



Environment Institute
of Australia and
New Zealand Inc.

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Biodiversity Conservation Act Review
Department of Planning and Environment
Locked Bag 5022
Parramatta NSW 2124
Submitted via: biodiversity.review@environment.nsw.gov.au

Dear review experts

RE: Submission to the NSW Biodiversity Conservation Act Review on behalf of the EIANZ Biodiversity Offsets community of practice and Ecology Special Interest Section

This submission to the New South Wales (NSW) *Biodiversity Conservation Act 2016* (BC Act) Review is made by the Biodiversity Offsets Community of Practice, under the Ecology Special Interest Section of the Environment Institute of Australia and New Zealand (EIANZ). The submission includes contributions from a group of experienced consultant ecologists that represent multiple experts, ecologists, consultancies and Biodiversity Assessment Method (BAM) accredited assessors. The members have significant experience of the NSW Biodiversity Offsets Scheme (BOS) since its commencement in 2018, as well as the prior voluntary scheme (Biobanking) from 2006-2017, and assessment and ecology offset process prior to implementation of both schemes (negotiated outcomes on a case-by-case basis).

The contributors to this submission implement the BOS on a day-to-day basis, and together have unparalleled experience on how the scheme operates in real life. We have sought to make our comments under the headings provided, but that matters raised may stray outside of the specific topics.

As a group representing a large number of accredited assessors, we welcome direct discussion of the matters raised in this submission. We believe that we are the group that is best placed to provide commentary on the effectiveness of the BC Act as we are the ones working day-to-day in this space.

The EIANZ has also developed and released a position statement on Biodiversity Offsets (available online [here](#)), developed after the EIANZ's successful 2022 Biodiversity Offsets conference 2.0 attended by many practitioners and regulators from around Australia and New Zealand.

Purpose of the *Biodiversity Conservation Act*

We support the BOS and believe it can be an effective tool for halting the loss of biodiversity values from development within NSW. The BOS prioritises avoidance of impacts wherever possible, mitigation of impacts, followed by compensation of remaining unavoidable impacts on biodiversity values (i.e. biodiversity offsets). In our view the provision of biodiversity offsets provides the following key benefits to biodiversity:



1. Providing financial incentive to avoid or reduce impacts for development proponents. This is achieved because:
 - a. clearing of greater areas of vegetation will incur a higher offset liability – this encourages proponents to reduce the development footprint and avoid vegetation clearance;
 - b. areas in high ecological condition require more credits than degraded areas – this encourages proponents to avoid high condition vegetation;
 - c. biodiversity values which are rarer tend to have a higher offset cost, which encourages proponents to avoid rarer vegetation and/or threatened species impacts.
2. The provision of positive in perpetuity biodiversity management over lands on Biodiversity Stewardship Sites, and a system to provide for the in-perpetuity funding and ongoing management of these lands, overseen and audited by a combination of the Biodiversity Conservation Trust (BCT) and Credits Supply Taskforce (CST).
3. Providing a scheme that is scientifically robust with a consistent methodology that is applied to both development and Stewardship (conservation) site assessments.

The above factors are significant and positive factors. The BOS is a pragmatic and robust system to quantify the biodiversity offsets required for development sites, and to quantify improvements at Stewardship sites. It is, in our view, a significant improvement on offsets that were negotiated on a case-by-case basis prior to the BAM and Biobanking schemes. We also note that there is significant regulatory review on both the development and Stewardship (conservation) site assessments.

Whilst we support the BOS, the BOS has several matters that would benefit from adjustment and that we are seeking to work with the NSW government on improving these. In particular, the scheme has become overly complicated, which leads to delays in approval of Stewardship sites and development assessments. We agree that the BOS needs to capture the complexity of the natural environment, but the significant (and constantly evolving) technical complexity in the methodology erodes the transparency of the scheme. We recommend that a simpler scheme would provide better biodiversity outcomes and would facilitate transparency and understanding at all levels (proponents, Stewardship site landholders, government agencies, and consultants).

There is variation with regards to entry into the BOS, depending on the approval pathway, with different entry requirements into the BOS between major projects (entry by default unless a waiver is granted), development assessments (biodiversity values map, clearing threshold and significant impact triggers), and smaller government agency projects assessed under a Review of Environmental Factors (BOS as an option if there is a significant impact). We recommend simpler and consistent triggers for the BOS across all types of approvals. This change, if enacted well, would help to deliver less complexity and greater consistency between projects.

