets strategy.**

• **Changes to the Biodiversity Conservation Fund and use of credits**

The Bill continues to allow payments to be made to the Biodiversity Conservation Fund (BCF) as an alternative to the retirement of biodiversity credits. Whilst the Henry Review does not seek to, or recommend, the discontinuation of payments into the fund, it did seek to increase transparency and procedures around when this was allowed to occur. In 2022-23, 4 out of 5 offsetting requirements were met in NSW through payment into the BCF, which has negative outcomes for achieving like-for-like nature protections in a timely manner.

The Bill in its current form, specifically the 'reasonable measures' outlined in 6.3A, does not fully meet the Henry Review's recommendation 29. The Bill must include stringent, clear requirements for proponents to follow to prove they have sought like-for-like credits before they can pay into the BCF. The Bill states that these will be established through the Regulations, but there is no certainty regarding what these will contain.

Placing a time limit of three years for the Biodiversity Conservation Trust (BCT) to find suitable credits and use the money in the fund is a step in the right direction and is consistent with Recommendation 31 from the Henry Review. Furthermore, the additional commitment to develop strategic plans to guide the spending of funds (as per the Objects of the Bill) and to provide overall guidance for the spending of funds from the net-positive offsets plan and the NSW Nature Plan, should result in a far better functioning BCF and BCT. Section 6.30 does provide avenues for the Minister for the Environment to develop the regulations to include guidelines and restrictions for when payment into the fund is not a suitable offset due to the specific nature of the ecosystems or species involved. ACBF welcomes this as it is consistent with Recommendation 30 of the Henry Review.

New public registers with details of decisions, approvals, impacts, and measures imposed upon developments (including offsetting requirements) will help increase transparency around the use of the fund and its efficacy. This was a critical aspect of the Henry Review.



Recommendations

- 7. Amend the Bill to develop a statutory set of guidelines that proponents must adhere to in attempting to find like-for-like credits for a development proposal (recommendation 29 Henry review)**
- 8. Develop the regulation to ensure the Environment Agency Head has power and responsibility in establishing circumstances where payments into the fund are not possible for acquitting offsetting requirements, especially in the case where like-for-like credits are not likely to be available due to impacted species and ecosystems from a proposal (recommendation 30 Henry review).**

- **Biodiversity Offsetting Scheme**

The Bill has taken appropriate and meaningful steps towards addressing the functionality of the Biodiversity Offsetting Scheme (BOS).

ACBF welcomes new section 7.2 (3) that seeks to change entry thresholds into the scheme, removing smaller projects considered under Part 4 development, to limit regulatory burden and not slow down appropriate lower impact local development. If the Regulations that are to be developed and managed in Part 4 development incorporate effective and wide-reaching triggers to capture proposals that do have an impact and need to go through the BOS, this change will help the entire system's functionality. This change is consistent with recommendations 16 and 19 of the Henry Review (if the Regulation is developed appropriately).

The Henry review also recommended applying the BOS to all Part 5 development activities that meet regulated/legislated thresholds or have affected land on the Biodiversity Values Map, not just state significant infrastructure or those that voluntarily opt-in (recommendation 18).

- **Application of discounts to development within the BOS**

Section 7.14(3) and 7.15(3) of the Bill retains the discounting provisions for development which can be applied by Ministers. Recommendation 26 of the Henry Review suggests that the Minister for the Environment has sole discretion regarding decisions to apply offset discounts. If the Bill proceeds without factoring in that change, it must be amended to provide the Minister for the Environment concurrence on all discounting decisions. Ensuring consistency between public and private proposals will increase public trust within the system. For the system to be robust and transparent and to deliver the environmental outcomes that are embedded within the objects of the Bill, the Minister for the Environment must be a decision-maker in any discounting decision.



Recommendation

9. Make the Minister for the Environment the sole decision-maker on the question of credit discounts for projects (recommendation 26 Henry Review). Barring this, the Minister for the Environment should at least have concurrence in any and all discounting decisions.

- **Biodiversity Values Map**

The addition of section 7.4, which allows landholders to request a change to the Biodiversity Values Map (BVM) if they believe it to be incorrect, is a crucial step in building a durable land management framework. This section ensures a process for ground-truthing and challenging aspects of the BVM, which is vital for securing buy-in and use from landholders. It also contributes to the creation of a comprehensive knowledge base of the NSW landscape. Equally important is the role of local experts in the review process. Their knowledge and skills can help identify and rectify any errors in the BVM, thereby enhancing its accuracy and reliability.

In addition to landholders' applications, establishing a process whereby relevant third parties can challenge the BVM and make applications to amend it is sensible and reasonable.

Recommendation

10. Amend the Bill to create an avenue for additional and relevant third-parties (besides landholders) who can seek an amendment to the Biodiversity Values Map