

NCC SUBMISSION TO THE STATUTORY REVIEW OF THE BIODIVERSITY CONSERVATION ACT 2016



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21 April 2023

Biodiversity Conservation Act Review
Department of Planning and Environment
Locked Bag 5022
Parramatta NSW 2124

Email: biodiversity.review@environment.nsw.gov.au

Dear Panel,

Submission to the five-year statutory review of the *Biodiversity Conservation Act (2016)*.

The Nature Conservation Council of New South Wales (NCC) is the state's peak environment organisation. We represent over 170 environment groups across NSW. Together we are dedicated to protecting and conserving the wildlife, landscapes and natural resources of NSW.

We welcome the opportunity to contribute to this review. The review is a chance to align the *Biodiversity Conservation Act* (the BC Act) with the urgency of conserving what remains of precious habitats and ecological communities across NSW.

Australia has the world's [worst track record](#) for mammal extinctions, and we are living in an [extinction crisis](#). The national threatened species list comprises more than 1,700 species and over 100 threatened ecological communities, and more are added every year.

In the last five years, since the commencement of the conservation reforms under review here, we have witnessed scandal after scandal linked to the dysfunctional biodiversity offsetting scheme. While some programs are beginning to produce conservation results, their extent and longevity may not provide the conservation outcomes required to arrest and reverse the decline in biodiversity in NSW. Combined with the impacts of intensifying natural disasters; drought, bushfire and flood, the BC Act is facilitating Australia's continued leadership in biodiversity loss.

The accelerating loss of flora and fauna impacts the health, well-being and identity of the NSW community, and in particular harms the rich cultural heritage of First Nations peoples. The current state and the trajectory of biodiversity and the precarious ecological health of NSW is of great concern.



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Significant reform is needed to return the objectives and outcomes of land management regulation to *reducing* land clearing, *restoring* habitat and *improving* biodiversity outcomes.

New objectives are required to reverse the pattern of decline of native animal species and populations, the decrease in the range of fauna species and the extent of habitat loss. There is a need to incorporate the impacts of climate change into the regulatory system, using predictive modelling to help ascertain the consequences of land clearing on native vegetation, water availability and landscape health.

Simply tightening regulation of land use and continuing with business as usual conservation efforts will not suffice. The work of revaluing nature and biodiversity must be done alongside landholders and developers, using relevant and legitimate incentives and effective communication.

In composing this submission, NCC drew on the expertise and first-hand experience of member groups and our own programs. We also acknowledge the contributions to this review provided by our colleagues in the conservation and environment movement including the Environmental Defenders Office (EDO) among others. We support the recommendations made by the EDO and welcome the panel's continued engagement with environment stakeholders in this review process.

Your key contact point for further questions and correspondence is Jacquelyn Johnson, Executive Officer, available via jjohnson@nature.org.au and 02 9516 0461.

Yours sincerely,

Jacqui Mumford
Chief Executive Officer
Nature Conservation Council



Summary of Recommendations

1. That the NSW government undertake a comprehensive Special Commission of Inquiry into biodiversity loss, which includes an assessment of the effectiveness of the 2016 reforms to address aspects that are outside the scope of the current statutory review.
2. That the BC Act matches international and national ambition and seeks to reverse loss and improve nature. Specific changes to the Objects should include:
 - At 1A replacing the word 'conserve' with a stronger, nature positive word such as 'restore', and inserting 'local' before 'bioregional'; and
 - A new provision that addresses the need to maintain and increase habitat connectivity; and
 - A provision that commits NSW to restoring 30% of degraded terrestrial, inland water, coastal and marine systems, and active conservation of 30% of the country's land and oceans by 2030; and
 - A new provision that outlines how the objects will be achieved; and/or
 - Specific provisions that require decision-makers to make decisions consistent with the objects of the Act; and/or
 - Specified standards and goals.
3. That the BC Act and relevant regulations consider climate change in such a way that require decisions to respond to this threat. NCC agrees with the proposals made by the EDO that any biodiversity conservation program should:
 - respond to the impacts of climate change on species and ecological communities
 - require investments to respond to the impacts of climate change
 - require the Minister to consider climate change in developing the Biodiversity Assessment method.
4. That the NSW Government insert initiatives, incentives and deterrents for landholders and developers into the BC Act that can reduce ecosystem stressors, such as pollution, over-exploitation, habitat loss and fragmentation, and invasive introduced species. This should include incentives to expand the adoption of conservation and sustainable use practices to a broader cohort of landowners to increase the uptake of conservation agreements under the Biodiversity Conservation Trust.
5. That the BC Act legislate and clearly define the 30 by 30 target.
6. That the BC Act be amended to ensure integration of Aboriginal understandings, knowledge and programs into existing and future programs under the Act. The independent panel and



Government should consult with First Nations people about how the legislation can better incorporate Aboriginal ecological knowledge.

7. That marine protected and threatened species elements are taken out of the Fisheries Management Act are moved into biodiversity conservation legislation. Alternative statutory approaches to native vegetation management under native vegetation management law should be considered.
8. That planning authorities are required to consider, and make decisions consistent with strengthened laws and regulations regarding developments that would exacerbate the impact of key threatening processes.
9. That the phrase 'serious and irreversible impacts' is changed to 'serious OR irreversible impacts' and all projects and developments, including those deemed 'significant' and 'major' be assessed against the same criteria.
10. That the Minister for the Environment be allocated a concurrence role in the assessment of major projects.
11. That provisional listings are strengthened by adding a trigger for major events that impact on the conservation status of a species and that BC Act allow for the listing of specific populations.
12. That maintaining landscape connectivity is made a priority in assessing proposed developments and land use change.
13. That the Save Our Species (SOS) program be improved by:
 - imposing duties on developers and development decision makers to act consistently with SOS conservation priorities.
 - declaring that SOS sites (outside national parks and reserves) are Areas of Outstanding Biodiversity Value (AOBVs).
14. That the reasons for the failed uptake of the AOBV program are identified and rectified so that the declaration of AOBVs becomes a relevant component in protecting valuable areas of biodiversity on private lands.
15. That the government take responsibility for prioritising and working with landholders and communities toward listing special places as AOBVs. Resources should be allocated for outreach and coordination to support this process and make sure communities and landholders know about this pathway and the benefits it could bring.



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16. That all AOBVs are funded for maintenance and protection, and are totally off-limits from harm – including from mining interests.
17. Urgently reform the Biodiversity Offsets Scheme to meet [best practice standards](#), and place a moratorium on new offset trades until this has been achieved.
18. Identify a 'red line' that excludes all development in all protected areas, lands subject to stewardship agreements, and where any threatened species or ecological community is found. This must apply to single projects and regional plans.
19. Implement a requirement for mandatory public reporting on the outcomes and decisions made under the Biodiversity Offsets Scheme.



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NSW Nature Conservation Council submission on the 5-year statutory review of the Biodiversity Conservation Act.

Introduction

Between 2003 and 2017, the *Native Vegetation Act* aimed to prevent broadscale land clearing unless it was shown to maintain or improve environmental outcomes.

In 2017, the *Native Vegetation Act 2003* was repealed and the new legal framework regulating land clearing commenced, consisting primarily of the *Local Land Service Act 2013* (LLS Act), and the *Biodiversity Conservation Act 2016* (BC Act). These reforms deregulated rural land clearing, shifting to a system of self-assessment by land holders. They also moved the administration of rural land clearing laws from the environment portfolio to the agriculture portfolio and in practice, Catchment Management Authorities. New biodiversity conservation measures were added through the BC Act.

In the last 5 years we have seen species added to our threatened lists; a significant increase in rural land clearing; the impacts of drought, bushfire, floods; changes to climate policy; serious concerns raised around relaxed biodiversity offsetting rules; and ongoing koala policy debacles. The NSW Audit Office, Natural Resources Commission and multiple parliamentary inquiries have all raised concerns about the regulatory framework in NSW.

Current policy settings are unequivocally having an unsustainable environmental impact. The environment in which we now operate, and the urgency of the climate and biodiversity crises will require constraint and sacrifices. The safety of our unique biodiversity requires clear red lines determining where development is simply not acceptable. Economic and electoral imperatives can no longer outweigh the increasing need to preserve our life support systems.

Our governments must develop the ability to reflect this in laws and regulations, and explain this to the public.

NCC is of the view that the current laws and regulatory arrangements are completely inadequate to respond to the urgency and scale of the task ahead for NSW; to restore our environment to a healthy and sustainable condition which will allow nature and communities to thrive in the years ahead.

An insipid assumption pervades parts of our current laws; that ecosystem conservation is a reaction to development and habitat loss, rather than an imperative of its own value. A reset

which acknowledges the falsity of that assumption and accepts the enormity and urgency of the task for NSW to become 'nature positive' is required.

Within the scope of this review, we have made pragmatic suggestions. This submission provides an outline of the shortcomings of the Land Management and Biodiversity Conservation reform package, as they apply to the questions in the discussion paper.

The submission provides recommendations for the independent panel undertaking the review on reforms that will benefit biodiversity in NSW. The recommendations are informed by our member groups and NCC's on-ground Healthy Ecosystems teams who work with the programs and regulations brought about by the BC Act and Part 5A of the LLS Act.

The land management framework review should be a single exercise.

[Question 25 – other important matters]

When the land management and biodiversity conservation laws were made, they were made as a full package of reforms. The changes to land clearing regulation were to be counterbalanced by changed approaches to biodiversity conservation through offsetting and investment.

A key question for this statutory review, therefore, is whether the impacts of relaxing land clearing rules and allowing more unregulated clearing under the LLS Act is being offset or adequately moderated by increased investment in conservation and the biodiversity offsets scheme under the BC Act?