The BC Act refers to Part 5A of the NSW *Local Land Services Act 2013* (LLS Act) for the definition of native vegetation. Section 60B of the LLS Act is extremely broad in its definition and includes all plant species native to NSW. In practice, this means that highly degraded vegetation cleared of both overstorey and midstorey (ie. trees and shrubs) and with depauperate groundcover with low native species diversity can require biodiversity offsets. A key issue is that

there is a lack of clarity on vegetation requiring assessment given the wide breadth of the definition, and due to the current LLS 'self-assessment' process which is lengthy and unclear. This is a fundamental issue. Without a clear and consistent definition of native vegetation, regulating and enforcing the management of native vegetation becomes incredibly difficult.

We recommend that the definition of native vegetation is tightened up to seek to achieve clarity for all parties and to avoid perverse outcomes.

Bilateral Agreement

One of the benefits of the BC Act is the bilateral agreement with the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). This agreement helps to simplify the assessment against both legislation and the delivery outcomes, including biodiversity offsets. However, entities listed only under the EPBC Act (for example various migratory bird species) are excluded from the bilateral agreement, and, if significantly impacted, offsets for impacts against these species must be negotiated directly with the Commonwealth. This is unfortunate, as it removes the clarity associated with the BOS.

Conserving threatened species and ecological communities

The review asks how the BC Act could best support landscape-scale actions to prevent species from becoming threatened. Currently, the BC Act does not give significant consideration to landscape-scale factors. These were considered and integrated into the previous Biobanking scheme, but no consideration is given under the BOS to strategic conservation objectives such as key biodiversity corridors or broader areas of higher biodiversity value. This approach to private land conservation offers no incentive to landowners in key strategic areas to enter into Biodiversity Stewardship Agreements (BSAs), which can limit the conservation outcomes achieved. Mapping ecological corridors and offering incentives for creation of BSAs within these areas (ie higher credit generation), especially where native vegetation is restored and improves ecological connectivity, would be desirable. It is, however, noted that the process of generating appropriate rulesets and/or mapping is likely to be difficult to achieve, as this can be perceived by landholders as limiting development options. Nonetheless, from a biodiversity conservation perspective it would be a desirable outcome.

Furthermore, strategic biodiversity certification offers significant opportunities to deliver broader landscape strategic biodiversity corridors due to working across multiple landowners. However, it is the view of the EIANZ that this needs to deliver more than just 'avoided' land within areas that are not developed, such as has occurred within the recently approved Cumberland Plain Conservation Plan.

Private land conservation and investment and the BOS

Benchmarks

One factor which to date has received incredibly little attention within the BC Act is the ecosystem benchmarks. This data is crucial and underpins credit assessment outcomes within both impact (Biodiversity Development Assessment Reports; BDARs) and Biodiversity Stewardship Site Assessment Reports (BSSARs).



Despite the importance of this data, in our view the current data would benefit from significant tightening and improvements. This is because much of the benchmark data is done at the broader vegetation class level (groupings of multiple plant community types (PCTs)), rather than at the more specific PCT level. This can lead to significant inaccuracies in vegetation integrity scores under the BAM, and consequent inaccuracies in the credits required or generated. There is little incentive for proponents to spend the considerable time and cost required to generate 'more appropriate local data' allowed for under the BAM to review and update benchmark data for projects. In our view, the current benchmark data needs urgent updating, and should be enacted as a priority by Biodiversity Conservation Division (BCD).

Furthermore, "dry, average, and wet" benchmarks have been developed for PCTs in western NSW. The current policy does not seem to allow for gathering site specific BAM plot data over multiple years, and thus in different condition states. This is a typical approach on major projects, which may require several years of survey to collect sufficient data to satisfy the requirements of the BAM. In these instances, the current policy is not effective and can result in greater uncertainty for proponents. We recommend that an update of the BAM calculator be provided to allow rapid entry of rainfall over the previous 12 months for each plot, so that each BAM plot can be individually assigned to one of these condition states when entered into the BAM calculator. This would also involve an update of the underlying vegetation integrity score within the BAM calculator. In our view, the update of benchmarks to the more accurate PCT level should be the higher priority.

