

Submission  
No 56

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

**Organisation:** Biodiversity Council

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**Biodiversity  
Council**

# Submission to Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024

September 2024



## About the Biodiversity Council

The Biodiversity Council brings together leading experts including Indigenous knowledge holders to promote evidence-based solutions to Australia's biodiversity crisis. The Council was founded in 2022 by 11 universities with the support of Australian philanthropists.

## Overview

New South Wales is a treasure trove of biodiversity, boasting a stunning array of plants, animals, and other living organisms, many of which occur nowhere else in the world. However, the state's biodiversity faces many threats, through the impacts of habitat destruction, invasive species, over-extraction of water resources and fire.

These combined pressures have led to a decline in biodiversity across the state. Australia has been ranked as second globally for the overall loss of biodiversity and a world leader in the extinction of mammals. New South Wales is no exception, with more than 1000 species, subspecies or populations listed as threatened. The scientific data paints an alarming picture. The 2021 NSW State of Environment report found that 64% of all mammal species in the state have experienced a contraction in range, whilst the Threatened Species Index has shown a decline of approximately 62% of NSW threatened species over the past 35 years.<sup>1 2</sup>

The recent 2024 NSW Biodiversity Outlook report noted that:

- only 50% of threatened species are expected to survive the next 100 years
- only 29% of the capacity of habitat to support native species remains
- past habitat loss and future climate change will significantly reduce the capacity of landscapes to retain biodiversity over the next 50 years<sup>3</sup>

Biodiversity offsets have emerged over the past two decades as a significant area of environmental regulatory policy. The NSW offsets regime is one of Australia's more mature and complex. It has been the subject of multiple inquiries and significant media reporting in recent years, including investigations by the NSW Audit Office, the 2023 report from the Independent Pricing and Regulatory Tribunal and the Independent Review of the Biodiversity Conservation Act 2016 (the Henry review).

The Henry review outlined the serious challenges facing biodiversity in the state, noting that:

*'Biodiversity is not being conserved at bioregional or State scale. The diversity and quality of ecosystems is not being maintained, nor is their capacity to adapt to change and provide for the needs of future generations being enhanced. Yet these are the principal purposes of the legislation.'*<sup>4</sup>

This review, along with the others mentioned above, outlined the significant challenges of the NSW Biodiversity Offset Scheme, notably that *'the regulatory provisions of the Act are complex and*

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<sup>1</sup> NSW EPA 2021 NSW State of Environment Report [https://www.soe.epa.nsw.gov.au/sites/default/files/2022-02/21p3448-nsw-state-of-the-environment-2021\\_0.pdf](https://www.soe.epa.nsw.gov.au/sites/default/files/2022-02/21p3448-nsw-state-of-the-environment-2021_0.pdf)

<sup>2</sup>The Australian Threatened Species Index 2023 <https://tsx.org.au>

<sup>3</sup> DCCEEW (NSW) 2024 NSW biodiversity outlook report 2024 Status and trends of biodiversity and ecological integrity <https://www.environment.nsw.gov.au/research-and-publications/publications-search/nsw-biodiversity-outlook-report-2024>

<sup>4</sup> Dr Ken Henry, Dr John Keniry, Distinguished Professor Michelle Leishman and Mr Mike Mrdak 2024 Final Report: Independent Review of the Biodiversity Conservation Act 2016: Final Report

*uncertain, with high compliance costs’ and that ‘the integrity of the Biodiversity Offsets Scheme is being compromised by payments being made into the Biodiversity Conservation Fund’.<sup>5</sup>*

It is the Biodiversity Council’s view that the Bills, whilst making progress in certain areas such as a stronger focus on avoidance and mitigation, do not address the fundamental flaws that have been identified through multiple reviews of the NSW biodiversity offsets system. In general, there has been an over-reliance on biodiversity offsets in the NSW biodiversity and native vegetation regulatory system (and Australia in general). There is very limited evidence that biodiversity offsetting delivers overall gains for species or ecosystems, let alone providing for broad biodiversity outcomes at regional or statewide levels or at a policy level. If we are to protect and restore NSW biodiversity, we need to rethink our approach to how it is managed. Specifically, biodiversity offsets (i.e. compensation for impacts that are not avoided or mitigated) should only be utilised where they are scientifically feasible, have a high likelihood of success and environmental outcomes can be delivered in an ecologically relevant timeframe.