Reports and enquiries are finding consistently that:

- the clearing of woody vegetation increased significantly after the commencement of Part 5A of the LLS Act. Land clearing for agriculture has doubled compared to the long-term average before the 2016 reforms. Economic factors, population growth, land use changes have all increased the demand to clear.
- the clearing of native vegetation, and the destruction of habitat that is associated with it, are the single greatest threats to biodiversity in NSW. Habitat restoration and revegetation programs are not restoring native vegetation at the rate of permanent clearing, according to the [2021 NSW State of the Environment report](#).
- the biodiversity offset scheme, a touted protective measure against ecosystem loss, lacks transparency, is without the safeguards it needs against potential conflicts, is



flawed, dysfunctional, ineffective at sustaining a market, and insufficient for offsetting losses resulting from development.

The land management framework in NSW contains a trade-off between conservation and development; the latter largely responsible for funding the former. The consequences of this trade-off cannot be properly explored by two separate agencies, with two separate independent panels reporting to two Ministers with different portfolios.

These concurrent reviews will each fail to build a complete picture of the impact of part 5A of the LLS Act on habitats with the attempts to preserve nature in the BC Act. A comprehensive and rapid inquiry would increase the relevance and value of the current two disparate reviews.

Recommendation 1: that the NSW government undertake a comprehensive Special Commission of Inquiry into biodiversity loss, which includes an assessment of the effectiveness of the 2016 reforms to address aspects that are outside the scope of the current statutory review.

The Objectives of the Act

The Objects of the BC Act are outdated and need to be brought in line with international and national commitments and obligations aimed to bring the world closer to achieving a safe future.

[Question 1 & 3]

As described by Dr Ken Henry in the Foreword of the consultation paper for the current review, biodiversity loss continues at an alarming rate and biodiversity is at greater risk now than when the Act was enacted in 2016.

While biodiversity continues to decline, its role in abating and sequestering carbon, and over time reducing the state's emissions, is increasingly being understood and valued.

The BC Act's Objects are no longer fit for purpose and are not in line with national and international policy ambitions.

The BC Act should explicitly provide a legislative basis for the biodiversity conservation strategies and plans of the NSW Government. NSW laws should clearly lay out the state's contribution to national and international agreements. This review is an opportunity to raise the ambition in NSW in line with:



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- The 2020 [Leaders Pledge for Nature](#) which commits signatories to reverse biodiversity loss by 2030.
- The 2021 COP 26 commitment to halt and reverse deforestation through the [Declaration on Forests and Land Use](#), which pledges signatories to stop deforestation by 2030 and strengthen commitments to sustainable land use and the conservation, protection and sustainable management and restoration of forests and other terrestrial ecosystems. This declaration also requires signatories to design and implement agricultural policies and programmes that incentivise sustainable agriculture, promote food security, and benefit the environment.
- The December 2022 adoption of the [Global Biodiversity Framework](#), which saw the federal government commit specifically to ensuring that 30% of degraded terrestrial, inland water, coastal and marine systems are under effective restoration, and that 30% of the country's land and oceans are under effective conservation and management by 2030 (30 by 30). At present in NSW, only 10% of land is part of the National Parks estate.
- The Federal government's [Nature Positive Plan](#), released in December 2022, which aims to protect biodiversity, stop new extinctions, reverse the damage already done across the nation through a nature repair market, and work in partnership with First Nations people on these goals.
- [Threatened Species Action Plan](#) - Towards Zero Extinctions: In October 2022, the Federal government released its Threatened Species Action Plan: Towards Zero Extinctions. The Action Plan includes objectives of preventing new extinctions of plants and animals (Objective 3) and protecting and conserving at least 30 per cent of Australia's land mass is protected and conserved (Objective 4).

Recommendation 2: That the BC Act matches international and national ambition and seeks to reverse loss and improve nature. Specific changes to the Objects should include:

- At 1A replacing the word 'conserve' with a stronger, nature positive word such as 'restore', and inserting 'local' before 'bioregional'; and
- A new provision that addresses the need to maintain and increase habitat connectivity; and
- A provision that commits NSW to restoring 30% of degraded terrestrial, inland water, coastal and marine systems, and active conservation of 30% of the country's land and oceans by 2030; and



- A new provision that outlines how the objects will be achieved; and/or
- Specific provisions that require decision-makers to make decisions consistent with the objects of the Act; and/or
- Specified standards and goals.

The BC Act's purpose to conserve biodiversity 'consistent with the principles of Ecologically Sustainable Development (ESD)' is not being achieved.

[Question 2]

The frame of ESD embeds a problematic assumption that the purpose of this Act is facilitating development rather than prioritising conservation. Regardless, taken as a method to assess the impact of developments, the BC Act is not achieving the purpose of conserving biodiversity consistent with ESD principles.

The purpose of the BC Act is to maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future, consistent with the principles of ecologically sustainable development (ESD) as described in s 6(2) of the Protection of the Environment Administration Act 1991 (POEA Act).

Section 6(2) of the POEA Act states that ESD can be achieved through the implementation of certain principles and programs. The BCA is failing in adherence to three of these principles:

1. the precautionary principle: that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
2. inter-generational equity: that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations.
3. conservation of biological diversity and ecological integrity: that conservation of biological diversity and ecological integrity should be a fundamental consideration.

Neither the native vegetation clearing provisions of the LLS Act, nor the biodiversity offsets scheme of the BC Act adequately consider the cumulative impact over time of the loss of habitat and of biodiversity.

The current laws enable clearance of vegetation on a property or development scale rather than a landscape or bioregional basis. Offsetting is not capable of replacing existing mature habitats. Instead of avoiding the impacts of development on biodiversity, the offsets scheme enables many developments to default to 'offsetting' the costs of biodiversity loss via a monetary



contribution. The scheme as it is being administered does not meet the precautionary principle or intergenerational equity requirements of ESD.

The number of threatened and endangered species continues to rise.

The 2021 NSW State of the Environment report identified that the number of species and ecological communities listed as threatened in the *Biodiversity Conservation Act 2016* continues to rise. The single [greatest threat](#) to biodiversity is the clearing of native vegetation and the destruction of habitat that is associated with it. The conservation of biological diversity and ecological integrity cannot be attained when species diversity is being reduced and ecosystem integrity is being constantly undermined – both of which are quantifiable outcomes of the existing biodiversity and native vegetation laws.

Land clearing and loss of habitat has increased since the introduction of the BC Act.

The long-term maintenance and integrity of existing ecosystems and of biodiversity should be an element of equal value in the economic, social and environmental aspects of development. Sadly, the combined impact of the native vegetation provisions of the LLS Act and the offsets component of the BC Act enables landholders and developers to undertake vegetation clearance activities either without regulatory oversight or with ineffective consideration and protection of outstanding biodiversity values. The result is a degraded NSW environment, with a three-fold increase of permanently cleared native woody vegetation since 2015 – a situation that clearly does not benefit future generations and that will continue without substantial changes to the legislation.

The Act can better support national and international biodiversity aspirations including climate change adaptation, nature positive and restoration goals.

[Question 2]

Climate change

Climate change is acknowledged as a major impact on biodiversity with the increase in the intensity and frequency of fires, storms and periods of drought. Australia is already experiencing these impacts. Biodiversity, through the ecosystem services it supports, makes an important contribution to both climate change mitigation and adaptation. Consequently, conserving and sustainably managing biodiversity is critical to addressing climate change.

Adding initiatives, incentives and deterrents for landholders and developers into the BC Act is a measure that the Government can take to reduce stresses such as pollution, over-exploitation, habitat loss and fragmentation, and invasive introduced species.



Recommendation 3: That the BC Act and relevant regulations consider climate change in such a way that require decisions to respond to this threat. NCC agrees with the proposals made by the EDO that, any biodiversity conservation program should:

- respond to the impacts of climate change on species and ecological communities
- require investments to respond to the impacts of climate change
- require the Minister to consider climate change in developing the Biodiversity Assessment method.

Restoration goals

The Act provides for the Biodiversity Conservation Trust to enter into agreements with landowners to conserve or study the biodiversity of the land. More appealing incentive measures to expand the adoption of conservation and sustainable use practices to a broader cohort of landowners should be canvassed to increase the uptake of conservation agreements under the Biodiversity Conservation Trust.

With the Federal Government's Nature Positive Plan aiming to protect biodiversity, stop new extinctions, and restore damaged ecosystems, it is incumbent upon the NSW government as a major land manager and regulator to ensure its own land management legislation promotes programs and actions which meet these aims.

Amendments to the BC Act should be considered to ensure that programs such as Save Our Species are sufficiently robust to stop extinctions, and sufficiently enforceable and resourced to include ecosystem restoration and improvements aimed at attaining healthy ecosystems.

Recommendation 4: That the NSW Government insert initiatives, incentives and deterrents for landholders and developers into the BC Act that can reduce ecosystem stressors, such as pollution, over-exploitation, habitat loss and fragmentation, and invasive introduced species. This should include incentives to expand the adoption of conservation and sustainable use practices to a broader cohort of landowners to increase the uptake of conservation agreements under the Biodiversity Conservation Trust.

Nature positive

The BC Act should include a legislated goal for 30by30 and provide a clear definition for protected areas and other effective area-based conservation measures (OECMs) for the purpose of achieving that target. 30by30 requires a rapid tripling of the Protected Area estate, which means large scale acquisition of areas of conservation significance, and significant investment in connectivity protection and restoration.

Recommendation 5: That the BC Act legislate and clearly define the 30 by 30 target.



The Act can better integrate Aboriginal knowledge and support the aspirations of Aboriginal people in biodiversity conservation through consultation and resourcing.

[Question 4]

There are no specific clauses in the BC Act that facilitate improved sharing and use of local and traditional Aboriginal ecological knowledge about biodiversity conservation, despite it being an Object of the Act.

The BC Act's Purpose would benefit from inclusion of full and active participation of Indigenous people in decision making, to improve the way in which the rights and interests of Indigenous communities are ensured.

Traditional Ecological Knowledge needs to be incorporated into the management of species and sites. Funding is required to support First Nations experts managing Country, including Indigenous Protected Areas and Country where Native Title rights have been established. Protected areas should proceed to joint management arrangements.