Major projects

We support major projects utilising the BOS as major projects generally have the greatest impacts on biodiversity values. As identified above, the BOS encourages avoidance and minimisation of ecological impacts, as well as compensation for unavoidable impacts on terrestrial biodiversity values. There are options under the legislation for major projects to have the biodiversity credit obligations varied, with the reasons published. In our experience to date this provision has rarely been utilised. Given this, we feel that these provisions are reasonable for use in a very limited set of projects.

We believe that the use of the BOS for strategic assessments and/or biodiversity certification is appropriate. Biodiversity conservation planning works best when considered early and at a landscape scale. The strategic assessment process lends itself to positive conservation outcomes by promoting this approach. The BOS provides a consistent methodology for assessing biodiversity at both development and conservation sites and across all types of development.

Biodiversity Conservation Fund

Part of the intent of the original BioBanking scheme was to provide opportunities and incentives for private landowners with biodiversity values to conserve and manage the biodiversity values on their land in-perpetuity instead of the old practices whereby conservation outcomes were provided predominantly on public land. In the recent changes, a new 'Developer Charge' model for meeting biodiversity credits obligations under the Biodiversity Conservation Fund has been introduced by the BCT. This is a significant improvement from the previous Biodiversity Offset Price Calculator, which was fundamentally



flawed. We acknowledge the view of the BCT that these prices will influence the biodiversity credit market. In our view, influence on the market will still occur, but the lack of public availability to the price data undermines the transparency and degree of trust in the scheme as a whole. We therefore recommend that the prices are made publicly available. We also recommend that this pricing should include a 'risk premium' given that the NSW government takes on the responsibility of delivering the biodiversity credit obligation.

Capital Gains Tax

There is a lack of clear advice on the capital gains tax implications associated with the establishment of a Stewardship site. Capital gains tax events are complicated to understand. Uncertainty over potential tax liability can deter private landowners from entering into a Stewardship site agreement. Whilst taxation is a Commonwealth government matter, we strongly recommend capital gains tax advice for credit generation be reconsidered and that clearer advice to participants of the Scheme is provided. We would encourage the NSW government to engage with the Commonwealth government in seeking to achieve a favourable outcome with regards to taxation treatment of credit generation on Stewardship sites to encourage more private land conservation.

Credit Trading Groups

The principle of "like-for-like" credit trading is supported, however, the current scheme is highly fractured by the current 'offset trading group' rules. There may be options to make the credit matching rules more practical, noting that this is a complex area, and the EIANZ Biodiversity Offsets community of practice would be happy to discuss this topic.

Facilitate Credit Trading

Currently the information on biodiversity credits and future demand is spread over multiple government databases, all of which require quite a high level of knowledge and/or skill to utilise. The database of credits available includes many credits which are being held to meet future development needs. A consolidated credit platform with a user-friendly interface and search functions would greatly help to improve the visibility of the biodiversity credit market. It would be highly desirable to also include forecast biodiversity credit demand from proponents, with government projects constituting a large proportion of this demand. This would allow landholders to understand the potential future demand and to make decisions about whether to pursue Stewardship sites. This could encourage greater competition in the supply of biodiversity credits. The key here would be to locate the information within one portal, to make it user friendly, and with the best available data. This would assist in reducing complexity, cost, and encouraging investment.

Approval time of Stewardship sites

The Credits Supply Taskforce (CST) was tasked with improving the approval time of Stewardship applications. As accredited assessors who have contributed to this submission, this has not occurred, and significant delays still occur in the approval of Stewardship sites. The current Stewardship site application process is relatively cumbersome and lengthy. This process could be simplified by:



- Encouraging early engagement with the CST regards to the 'due diligence' process for lands (ie. prior to biodiversity assessments commencing), so that any issues are addressed early.
- Providing minimum costings for management actions such as fencing, weed management, feral animal control or the like, and for a minimum allocation for travel time to be applied to all management actions for a site based on the remoteness of that site from towns.
- Better templating of the plans or actions required within Stewardship sites.

Serious and Irreversible Impacts

The assessment process for entities listed as serious and irreversible impacts (SAIL) is currently unwieldy, and circular in nature, with the impact assessment process referring back to the principles for the listing of the entities, and many technical questions which are considered of be of very limited value in actually assessing the impact on the entity. It is recommended that this process is amended to allow a simpler assessment of the impact, and for any proposed positive measures to also be considered.