One of the proposed benefits of biodiversity offsets has been their operation as a pricing signal to encourage developers to avoid and mitigate impacts - the priority steps in the mitigation hierarchy. Whilst there may be merit to this argument, for it to be effective, pricing needs to be apparent to project developers up front and reflect the actual price of restoring and recreating ecosystems and managing these over extended time horizons. The current approach has failed to set adequate pricing signals for delivering effective biodiversity gains, noting that conserving ecosystems is cheaper than restoring or recreating ecosystems. The IPART review highlighted that ‘government interventions should not be designed to lower credit prices but should set the conditions necessary to allow the market to determine them’.<sup>6</sup> The apparent drive to increase liquidity in the NSW biodiversity offsets scheme, through for example relaxing like-for-like requirements, runs counter to this advice.

The Biodiversity Council has a number of recommendations for improving the proposed bill and strengthening NSW overall offsets regime:

## **Recommendations:**

- 1) The Biodiversity Council broadly supports moves to enshrine key components of the mitigation hierarchy, notably avoidance and mitigation measures, within the legislation.
- 2) There should be a clear definition of what are ‘genuine efforts’ to avoid and mitigate impacts. There needs to be a clearer process and definitions for how decision makers/consent authorities will consider this information in decision making. For example if there are alternative sites for a development with no negligible biodiversity impacts, explicitly stating why these weren’t chosen.
- 3) The Biodiversity Council supports the intent of transitioning the overarching objective of the NSW Biodiversity Offsetting Scheme (BOS) to ‘net positive’, but harbours concerns that much of the detail on how this will be achieved is left to a yet-to-be developed strategy. It is recommended that goals and objectives for the strategy are set within the legislation, such as through defining what a ‘net positive’ offset regime will deliver. The Biodiversity Council is of the view that ‘net positive’ should amount to an overall increase in both quantity and quality of relevant ecosystems/habitats that are covered by the offsets scheme.

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<sup>5</sup> Ibid

<sup>6</sup> IPART 2023 Biodiversity Market Monitoring Annual Report 2022–23 December 2023

<https://www.ipart.nsw.gov.au/documents/annual-report/annual-report-2022-23-biodiversity-market-monitoring-december-2023>

- 4) The legislation should be amended to establish a 'permitted list' of matters and habitats for which offsets are known to be scientifically feasible or for which there are no known supply side constraints.
- 5) It is recommended that the legislation be amended to mandate like-for-like delivery of biodiversity offsets across the scheme, without the ability to utilise variation rules to circumvent like-for-like obligations or move it to some future use.
  - a) In circumstances where the BCT is unable to acquit a like-for-like offset obligation, it should trigger an automatic review of whether or not that ecosystem/habitat type should be on the 'permitted list' (see 4. above).
- 6) The NSW Government should adopt the December 2023 recommendations from NSW Independent Pricing and Regulatory Tribunal to:
  - a) phase out the option for proponents to acquit their offset obligation through paying into the Biodiversity Conservation Fund
  - b) prioritise facilitating market participation, maintaining integrity and instilling confidence in the market over keeping the cost of offsetting biodiversity impacts low.<sup>7</sup>
- 7) The NSW biodiversity offsetting arrangements are relatively complex and multi-layered. Much of the proposed legislation relies on subordinate regulations or other policy arrangements to give full effect, such as the development of the strategy to determine the transition of the BOS to 'net positive'. It is recommended that the government investigate ways to
  - a) simplify the system to improve access and transparency,
  - b) outline the future pathway for the development of subsequent policies, regulations and registers, and
  - c) provide the community and proponents with clear guidance on how to fulfill relevant aspects of the proposed changes, such as demonstrating avoidance and mitigation measures.
- 8) The Bill provides for broad exemptions from the requirements of the BOS in the case of 'natural disasters or exceptional circumstances'. Unless sufficiently bounded, the use of 'exceptional circumstances' is far too broad and may be prone to use for political or other means. Noting that there are significant costs associated with offset liabilities for developers, broad and unbounded political intervention presents a significant corruption risk. It is therefore recommended that there are strict rules developed for what may constitute 'exceptional circumstances' or that such broad language is removed from the bill.
- 9) The Biodiversity Council is strongly supportive of moves outlined in the NSW Government's proposal in the NSW Plan for Nature to update the NSW *Biodiversity Offsets Policy for Major Projects* to remove the option for major mining proponents to meet a credit obligation through a commitment to ecological mine site rehabilitation. Mine site rehabilitation is an obligation so using it as a credit is counter to the principle of additionality - central to credible offsetting schemes.

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<sup>7</sup> Ibid