Recommendation 6: That the BC Act be amended to ensure integration of Aboriginal understandings, knowledge and programs into existing and future programs under the Act. The independent panel and Government should consult with First Nations people about how the legislation can better incorporate Aboriginal ecological knowledge.

Conserving threatened species and ecological communities

The current elements of the BC Act aimed at biodiversity conservation are not achieving the required outcomes.

[Question 5]

The BC Act contains several elements that aim to protect and conserve threatened species and ecological communities. No programs focus on biodiverse, resilient landscapes. None are having a real impact on improving biodiversity conservation, restoration or resilience, and much is missing.

Marine environments and land clearing



The legislative distinction between terrestrial and marine biodiversity is problematic. The retention of statutory powers for the conservation of marine biodiversity in the *Fisheries Management Act* assumes an organisation with a focus on 'resource management' - Fisheries NSW – can also act as a biodiversity conservation operation. The absence of any declared marine threatened ecological communities demonstrates the failure of this approach.

The assumption that biodiversity conservation outcomes can coexist with the conflict of interest inherent in resource management is [objectively failing](#) when it comes to the protection of native forests by Forestry NSW, which is overseeing vast destruction and ballooning numbers of species becoming threatened and endangered. The same can be said for native vegetation management in the LLS Act, which has overseen broadscale land clearing becoming one of the [primary threats](#) to the environment in our state.

Recommendation 7: That marine protected and threatened species elements are taken out of the Fisheries Management Act are moved into biodiversity conservation legislation. Alternative statutory approaches to native vegetation conservation and restoration under native vegetation management law should be pursued.

Key Threatening Processes

There are a substantial number of Key Threatening Processes (KTPs) listed in Schedule 4 of the BC Act. KTPs are listed if they are likely to adversely affect threatened species or ecological communities or could cause species or ecological communities that are not threatened to become threatened. Yet, a KTP listing has no legal effect.

One of the key objectives of the Biodiversity Conservation Program is to minimise the impacts of KTPs on biodiversity and ecological integrity. Assessment of a proposed development must determine whether it will contribute to any KTP or will be likely to increase the impact of a KTP.

The assessment of KTPs needs to be more proactive to evaluate their impact on all aspects of biodiversity. Strengthened assessment requirements could be incorporated into the BC Act by requiring planning authorities to ensure that strategic plans and developments are not likely to increase the impact of KTPs. The significant range of defences through which biodiversity may legally be destroyed or degraded should be substantially reduced.

Recommendation 8: That planning authorities are required to consider and make decisions consistent with strengthened laws and regulations regarding developments that would exacerbate the impact of key threatening processes.

Serious and irreversible impacts on biodiversity values



The aim of assessing the serious and irreversible impacts of a development proposal is to refuse projects that will cause unacceptable impacts on threatened entities. This element of assessment should be stronger.

Serious and irreversible impact assessments only apply to local projects. Major projects, inevitably with a larger footprint, such as those designated State Significant Development or State Significant Infrastructure, may be allowed to proceed regardless of their impact.

The Minister for Planning currently has decision-making authority. The Minister for the Environment should have a concurrence role for the review and approval of biodiversity assessments for any major projects.

Recommendation 9: That the phrase ‘serious and irreversible impacts’ is changed to ‘serious OR irreversible impacts’ and all projects and developments be assessed against the same criteria.

Recommendation 10: That the Minister for the Environment be allocated a concurrence role in the assessment of major projects.

The BC Act should contain the architecture required to respond to natural disasters effectively.

[Question 6]

The NSW State of the Environment report shows that the bushfires in NSW during 2019-20 resulted in over 5.52 million hectares of land or about 7% of NSW being burnt, with over 1 billion vertebrate animals estimated to have been killed, injured or displaced. This was a catastrophic event for wildlife and for threatened species, particularly in eastern NSW.

The BC Act has no capacity to respond legislatively to events that clearly compromise biodiversity health. The lessons of the Black Summer should be incorporated into this review. Biodiversity legislation needs to be able to effectively respond to large scale threats, which will increase in frequency and severity in the years ahead.

Biodiversity in NSW would benefit from amendments to the BC Act that enable immediate responses that assist biodiversity in the aftermath of disasters. For example, following disasters such as fires and floods, protecting undamaged areas adjacent to impacted areas can be essential for the survival of isolated populations of threatened and other native species.

The World Wildlife Fund-Australia report [Defending the Unburnt](#) identifies six priority areas earmarked for the protection of critical unburnt habitat as a response to the 2019–20 bushfires.



Amending the BC Act to enable protective action such as that described in the WWF report to occur quickly on public and private lands is a sensible approach that would make protective requirements clear to communities, land holders and the public service.

NCC supports the Environmental Defenders Office recommendations to strengthen provisional listings and enable the listing of specific populations to safeguard species following a major event. The ability to recognise distinct local populations, and protect them, is essential for conserving and retaining genetic diversity, a fundamental component of biological diversity.

Recommendation 11: That provisional listings are strengthened by adding a trigger for major events that impact on the conservation status of a species and that BC Act allow for the listing of specific populations.

The BC Act can better support landscape scale actions by focusing on vital corridors.

[Question 7]

Many NSW landscapes contain natural habitat that is only available in small, isolated patches that are unable to support their full complement of native plants and wildlife. [Vegetation corridors](#) maximise the wildlife habitat value of such fragmented landscapes. This applies to continuous linear corridors and isolated patches of vegetation with single trees acting as stepping-stones between primary habitat for wildlife.

The BC Act should articulate the value of vegetation corridors in the landscape. Assessment of development impacts should be required to extend beyond the specific footprint of a given application, and demand that proponents account for the broadscale impact on wildlife of allowing the destruction of connections. Project assessment criteria should account for the importance of maintaining connectivity of populations, ecological communities and habitats at all scales.

Recommendation 12: That maintaining landscape connectivity is made a priority in assessing proposed developments and land use changes.

Several improvements can be made to conservation programs to increase their impact on enhancing biodiversity.

[question 8]



The impact of vastly increased clearing under the LLS Act has not been offset by the increased area of private land conservation achieved by the Biodiversity Conservation Trust, set asides and offsets.

NCC supports the BCT's Conservation Management Program, but notes that insufficient funding and implementation problems greatly hampers its ability to support landholders to establish private protected areas that could collectively equate to the area of high conservation value ecosystems being cleared under the LLS Act Part 5A.

Save Our Species

The BC Act requires the establishment of a Biodiversity Conservation Program to maximise the long-term security of threatened species and threatened ecological communities, and minimise the impacts of key threatening processes on biodiversity and ecological integrity. The Program is currently delivered through the NSW Government's Saving our Species (SOS) program. The SOS program aims to manage and conserve threatened species by funding on-ground conservation projects working directly with landholders and the community.

Although it has a very important role in managing impacts on threatened species and conserving and restoring important habitat, the SOS program is operating within a system that is weighted heavily toward habitat loss and destruction. Without broader change including ending deforestation, moving beyond extractive industries and better protections for NSW flora and fauna, there is only so much that it can achieve.

NCC has direct experience implementing the SOS program and in 2020 NCC participated in a review of the program. The submission to that review identified its strengths and weaknesses, as experienced by NCC and our member groups. The case examples and recommendations remain relevant. The submission is attached at APPENDIX 1.

There are operational challenges that make program delivery difficult for landowners and for funded program managers.

- Funding is piecemeal and might only last 3 – 4 years. This limits the outcomes for species and the amount of meaningful monitoring data that can be captured. Gaps can occur in the funding cycle causing uncertainty, staff turnover and interruptions to knowledge, relationships, partnerships and outcomes. Conservation priorities and best practice should drive funding arrangements.
- Reporting systems are often more onerous than should be required. Project managers are required to spend a proportion of their time coordinating funding, an activity which is not recognised in funding allocations.



- Conservation efforts under the SOS program may be undermined by activities detrimental to the species on adjacent lands. For example, significant forestry operations in nearby state forests and private plantations can be removing the habitat of threatened species that SOS funding is protecting.
- It is counter-productive to operate programs such as SOS without committing to ongoing monitoring of the impacts of events such as the Black Summer bushfires. The cumulative impact on both threatened and non-threatened species, and on habitat and other landscape values needs to be understood over the long term to ensure the value of SOS project work is not lost due to a lack of data.

NCC supports the EDO's recommended reforms for the SOS program, and refers the panel to our 2020 submission at APPENDIX 1.

Recommendation 13: That the SOS program be improved by

- imposing duties on developers and development decision makers to act consistently with SoS conservation priorities,
- declaring that SOS sites (outside national parks and reserves) are Areas of Outstanding Biodiversity Value (AOBVs)

Areas of Outstanding Biodiversity Value

Areas of Outstanding Biodiversity Value (AOBVs) were placed in the BC Act to identify sites of outstanding biodiversity conservation outside of the existing reserve system. However, there have been no new AOBVs declared since the BC Act came into effect in August 2017.

Recognising a place as an AOBV is entirely voluntary, landholder driven without support, and requires proponents to jump through several administrative hoops. Even then, protection is not absolute with AOBVs able to be cleared and offset.

NCC member groups have struggled to have special places classified as AOBVs over the last five years. One particular experience, and suggestions for improvements to the AOBV listing process, are attached at APPENDIX 2.

Recommendation 14: That the reasons for the failed uptake of the AOBV program are identified and rectified so that the declaration of AOBVs becomes a relevant component in protecting valuable areas of biodiversity on private lands.

Recommendation 15: That the government take responsibility for prioritising and working with landholders and communities toward listing special places as AOBVs. Resources should be

allocated for outreach and coordination to support this process and make sure communities and landholders know about this pathway and the benefits it could bring.

Recommendation 16: That all AOBVs are funded for maintenance and protection, and are totally off-limits from harm – including from mining interests.

Private land conservation and investment

Private landholders need confidence that they will be supported in order to enter into partnerships and agreements.

[question 10]

Encouraging private landholders to partner with the Biodiversity Conservation Trust in a conservation agreement or wildlife refuge agreement is essential to support and enhance the protected lands estate across NSW. However, in NCC's experience working with private landholders, for people to have confidence that they will be properly supported, there are on-ground issues that need to be addressed.