Biodiversity Certification

A change that we feel would be beneficial for biodiversity certification approvals would be to have a clearly defined process for minor amendments to development or conservation boundaries. This is because strategic assessments and/or biodiversity certification are based on the information at the time of the application, and situations can arise during the detailed design process wherein minor changes to the boundaries may be required to achieve a better conservation outcome. A clear, transparent, and simple process for such amendments would be a desirable amendment.

Furthermore, it would be desirable to have greater flexibility within the scheme to allow application of judgement or innovative practices in some situations, noting that these will be the exception rather than the norm. For example, in some limited instances, a more effective outcome for a threatened species could be a broad-scale pest or predator control program, rather than management on a specific site.

Regulating impacts on, and caring for, native animals and plants

We believe that the BC Act currently appropriately regulates the protection of native animals and plants, scientific and wildlife licencing.

Compliance and enforcement

We believe that consideration of the LLS Act is also essential. As identified earlier, the definition of native vegetation under the LLS Act is extremely broad, unclear, and counterproductive. That is, we support a tighter definition of native vegetation. This should still include degraded native vegetation, but not areas so degraded that they contain very little native plant diversity.

We also further believe that much of current unauthorised native vegetation clearance would occur under the LLS Act for agricultural activities but would nonetheless impact on biodiversity values. Amalgamation of the BC Act and LLS Act to simplify assessment processes would, in the long term, be desirable.

Other important matters

We recognise that there is the potential for real or perceived conflicts of interest to occur in the Biodiversity Offsets Scheme. While the Regulations define a fit and proper person to enter into and fulfil the obligations imposed by a proposed biodiversity stewardship agreement, the regulations do not provide an adequate basis for managing potential conflicts of interest that might arise in the biodiversity offsets process for environmental practitioners.

The biodiversity offsets process requires the involvement of appropriately qualified environmental practitioners for its effective operation. The process needs to ensure that the professional integrity of practitioners can be demonstrated in relation to the commercial transactions in the process. This is needed to protect practitioners, government and the public interest.

We note that there is a code of conduct which accredited assessors must sign up to. EIANZ has a Code of Ethics and Professional Conduct and Certified Environmental Practitioners (CEnvP) are required to adhere to this Code. CEnvP could form part of the accredited assessors. We would be interested in discussing with the NSW government the development of rules or guidelines to help provide clarity to situations considered to be potential conflicts of interest, and appropriate mechanisms to deal with such situations.

Closing

The EIANZ submission can be summarised as follows:

- We support and endorse the BOS. Based on our experience of ecological assessment outcomes within the BOS compared to the previous impact assessment processes without an offset protocol, the BOS results in superior biodiversity outcomes. Specifically, the BOS system provides an effective financial incentive to avoid or reduce impacts for development proponents; provides for positive in-perpetuity biodiversity management over Stewardship sites; and has a scientifically robust methodology applied on both impact and conservation sites.
- The BOS has become unnecessarily complex, and it is recommended that this complexity is reduced.
- We believe that the definition of native vegetation is currently too broad and would benefit from being refined and made clearer.
- Landscape-scale factors should be included into the BC Act assessment process.
- Ecosystem benchmark data should be updated to the PCT level as a priority.
- Making the 'Developer Charge' biodiversity credit prices for use by the Biodiversity Conservation Fund publicly available.
- We encourage government to review the current tax ruling with respect to the generation of biodiversity credits and provide clear advice to landholders on tax implications of establishing a Stewardship site.



- Discussion with the EIANZ Biodiversity Offsets community of practice and other stakeholders on offset trading groups.
- Provision of a user-friendly portal with all credit availability and demand information in the one location, with the best available data.
- EIANZ is committed to raising the integrity of the industry to improve the management of real or perceived conflicts of interest within the Biodiversity Offsets Scheme and offers to work with the NSW Government in developing appropriate codes of conduct, guidelines, training or other material.

On behalf of the EIANZ Biodiversity Offsets Community of Practice under the Ecology Special Interest Section.

Signed

Steven Ward
Chair of Biodiversity Offsets Community of Practice

To contact

Nicole Brown
Executive Officer
(e) nicole@eianz.org
(m) 0419 340 631
(w) eianz.org