Funding may not be sufficient to undertake basic maintenance works on properties under agreement. Maintenance is essential, for example tracks that access conservation management areas can deteriorate quickly due to natural events such as floods, fires and storms, making access unsafe or impossible.

Landholders are likely to be more willing to enter into agreements if greater certainty exists regarding funding for basic but often expensive maintenance.

Understanding of landholders' circumstances regarding the personal impacts of fires and floods and their ability to cope with the requirements of an agreement also need to be considered, a relevancy for both existing holders of an agreement and those who may yet become willing to join.

The Biodiversity Offsets Scheme

[questions 13 – 17]

The biodiversity offsets scheme was introduced to help compensate for anticipated losses due to clearing on rural properties under part 5A of the *Local Land Services Act*. The BC Act at 1L



describes the requirement to establish "a scientific method for assessing the likely impacts on biodiversity values of proposed development and land use change, for calculating measures to offset those impacts..."

The [evidence shows](#) that the biodiversity offsets scheme (BOS) has so far been largely ineffective at conserving biodiversity. Its failures can in part be explained by two foundational faults:

- First, the offsetting scheme can be said to actually facilitate biodiversity loss by [removing ethical roadblocks](#) to destroying the ecosystems and habitats of threatened species, rather than preventing it.
- Second, in practice, the BOS has become a method for developers to simply calculate a financial penalty for environmental damage. Meaningful responses to actual impacts on irreplaceable biodiversity have been effectively lost. The Act does not recognise any point at which known impacts on habitat loss, loss of connectivity and reduction in species population reach a critical point, nor does it set a standard for outright refusal.

Much work has already been done by many on the various practical failings of the current scheme, and recommendations to improve it have been put forward. These will not be repeated here. NCC's previous publications and submissions are linked and attached as APPENDICES 3 and 4:

- [Paradise lost](#): the weakening and widening of NSW biodiversity offsetting schemes (2016)
- Submission on proposed changes to the Biodiversity Offset Scheme (April 2021)
- Submission to the inquiry on the integrity of the Biodiversity Offsets Scheme (Oct 2021)

Recommendation 17: Urgently reform the Biodiversity Offsets Scheme to meet [best practice standards](#), and place a moratorium on new offset trades until this has been achieved.

Recommendation 18: Identify a 'red line' that excludes all development in all protected areas, lands subject to stewardship agreements, and where any threatened species or ecological community is found. This must apply to single projects and regional plans.

Recommendation 19: Implement a requirement for mandatory public reporting on the outcomes and decisions made under the Biodiversity Offsets Scheme.



Beyond the BOS's structural problems, several practical implementation failures at conserving biodiversity have been reported by NCCs on-ground practitioner networks.

These challenges and suggested solutions are listed.

- Land can be identified as “avoided land” because it has high biodiversity values. Although planning controls are in place on avoided lands to protect biodiversity, development may still occur. Avoided lands should be protected under the BC Act rather than remaining under the jurisdiction of planning legislation.
- Biodiversity offsets should be identified and functioning before proponents can undertake any vegetation clearing. All offsets under the BOS need to be funded and monitored for biodiversity outcomes for at least 20 years.
- Proponents changing biodiversity offset obligations after a Development Application has been approved has become a common occurrence. Concurrence with biodiversity offset agreements needs to be much stricter once DA approval has occurred. Any changes that are allowed should be published, providing detailed justification for the changes.
- Forestry activities, whether on Crown lands or Private Native Forestry (PNF) are development activities which cause biodiversity loss on a significant scale. A PNF Plan agreement signed by a landowner and the LLS requires no referral to local government or public exhibition. Even where some Councils have a dual consent process in place for PNF agreements and the BOS is triggered the process is seldom enforced. A process to ensure the BOS is enforced is required.
- Feral animals are known to have a significant impact on biodiversity. Control of feral animals should be included in Biodiversity Stewardship Agreements and assessed as an impact in Development Applications.
- Government development proposals assessed under Part 5 of the Environmental Planning and Assessment Act 1979 should be subject to the BOS and councils must also be required to comply with all requirements of the BC Act and use the BOS.



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Appendices

1. Submission to review of the SOS Program (2020)
2. Letter to the Hon. Matt Kean regarding AOBVs (2021)
3. Submission on proposed changes to the Biodiversity Offset Scheme (April 2021)
4. Submission to the inquiry on the integrity of the Biodiversity Offsets Scheme (Oct 2021)



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31 July 2020

Alison Gibbons

Consultant

Via email: alison.f.gibbins@gmail.com

Dear Alison

Save Our Species Program review

The Nature Conservation Council of New South Wales (NCC) is the state's peak environment organisation. We represent over 150 environment groups across NSW. Together we are dedicated to protecting and conserving the wildlife, landscapes and natural resources of NSW.

The proposed extension of the SOS Program is an opportunity for the NSW Government to make an ongoing strategic commitment to threatened species conservation. Thank you for the opportunity to share our views about how the program might best achieve its goals in the future.

Introduction - context for the review

Around three billion animals were lost or displaced as a result of the 2019 - 20 bushfire disaster. Not all of the casualties were direct results of the flames or heat. Starvation, dehydration and predation by feral animals are still taking a toll.¹ The fires that ravaged much of the NSW east coast rank as one of the worst wildlife disasters in modern history. The future of all conservation programs must be viewed through this lens.

The Commonwealth Environmental Protection and Biodiversity Conservation Act (EPBC Act) review has recently produced its interim report. Independent assessment of the EPBC Act has found that Australia's biodiversity is in a state of unsustainable decline and is under increasing

¹ Van Eeden, L., Nimmo, D., Mahony, M., Herman, K., Ehmke, G., Driessen, J., O'Connor, J., Bino, G., Taylor, M & Dickman, C. 2020, 'Australia's 2019-20 bushfires: the wildlife toll. Interim Report. World Wildlife Fund Australia. Available: <https://www.wwf.org.au/news/news/2020/3-billion-animals-impacted-by-australia-bushfire-crisis#gs.bc7dox>



threat. A major hurdle to improving how we care for our biodiversity is a lack of baseline data.² According to the 2016 State of the Environment Report, Australia is unable to measure the effectiveness of most of our investment in threatened species and biodiversity.³

Strengthening laws and programs that benefit nature has never been more important. Long-term monitoring and research that will address knowledge gaps on wildlife densities and responses to fire is essential.⁴ The SOS Program is an opportunity to further this work.

Methodology

Many NCC member groups undertake work funded by the SOS Program. We asked them to share their experiences. Ten member groups provided feedback to NCC via written responses and phone conversations to the key questions:

- Do you have a case example that demonstrates the strengths and/or weaknesses of the SOS Program?
- What are two or three key things that should be built into an ongoing SOS Program?

Their on-the-ground experience of implementation has been drawn together in this document, organised according to themes.

NSW National Parks and Wildlife Services (NPWS)

SOS funding allows the NPWS to undertake a range of conservation works. SOS Programs support NPWS to reintroduce captive bred mammals into national parks, conduct bushfire recovery work, raise public awareness about conservation and implement citizen science projects. SOS funding has resulted in research on the presence and density of threatened species such as the brush-tailed rock wallaby and *Astrotricha crassifolia*. The continuation of

² Samuel, G. 2020, 'Independent Review of the EPBC Act. Interim Report. Available: <https://epbcactreview.environment.gov.au/resources/interim-report>

³ Commonwealth Government. 2016, State of the Environment Report. Available: <https://soe.environment.gov.au/>

⁴ Van Eeden, L., Nimmo, D., Mahony, M. Herman, K., Ehmke, G., Driessen, J. O'Connor, J., Bino, G., Taylor, M & Dickman, C. 2020, 'Australia's 2019-20 bushfires: the wildlife toll. Interim Report. World Wildlife Fund Australia. Available: <https://www.wwf.org.au/news/news/2020/3-billion-animals-impacted-by-australia-bushfire-crisis#gs.bc7dox>



this research is necessary to grow our understanding of the most effective conservation efforts.

Key themes

Premise of the program

The intention of the SOS Program is for threatened species to be on track for secure survival in the wild in NSW for 100 years. A five year program, beset by delays, cannot be regarded as adequate to set a trajectory for threatened species for a century. At the very least, ongoing support of this program, and its expansion, is vital to achieve that goal.

Threatened species in NSW are up against more than a \$100 million funding injection can provide. In NSW, the Biodiversity Conservation Act (2016) has overseen the rapid decline of our wilderness and species. The Act does not provide for any assessment of cumulative damage and there are few specific triggers that lead to developments being rejected. At NCC we've found that there is [no departmental scrutiny](#) of industry funded environmental assessments, even though project proponents hand-pick their own assessment consultants.⁵ Land clearing rates in NSW have increased 1300 per cent since the government radically weakened biodiversity conservation laws in late 2017.⁶ [Koalas](#) are on track to be extinct in the state before 2050 due to land clearing for agriculture, logging for timber, urban development and climate-fuelled bushfires.⁷

Offsetting arrangements in NSW allow developers to clear threatened species habitat on the mere promise of securing something else in the future to offset the loss. The NSW offsetting arrangements don't require development proponents to commit to when, where or what they will do to undo the damage wrought by development. The [Environmental Defenders Office](#) has described this as a 'death by a thousand cuts' for NSW biodiversity.⁸

⁵ Nature Conservation Council NSW. 2020, Centennial Coal vastly underestimates carbon emissions from major mine projects over 10 years, Media release 10 May 2020: <https://www.nature.org.au/media-releases/2020/05/centennial-coal-vastly-underestimates-carbon-emissions-from-major-mine-projects/>

⁶ [Land management and biodiversity conservation reforms: Final advice on a response to the policy review point July 2019](#), NSW Natural Resources Commission

⁷ Legislative Council Portfolio Committee 7, 2020. [Koala Populations and habitat in NSW](#)

⁸ Environmental Defenders Office. 2020, Court challenge over coal mines critically endangered woodlands offset failure, media release 3 April 2020: <https://www.edo.org.au/2020/04/03/court-challenge-over-coal-mines-critically-endangered-woodlands-offsets-failure/>



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The SOS Program is operating within a system that is weighted heavily toward habitat loss and destruction. Without broader change; ending deforestation, moving beyond coal and other extractive industries and better protections for NSW flora and fauna, there is only so much that it can achieve.

Monitoring the decline

The SOS program has been reasonably successful in identifying threatened species and threatened ecological communities (TECs) that need additional protection, setting priorities and monitoring those species and TECs. However, member groups report three significant limitations of the SOS Program that result in the program simply “monitoring the decline” of species rather than facilitating timely conservation strategies and habitat restoration.

Local knowledge and bushfire preparedness

Accurate and thorough data is important for informed decision-making. This is rightly a focus of the SOS Program. However, local knowledge can be as important as data. Respondents said that the singular focus on data had resulted in missed opportunities for funding on-the-ground groups to trail and implement habitat restoration and conservation strategies. Member groups report that funding for a variety of activities, particularly bushfire impact mitigation strategies, prior to the 2019 -20 bushfires would have improved our ability to plan for future bushfire seasons.

Enforcement

The Biodiversity Conservation Act 2016 established the SOS Program. However, it provides no mechanism to ensure that program objectives are met and identified species and sites are protected. Member groups report that the program needs more power.

“Mountain bikes have been causing enormous damage within the Priority Management Site with riders building an extensive network of illegal tracks. This has caused significant erosion, damage to vegetation including root systems, and even night riding which drives out the native fauna... Council's lacklustre response to date has been to erect no-bike-riding signs which are quickly torn down. No fines have been issued” -
Member group response

Without additional legal protections sites are being damaged, cleared and habitat of SOS threatened species lost.



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Knowledge

A challenging lack of knowledge exists about the location and extent of threatened ecological communities and the program overall. Member groups fed back that it would be helpful for the location of SOS program managed threatened ecological communities to be made known to all landowners; private and public owners including councils. Threats, objectives and actions that impact the protection of those sites must be proactively communicated. Member groups recommended funding for appropriate signage for Priority Management Sites to educate the public of their importance and to advise of restricted activities.

“Where Powerful Owl habitat is on public land, the relevant landowners should adhere to the Powerful Owl Strategy. This should include Ausgrid who have often done clearing around Powerful Owl nest sites during breeding season - timing of any maintenance is crucial.”

Administrative issues

Member groups reported delays in funding delivery. This challenged their ability to meet the goals they had set. Member groups experienced delays moving through contract stages once expressions of interest had been made. Feedback also indicated that centralised decision-making and sign-off of milestones posed challenges. Technical decision-making on targets would benefit from decentralising appropriate authority to Departmental staff in the regions where projects are based.

Co-funding

Contracts with non-government organisations (NGOs) required cash co-funding arrangements. This model is difficult for small, on-the-ground projects run by not for profit groups. Project partners may be more easily able to contribute resources in-kind.

Baseline data and long-term thinking

NCC heard that it has taken several years to build-up a well structured database for the SOS Program. Now, as the program looks toward the end of its projected life, projects are finally able to provide information to a single database. After 5 years of operation, projects are beginning to bring together good, baseline data. The view among respondents is that the database will be a very useful tool for targets and tracking, although it is in its infancy.

Now is not the time to let this hard work fall over. Continuing data collection following the bushfires is an opportunity to gather important insight into the impact of the fires, adding to our depth of knowledge. Member groups reported that program guidelines required them to think



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about and invest in the long term. The NSW Government must now take the opportunity to leverage off the investment made into the program.

Citizen science

Member groups reported that the citizen science run and funded through the SOS Program can achieve significant data accumulation. Such data is critical to continued ecological research and community engagement in conservation work. Through the work of citizen scientists, we can rapidly expand the available data on species location and changes over time. Citizen science is also an effective means of engaging communities in conservation work. Member groups gave the caveat that such work needs to be funded over an extended period to be of value. Short term funding of citizen science projects does not provide useful data and can detract from the conservation work that is their focus.

After the bushfires

Decisions made about the SOS Program's future must take account of the changed context in which we work. The landscape has changed significantly since this time last year, deeply impacted by fire. Milestones and goals set in program agreements have become irrelevant as project groups have been delayed or working in crisis mode.

Yet, opportunities are presented by bushfire recovery grants for working together on common goals. Grants for projects to undertake locally relevant work could improve outcomes. Our members also report that now is an opportune time for weed and pest animal control.

Landscape management versus single species management

Many SOS Projects focus on conservation of a single species. Although this approach can be helpful for clearly setting out objectives, it has resulted in significant overlaps between projects and at times inefficient use of funds. It is often the case that several threatened species exist within a single habitat area. Member groups report that managing whole areas is more effective. Landscape management allows focus on rectifying processes that are detrimental to the habitat, and all the species within.

Member groups also suggest funding be made available through the SOS Program to bush care groups so that threatening processes on priority management sites can be effectively managed.



Case example: Clarence Environment Centre

A property of threatened dry rainforest habitat and over 40 known threatened species on the NSW North Coast receives SOS Program funding. There are multiple conservation programs running on the property. Often programs are coordinated by different organisations or managers working out of different regional offices.

There is duplication of work. Clarence Environment Centre was asked to complete a bushfire recovery plan for the property as part of their management of a particular species. They discovered by chance that a plan for the property had already been completed by another group based on their work on a different species.

The different projects impact each other. For example, plans to spray an area of introduced grass on this property as a weed control measure were scuttled upon realisation that spraying would impact the habitat of a population of threatened giant dragonflies.

SOS must be better integrated and influential to other processes

The planning development and approval process

Integration of the SOS Program into decision making regarding development on, adjacent to, or surrounding SOS identified habitats would improve the effectiveness of the Program. We heard about devastating impacts of developments on threatened species. Habitat loss, noise pollution, vibrations and air pollution have significant negative effects.

“A lack of accurate mapping is contributing to ongoing loss of Blue Gum High Forest even within the Priority Management Sites. Councils do not have experts in threatened ecological communities that can identify these species. Council just allowed removal of numerous trees within the IBM site citing they were ‘dangerous’”.

“Mirvac has refused to fence off areas of the SOS Priority Management Site of the Critically Endangered Ecological Communities of Blue Gum High Forest and Sydney Turpentine Ironbark Forest, which contain powerful owl nesting hollows, prior to construction starting on their staged residential development. Yet the SOS Strategy recommends ‘improve demarcation and fencing of bushland areas’”.



Case example - Association for Berowra Creek

A site of Sydney Blue Gum High Forest in West Pennant Hills is listed as a priority management site by the SOS Program. A lodgement for protection of the site was ignored when the project was fast-tracked for approval as part of the Planning System Acceleration Program. The subsequently approved Development Application will partially destroy this priority habitat to make way for the construction of a road. Despite the ecological significance and uniqueness of this Blue Gum High Forest habitat, its destruction was not prevented by its identification in the SOS Program.

Up to date information for hazard reduction

Councils should have input into hazard reduction certificates, identifying areas of ecological importance. Member groups reported that liaison often doesn't occur or if it does, a lack of resources or out of date data gets in the way of ensuring SOS species are protected.

"There have been numerous hurried attendances by Birdlife Australia staff, when citizen scientists have called them saying that hazard reduction burns are being carried out in areas of known powerful owl or glossy black cockatoo habitat. Councils must be more proactive in their interactions with their local RFS and Council bushfire committees."

Recommendations

- Commit to long term and growing funding for the SOS Program beyond 2021. A range of projects, including citizen science and projects that respond to locally identified needs should be included in the program
- Add clauses to the Biodiversity Conservation Act (2016), or draft a new Regulation, that provides additional effect and enforceability to the objectives of the SOS Program
- Work with the Department of Planning, Industry and Environment to integrate the SOS Program into development application processes
- Proactively communicate the location of SOS program managed threatened species and ecological communities to all landowners; private and public owners including councils.
- Decentralise decision making where possible to regional offices
- Reconsider co-funding arrangements for small not-for-profit organisations
- Reconsider the implications of single-species management



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Your key contact point for further questions and correspondence is Jacquelyn Johnson available via jjohnson@nature.org.au and 02 9516 4888. We welcome further conversation on this matter.

Yours sincerely,

Chris Gambian
Chief Executive



Nature Conservation Council

The voice for nature in NSW

22 February 2021

The Hon. Matt Kean MP
Minister for Energy and Environment
GPO Box 5341
SYDNEY NSW 2001

Email: office@kean.minister.nsw.gov.au

Dear Minister,

Areas of outstanding biodiversity values (AOBVs)

I am writing regarding the implementation of 'areas of the outstanding biodiversity value' (AOBVs) under the *Biodiversity Conservation Act 2016* (BC Act).

AOBV declaration under the BC Act provides an important legal mechanism to recognise areas with irreplaceable biodiversity values of state, national or global importance. However, since the BC Act came into effect in 2017, no new AOBVs have been declared or registered.

At the NCC Annual Conference in 2020, Member Groups approved a motion expressing concern that there is no process established for community members, or other stakeholders, to nominate AOBVs. The AOBV mechanism is not being implemented effectively, with significant unexplained delays in implementing the AOBV framework.

These shortcomings are demonstrated by the Mt Canobolis State Conservation Area (SCA) nomination, submitted to the Office of Environment and Heritage by Richard Medd and Colin Bower in July 2018. The nomination is yet to be determined. With a 60 km mountain bike track now proposed for the Mt Canobolis SCA, the additional protection an AOBV listing could provide is needed urgently.

The NSW Nature Conservation Council Annual conference calls on the NSW government to:

1) Establish a clear and transparent process for how areas can be nominated for AOBV status

There is no process in place guiding the community on how to nominate an AOBV, and no new AOBVs have been declared since the BC Act came into effect in 2017. This unacceptable delay must be explained.



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A clear and transparent process for individuals, community groups and other stakeholders to nominate AOBVs must be implemented as a priority. This process should include nomination guidelines and a nomination form explaining the AOBV process and how community and third parties can make nominations. We recommend a similar approach to the nomination process for threatened species.

2) Finalise the declaration of the Mount Canobolas State Conservation Area as an AOBV.

Despite the lack of clarity around AOBV nomination, there has been at least one known submission to DPIE nominating an area for AOBV status - the submission by Richard Medd and Colin Bower in July 2018 for the Mount Canobolas State Conservation Area (SCA), just south of Orange.

The comprehensive submission demonstrated the Mount Canobolis SCA addressed the AOBV criteria specified in Section 3.2 of the BC Act. The area is of state, national and global significance due to the high level of endemism, regionally important species, the large number of threatened species and ecological communities. The site makes a significant contribution to the persistence of biological distinctiveness; ecological processes and integrity; and has outstanding ecological value for education and scientific research. However, two years after being submitted, this nomination has not progressed and no additional protections are in place for this unique ecosystem.

This delay is particularly significant because the Mount Canobolis SCA is currently under threat from a proposal for 60 km of mountain bike track and associated infrastructure. As the park is only 1672 ha, this development would have severe impacts on biodiversity values. It would be much more appropriate for the mountain bike track to be located in the adjacent state forest. AOBV declaration could help prevent this damaging project.

3) Strengthen the protection provided by an AOBV listing

A number of legal restrictions and requirements have been put in place to protect the outstanding values of AOBVs. For example:

- AOBVs or land recommended for listing as an AOBV is to be identified as category 2 sensitive regulated land under the *Local Land Services Act 2013*, and code-based clearing cannot be undertaken in these areas.
- AOBVs are identified on the Biodiversity Values Map, which triggers the Biodiversity Offset Scheme.
- Under section 2.3 of the Biodiversity Conservation Act it is an offence to damage a declared areas of outstanding biodiversity value.

However, these areas are not entirely off limits to clearing and development and approval can still be given to clear and develop AOBVs. The legal protections for AOBVs should be strengthened to further restrict or prohibit clearing or development that would impact on an AOBV.



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Additionally, the BC Act and the *Local Land Services Act 2013 (LLS Act)* impose various obligations on decision-makers in relation to impacts on biodiversity values that are at risk of a serious and irreversible impact (NSW DPIE, 2019). The department has created guidelines for assessing whether these values are at risk - *Guidance to assist a decisionmaker to determine a serious and irreversible impacts*. To strengthen protection, AOBVs should be included as an 'entity at risk of serious and Irreversible impacts' in clause 2.3 of these guidelines.

We look forward to your prompt reply on these important matters.

Yours sincerely,

Don White

Executive Chair

Nature Conservation Council of NSW



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Department of Planning, Industry and Environment
C/o Michelle Chung
Director Biodiversity Offsets Scheme
Environment, Energy and Science Group

Via email: biodiversity@environment.nsw.gov.au

19 April 2021

To whom it may concern,

Submission on proposed changes to the Biodiversity Offset Scheme

The Nature Conservation Council of NSW (NCC) is the state's peak environment organisation, representing over 160 environment groups across the state. Together we are dedicated to protecting and conserving the wildlife, landscapes and natural resources of NSW.

We welcome the opportunity to comment on the proposed new approach to developer charges under the Biodiversity Offset Scheme (BOS).

NCC opposes the use of biodiversity offsetting where it facilitates a net loss of habitat and biodiversity. Where offsetting is unavoidable, schemes must adhere to best practice, as outlined in our 2016 report, *Paradise Lost: The widening and weakening of NSW biodiversity offsets scheme, 2005-2016*. In general, biodiversity offsetting has facilitated habitat destruction and net biodiversity loss in NSW. Since the introduction of biodiversity offsetting schemes to NSW in 2005, proceeding iterations have become weaker and strayed further from best practice.

The current BOS scheme is the worst so far.¹ At the time when the draft BOS was exhibited for public comment, we highlighted its many flaws. In particular, allowing payment in lieu of offsets is a significant threat to vulnerable species.

The reforms now on exhibition are a welcome acknowledgement that the current approach to determining payment in lieu of offsets is inadequate. The policy paper *Strengthening the Biodiversity Offsets Scheme – A new approach to developer charges* and supporting *Biodiversity Offset Payment Calculator Technical Review* by EY Port Jackson Partners (PJP) Strategic Advisory, recognises that developer payments to the Biodiversity Conservation Trust (BCT) may not cover the cost of offset obligations. In such cases, the BCT may need to apply variation rules, allowing use of offsets that are not like-for-like.

The PJP review attributes the considerable uncertainty around offset obligation pricing to the fact that most offset types (ecosystem or species) have never been traded. Out of 1,342 potential credit types, only 80 have been traded. This means there is limited information on the feasibility of



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securing the vast majority of offset types. This uncertainty underscores the profound risks to species and ecosystems of allowing payment in lieu of like-for-like offsets.

The payment in lieu of offsets feature of the BOS enables the destruction of our natural heritage with no guarantee that like-for-like offsets can ever be found. This situation is untenable and is contributing to the unsustainable trajectory of decline of Australia's natural environment.ⁱⁱ

In the context of this consultation, we reiterate our opposition to the use of payments in lieu of offsets. Our firm view is that like-for-like offsets must be secured before a development commences.

Within the scope of the current consultation, NCC:

- supports a more accurate methodology for costing like-for-like offset provisions
- supports increasing the role of the BCT as an independent administrator
- supports the preparation of State of the Market reports
- does not support any increase in the time allowed for offsets to be secured
- holds concerns about hiding the Biodiversity Offsets Payment Calculator from public view.

More detailed feedback on these points is provided in Attachment 1.

Under the proposed changes, offset payment quotes provided by the BCT will still rely on data and assessments by private accredited assessors, paid for by proponents. This is a fundamental problem with the scheme because there is a direct financial incentive for accredited assessors to minimise biodiversity values on development sites. This conflict must be addressed if the public is to have confidence in the Biodiversity Offset Scheme. Ecologists should be employed by the BCT to undertake biodiversity assessments for both development and offset sites. Developers should pay the BCT for this service.

The stated aim of the proposed reform is to 'provide greater confidence and stability in the setting of offset credit prices.' Yet, the material on exhibition does not explicitly address the biodiversity impacts or benefits of the changes. It is incumbent on the Department of Planning, Industry and Environment to translate and explain what this reform will mean for ecosystems and threatened species in NSW.

There is a clear need for an objective appraisal of the net ecological impacts of biodiversity offsetting in NSW. The BOS should be included in the three-year review, currently underway, of the 2016 land management and biodiversity conservation reforms.

Biodiversity offsetting should only be available as a last resort, after all efforts to avoid or minimise impacts have been made. If biodiversity offsets are to be used, widely recognised principles of best practice offsetting should be the foundation of the scheme. These include:

- requiring clear environmental outcomes for all biodiversity values
- requiring strict like-for-like offsetting
- ruling out destruction of high-conservation value habitats
- excluding supplementary measures, mine rehabilitation and payments in lieu of offsets.



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Serious questions about the integrity of biodiversity offsetting in NSW are now being raised in the public domain. After recent revelations in the Guardian,ⁱⁱⁱ NCC has publicly called on the government to refer the sale of biodiversity offset credits in relation to major roadworks in Western Sydney to ICAC, and conduct a comprehensive review of the state's biodiversity offsets regime.

We will continue to call for the government to fix structural flaws in the BOS and ensure biodiversity offsetting is administrated only as a last resort, with integrity and consistent with community expectations.

Thank you for the opportunity to participate in the consultation.

Your key contact point for further questions and correspondence is Ishbel Cullen, Policy and Outreach Coordinator, available via icullen@nature.org.au and 0406 940 914. We welcome further conversation on this matter.

Yours sincerely,

Chris Gambian
Chief Executive
Nature Conservation Council



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Attachment 1: NCC detailed feedback on proposed changes to the BOS

- **We support a more accurate methodology for costing like-for-like offset provision**
 - We welcome any reform that reduces the risk of offset obligations not being able to be met with like-for-like credits.
 - True costs should be recognised and feasibility of finding offsets realistically assessed through market sounding.
 - This should involve independent assessment by the BCT, tailored to the unique context of the development.
 - The BCT should quote for providing like-for-like offsets. Circumstances allowing the BCT to quote offsets that are not like-for-like must be made clear. This information should be made available to all stakeholders, up front.
- **We support increasing the role of the BCT as an independent administrator**
 - The offset quoting function should sit with the agency with the most expertise and independence.
 - To promote confidence in the BCT, all decision making and assessment processes should be:
 - transparent to all stakeholders
 - firmly based in the best available evidence and science
 - unambiguously independent from political or inter-agency influence
 - properly resourced with the right quantity and quality of staff.
 - There should not be avenues for developers to challenge quotes provided by the BCT. In taking on an increased role, and being the source of quoting costs for developers, we would be concerned if there were any avenues for developers to challenge the BCT.
 - Ecologists should be employed by the BCT to undertake biodiversity assessments for both development and offset sites. Developers should then pay the BCT for this service.
- **We support the preparation of ‘State of the Market’ reports**
 - These reports should be regular and comprehensive.
 - While we understand market terminology is widely used in relation to the BOS, these reports should also clearly communicate the real-world biodiversity losses and gains resulting from offset trading with meaningful ecological detail and in language which is comprehensible to a lay audience.
 - Reports should cover how the different features of the BOS, including the BCT payment option and use of variation rules are being used.
- **We don’t support any increase in the time lag, allowing a longer time for offsets to be secured**
 - The time lag between destroying ecosystems and providing offsets is central to our opposition to payment in lieu of offsets.
 - We strongly oppose increasing the timeframe for securing offsets from two years to five years.
- **We have concerns about hiding the Biodiversity Offsets Payment Calculator from public view**



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- As a matter of principle, we encourage transparency in the prices paid by individual developers to the government for biodiversity offsets. This information should be available for public scrutiny.
- We would be particularly concerned if the BCT was quoting for non-like-for-like offsets, behind closed doors, with the public not knowing until 5 years after the fact.

ⁱ Nature Conservation Council of NSW (2016) *Paradise Lost - The weakening and widening of NSW biodiversity offsetting schemes, 2005-2016*. Available at:

https://www.nature.org.au/media/265228/bio-offsetting-report_v14.pdf

ⁱⁱ Samuels, G. 2020 Final Report of the Independent Review of the EPBC Act, Commonwealth of Australia, Canberra

ⁱⁱⁱ Cox, L (16th April 2021), The Guardian, '*Enormous sum of money*': \$40m windfall from NSW environmental offsets sparks calls for inquiry. Available at:

<https://www.theguardian.com/environment/2021/apr/16/enormous-sum-of-money-40m-windfall-from-nsw-environmental-offsets-sparks-calls-for-inquiry>

Submission - Parliamentary Inquiry on the Integrity of the NSW Biodiversity Offset Scheme.



Nature Conservation Council

The voice for nature in New South Wales



11 September 2021

Email: portfoliocommittee7@parliament.nsw.gov.au

Dear Portfolio Committee 7,

Inquiry on the Integrity of the NSW Biodiversity Offset Scheme

The Nature Conservation Council of New South Wales (NCC) is the state's peak environment organisation. We represent over 170 environment groups across NSW. Together we are dedicated to protecting and conserving the wildlife, landscapes, and natural resources of NSW.

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 we leave future generations.**

The focus of this parliamentary inquiry is the *integrity* of the NSW Biodiversity Offset Scheme. NCC is calling for integrity in scheme design, integrity in scheme implementation and integrity in the scheme's ecological outcomes. These are separate, but related, considerations and all require further scrutiny. This submission expands on these three themes.

NCC is opposed to biodiversity offsetting. Where it does occur, 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.

If biodiversity offsetting is used, the scheme design must be best practice, transparent and include regular comprehensive evaluations of implementation, ecological outcomes and cumulative impacts.

Until integrity across design, implementation and outcomes is achieved, the BOS will struggle to achieve and maintain credibility and social license.

The current Land Management and Biodiversity Conservation Framework is not adequately protecting biodiversity in NSW and must be fixed. This includes the Biodiversity Offset Scheme.



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Thank you for the opportunity to contribute to this important inquiry.

Yours sincerely,

Chris Gambian
Chief Executive

Inquiry on the Integrity of the NSW Biodiversity Offset Scheme

Recommendations

That the NSW Government:

- 1) Commission an independent comprehensive review of the Land Management and Biodiversity Conservation Framework, including the BOS.
- 2) Strengthen BOS design so that it is consistent with best practice biodiversity offsetting principles: tighten like-for-like offsetting requirements and variation rules; set strict parameters about use of the payment option; remove the option to discount offsets based on non-ecological considerations; empower the BCT to refuse to accept an offset liability if they don't think they will be able to fulfill it with a like-for-like offset.
- 3) Strengthen the Land Management and Biodiversity Conservation Framework so that less clearing is permitted without approval or offsets:
 - a. Update the Land Management (Native Vegetation) Code to tighten Parts 2 and 3 and remove Parts 5 and 6.
 - b. Expand Category 2- Sensitive regulated land to include a broader range of sensitive and high conservation value areas including all vulnerable and endangered ecological communities.
 - c. Release the comprehensive Native Vegetation Map with all categories and all listed Critically Endangered Ecological Communities.
 - d. Establish guidelines and process for nominating Areas of Outstanding Biodiversity Value (AOBV).
- 4) Reduce the BOS area thresholds, so that more clearing is captured by the BOS.
- 5) Improve the application of the Biodiversity Values Map so that it captures more values and is accurate and up to date.
- 6) Make *Serious and Irreversible Impacts* an objective test, with supporting thresholds and criteria.
- 7) Require that Major Projects be refused where *Serious and Irreversible Impacts* will occur.
- 8) Increase the thresholds for identifying *Serious and Irreversible Impacts*, so that this mechanism provides absolute protections for threatened species and ecological communities.



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- 9) Where discretionary Ministerial discounting of offset obligations for Major Projects occurs, require that this is reported to the Parliament.
- 10) Review the Biodiversity Assessment Method to ensure it is consistent with best available science and evidence, including averted loss assumptions and tree hollow provisions.
- 11) Improve the clarity and scope of the BOS public register so that it includes location, total area, ecosystem and species credits of the clearing and the offset sites, as well as development application or Native Vegetation Panel reference numbers and total price paid.
- 12) Create an online map function which shows geographic location, and key details, of offset sites across the state.
- 13) List all offset obligations being created under the LLS Act, Environmental Planning and Assessment Act, the BC Act and the Vegetation SEPP in one central location, including fulfillment status information.
- 14) Publish a regular snapshot with state-wide information about activity under the BOS.
- 15) Implement proposed changes to improve the rigour of the developer charge model and biodiversity offset payment calculator under the payment-in-lieu of offsets option.
- 16) Release the 1400 submissions and a submission report from the developer charge model consultation conducted earlier this year.
- 17) Investigate alternative models for allocating accredited assessors to projects where developers do not choose their ecological consultants.
- 18) Publicly release the results from the accredited assessor audit currently being completed.
- 19) Conduct a comprehensive review of offset effectiveness under legacy programs over the last 20 years.
- 20) Conduct regular monitoring, evaluation and reporting on ecological outcomes at BOS offset sites over the long term.
- 21) Increase the capacity of the BCT so it is fit for purpose and can consistently and effectively fulfill its role in the BOS.
- 22) Increase the transparency of the BCT by requiring an independent Annual Audit, in addition to an Annual Report.
- 23) Establish 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.

Biodiversity in NSW is in steady decline.

Clearing of native vegetation and habitat modification are the greatest threats to species and ecosystems in our state. Over the last 200 years, NSW has lost almost half of its bushland through land clearing and only 9% of what is left is in good condition.ⁱ

The public conservation estate only covers 9% of NSW and does not constitute the comprehensive, adequate, and representative protection needed to ensure the long-term survival of species and ecosystems. This means efforts to protect vegetation outside the conservation estate are crucial.

Despite this, in 2016 the NSW Government introduced reforms that dramatically deregulated native vegetation management across the state.

The new Land Management and Biodiversity Conservation (LMBC) Framework was established in 2016 through the Biodiversity Conservation (BC) Act, the Vegetation SEPP and amendments to the Local Land Services (LLS) Act.

Since these excessively permissive laws were introduced, rates of annual vegetation clearing have approximately doubled in NSW.ⁱⁱ

The Biodiversity Offset Scheme (BOS) is a key component of the LMBC Framework and should be understood in this context. The BOS sits within the Framework as an enabling mechanism for habitat destruction. For those areas where important native vegetation is afforded some protection, the BOS provides a pathway to clearing, even for the most threatened species and ecological communities. Almost nothing is safe.

There is not enough public information about the operation of the BOS.

Reviews in 2019 by the Audit Officeⁱⁱⁱ and the Natural Resources Commission^{iv} confirmed that the new LMBC Framework is failing at its regulatory purpose of protecting native vegetation. These reviews focused on clearing on rural land and did not cover the BOS.

The three-year review of the LMBC Framework, promised by the Minister for Environment when introducing the legislation,^v is overdue and has not been published. The statutory five-year review is due next year, but the scope and timeframes are not known.

Given this context, we are particularly grateful to the Committee for working to shine a light on this important issue. We are also pleased the Audit Office has begun an investigation into the BOS.

The BOS has fundamental weaknesses in its design, which means it does not meet best practice standards.

A significant body of academic literature and policy guidance exists which establishes principles for best practice biodiversity offsetting. These include ensuring offsets are only used as a last resort; not permitted for use in areas with high conservation value, which must be 'no go zones'; like-for-like; genuinely additional; required to achieve no net loss to biodiversity and are direct land-based offsets, not payment or indirect conservation measures.

The design of the current BOS does not meet the best practice principles for offsetting. NSW has seen several iterations of biodiversity offset schemes over the last 20 years. In its design, the BOS is the weakest and most flexible scheme so far. The flaws and loopholes in the BOS were well documented at the time of the reforms. This includes in the 2016 NCC report *Paradise Lost – The weakening and widening of NSW biodiversity offsetting schemes, 2005-2016*. This report remains very relevant, and we encourage the Committee to draw upon it.^{vi}

The key weaknesses in the design of the BOS include that:

- provisions for 'no go zones' to protect high conservation value are very limited
- variation rules allow for offsets that are not like-for-like
- payments to the Biodiversity Conservation Trust (BCT) are allowable instead of securing offsets
- indirect conservation measures can be used instead of securing offsets
- mine site rehabilitation is an acceptable offset credit
- offset obligations for Major Projects can be discounted under Ministerial discretion.

Too much vegetation clearing is not captured by the BOS.

The self-assessed Land Management (Native Vegetation) Code under the LLS Act allows extensive unregulated clearing that does not generate an offset obligation under the BOS.

The Native Vegetation Panel, which determines approvals for higher impact clearing, including attaching offset obligations under the BOS, has only processed one application for rural clearing, in February 2021.^{vii} For all other rural clearing under the LLS Act over the last four years – double the pre-reform average - none have required offsets under the BOS.

Other clearing is not captured in by the BOS because it is below the BOS area threshold, or the area does not appear on the Biodiversity Values Map. The appropriateness of the area thresholds and the accuracy and completeness of the Biodiversity Values Map require further interrogation.

For clearing that is captured in the BOS, accessible avenues exist to avoid best practice offsetting requirements.

Proponents may pay money instead of finding offsets or apply variation rules where offsets delivered are not for the same species or ecological community being impacted. Major Projects can have offset requirements discounted based on social and economic considerations at the will of the Minister.

The one ‘no go zone’ provision in the BOS - the *Serious and Irreversible Impacts* test – can be interpreted subjectively by consent authorities and blatantly 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 is certainly not a tool to protect and support nature to thrive and maintain resilience. The BOS needs more boundaries around where offsetting can and cannot be applied.

Underpinning the BOS is the Biodiversity Assessment Method (BAM), which accredited assessors use to determine biodiversity values, development impact, offset requirements, and credits generated from offset sites. In the depths of this technical document, supporting appendices and formula, are the details about what ecological factors are counted, how they are counted, how they are weighted and the calculations that decide the quantities of offsets required to compensate impacts.

These methodological details and assumptions have big ramifications for ecological outcomes and must be carefully tuned based on the best available science. The rigour of the current BAM settings requires comprehensive review. For example, the current assessment only records if trees have hollows, rather than the actual number, size and functionality of hollows present. An old growth tree with several large and small occupied hollows could be offset by a credit generated from a tree with one small hollow which may not be occupied.

The BAM also embeds problematic assumptions about future loss. The assessment of gain at an offset site incorporates a measure of ‘averted loss’. This assumes future clearing with no protection at an offset site. A 2016 expert review of the draft BAM highlighted that the measures of averted loss were unreasonably high, assuming that tree cover would be completely lost in 2-7 years in high-risk areas and within 4-16 years in low-risk areas.^{viii} Research shows rates of assumed averted loss have been consistently overestimated in offsetting schemes across Australian jurisdictions.^{ix} This key pitfall of offset policy design discredits any claim to no net loss.

The design of the BOS lacks integrity in setting the foundations for delivering a scheme that protects biodiversity values.

Four years into implementation, serious questions exist about how the BOS is operating in practice.

The system as it stands is not transparent and as such does not enjoy public confidence.

Recent media investigations demonstrate that the implementation of offset policies and the delivery of offsets varies case-to-case but is often woefully inadequate. Highly dubious offsetting arrangements are coming to light. These have included massive delays in delivering offsets,^x conflicts of interests among scheme actors^{xi} and serious concerns about additionality^{xii}

Some past examples, such as in Western Sydney, Maules Creek and the Hunter Valley, eventuated under the Commonwealth offset policy and/or prior to the implementation of the BOS. However, this legacy is instructive and highlights the need for consistency, transparency, and evaluation in offsetting schemes.

Our current BOS is complex and opaque. The public does not have a clear view of key administrative information about the operation of the scheme. Between different agencies and levels of government, it is unclear if even the NSW Government has a complete picture. The public registers that do exist are not comprehensive and are obscure, and require well-informed interpretation. The clarity and scope of the BOS public registers must be improved. Establishing an offset map function, where all offset sites are displayed geographically, with key details, would be valuable.

Key components of the LMBC Framework, which interact with the BOS, are incomplete or not fully operational. This includes the Native Vegetation Regulatory Map, which still does not display all land categories, and the Areas of Outstanding Biodiversity Values mechanism, which hasn't been formally established. Both features have direct implications for what clearing is and is not captured by the BOS and should be finalised as a priority.

Key questions about the operation of the BOS include:

- How often is the *Serious or Irreversible Impacts* test resulting in impacts being avoided?
- How many offset obligations are being generated across the state?
- What and where are the projects generating offset obligations?
- What type of ecosystem and species credits are being generated across the state?
- What proportion are for Major Projects?
- What proportion are being fulfilled through 1) developer owned offset sites, 2) purchased offset credits 3) the payment option through the BCT?



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- How often and where are the variation rules, indirect measures, ministerial discounting, and mine site rehabilitation offset options being used?
- When is the Independent Planning Commission choosing to override Serious and Irreversible Impact provisions?
- Where is the Biodiversity Certification pathway being used?
- Where are the offset sites being established?
- What proportion are averted loss offsets, restoration offsets or a mix?

A regular snapshot report collating this information will provide accountability public visibility of what is being lost and gained, where, and over what timeframes.

The Biodiversity Offset Payments Calculator (BOPC) is not working effectively.

Proposed reforms to the BOPC, indicate that the current pricing function determining the amount paid to the BCT under the payment-in-lieu of offsets option is not working in its current form. This pricing function is obviously a crucial component of the BOS, with broad effect across the whole market. The 1,400 submissions received on the proposed changes earlier this year, should be made public and a submissions summary released.

So far, the prices paid to transfer offset obligations to the BCT have not always reflected the true costs for delivering like-for-like offsets. In effect this has left the BCT holding obligations it doesn't have the money to fulfil without using variation rules. The 2019-20 BCT Annual Report showed a \$11.5 million gap between the amount they had received from developers and the estimated costs to acquit their outstanding credit obligations.^{xiii}

The overall offset obligation liability sitting with the BCT is growing. There is a concerning trend of the payment option increasingly being used. A recent Question on Notice in the Legislative Council revealed the number of payments into the BCT to transfer offset obligations is increasing - in 2018-19 it was 31, in 2019-20 it was 75, in 2020-2021 it was 104.^{xiv} The BCT currently holds unfulfilled offset obligations for 158 development projects.^{xv}

Clearly, the government needs to improve the accuracy of the methodology used to quote BCT payment option prices. However, as long as the payment-in-lieu of offset option exists, with developers able to pay and proceed before like-for-like offsets have been found, there is a risk that like-for-like offsets will never be found or delivered. As use of the payment option increases, with more and more obligations and payments transferred, the resources of the BCT to fulfill offset obligations may also be stretched. The need for transparency and integrity in how this function is administered by the BCT will also only become more important.

Beyond the high-level systemic information about scheme operation, lies the more difficult questions around integrity of the behaviour of scheme actors: of proponents, developers, accredited assessors, consent authorities, DPIE and the BCT. The flexibility in BOS design leaves room for subjective judgements. The gaps in oversight, in a context with vested and conflicted interests, leaves room for unethical conduct. How individuals and organisations are applying the scheme, and the checks and balances to ensure ethical conduct, requires further scrutiny.

The role of accredited assessors, the ecological consultants who apply the BAM, is a key concern. They provide the data and analysis that determines the amount and type of offset credits required and importantly, identification of *Serious and Irreversible Impacts*. They are employed directly by proponents, with the obvious risk that some consultants will tell proponents what they want to hear. If a developer gets an assessment they don't like, they can shop around, and potentially get a less rigorous and more favourable assessment, from another consultant.

Quality assurance, integrity, transparency, and accountability requirements should be strengthened to ensure low quality work or unethical conduct is not tolerated. Alternative models for engaging accredited assessors should be investigated, such as a pool system, where accredited assessors are randomly allocated to projects by the BCT. The results of the first accredited assessor audit, currently being completed, should be publicly released.

Under the BOS, consent authorities are responsible for deciding whether *Serious and Irreversible Impacts* are likely to occur and therefore cannot be offset. For all development other than Major Projects, where it can be ignored, this is a red flag which stops development. This crucial threshold, of whether the ecological costs of destruction are too high, should be an objective test, not a subjective, contestable, decision by the consent authority. As long as this is the case, the application of the *Serious and Irreversible Impacts* trigger by consent authorities must be questioned.

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

Discussions around biodiversity offsetting too easily become distracted and weighed down in financial market terminology and administrative issues - 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 integrity 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 future gain that does not materialise, or the incorrect assumption of averting future loss— a counterfactual that can never be proven definitively. In each case, the outcome is simple: net loss in biodiversity.



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Across the world, biodiversity offsetting is widely applied but its effectiveness is rarely assessed after implementation. Studies that are available show that offsets often fail. A comprehensive 2016 study of the outcomes from all offset projects approved in Western Australia from 2004-2015 showed that only 39% could be considered effective.^{xvi}

Some natural assets, such as tree hollows in mature trees, are especially important habitat for a wide range of species and are particularly difficult to offset. A 2017 study titled 'The anatomy of a failed offset' monitored offset sites established for the Hume Highway and showed nest boxes installed to offset loss of hollow bearing trees were hardly used by the target threatened species.^{xvii}

An important 2017 desktop study evaluated outcomes from biodiversity offsetting in NSW between 2005-2015 using data collected by NSW Office of Environment and Heritage. It found that 82% of offsets were justified through 'averted loss', where no net loss in vegetation area would only be achieved on the assumption that the offset site would have been cleared otherwise. The underlying rate of clearing was overestimated to the extent that no net loss in area of vegetation will not occur for 146 years into the future.^{xviii} The study also found that a notional net gain in the quality of habitat was achieved, but only by substituting attributes difficult to restore (mature hollow-bearing trees) with attributes that are easy to restore (e.g.: tree saplings).

There is not enough visibility of the ecological outcomes of biodiversity offsetting policies in NSW. A comprehensive independent retrospective review of offsets sites and outcomes over the 20 years that offsetting policies have been in place is needed. Oversight and management of legacy offsets under old schemes must not be neglected.

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

We are reaching ecological tipping points and must change course.

Last year, NSW's first Biodiversity Outlook Report found that without effective management, 50% of threatened species and 41% of all threatened ecological communities will be extinct in NSW by 2100.^{xix} Species like the iconic koala are headed for extinction by 2050. Ecosystems in several bioregions are close to ecological tipping points, where ecological diversity and carrying capacity crosses a threshold and decreases rapidly.^{xx}



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The current system only stops destruction if it 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, or pursuing Biodiversity Certification, the Minister can legally permit activity likely to cause extinction.

The uncertainty about ecological outcomes under offsetting policies reinforces the importance of avoiding impacts. We must identify what 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.

Where biodiversity offsetting is used, the scheme design must be best practice, transparent and include regular comprehensive evaluations of implementation and ecological outcomes and cumulative impacts. If evidence shows no net loss outcomes are not being achieved, management and scheme design must be adapted accordingly.

A best practice scheme 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 and an incentive for offset creation. Rhetoric suggesting that high prices for offsets is a reason to abandon or further weaken the BOS is very concerning and misguided.

We fully support investment in private land conservation and recognise the importance of ecological management and restoration. The BCT is an important institution and should be supported to build the capacity needed to deliver strategic private land conservation outcomes over the long term. The BCT's oversight and quality control role in the BOS is positive and should be strengthened and made more transparent.



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