

## INQUIRY INTO INTEGRITY OF THE NSW BIODIVERSITY OFFSETS SCHEME

**Organisation:** Ecological Consultants Association of NSW Inc.

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## **ECOLOGICAL CONSULTANTS ASSOCIATION of NSW Inc.**

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26 July 2021

Dear Ms Faehrmann,

### **Re: Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme**

I write to you on behalf of the Ecological Consultants Association of NSW (ECANSW) [www.ecansw.org.au](http://www.ecansw.org.au). We are a membership body that develops and helps to maintain professional standards in the NSW ecological consulting industry through training (workshops, conferences), distribution of relevant information to our members (biannual journal, social media, email newsletters), liaison with Federal and State agencies, university researchers and related industry bodies. We also have strong ties with similar associations in other States. As ecological consultants, our members work daily with various environmental and planning legislation documents, including but not limited to the *Biodiversity Conservation Act 2016* (NSW), *Environmental Protection & Biodiversity Conservation Act 1999* (Cth) and various State Environmental Planning Policies.

Since the inception of the *Biodiversity Conservation Act* (BC Act) in late 2016, there has been much scepticism around the efficacy of the biodiversity protection measures within the Act, particularly in relation to the Biodiversity Offsets Scheme. Whilst in principle we support streamlining of multiple overlapping legislative instruments, it was clear that changes to policies and procedures, brought about by the BC Act, were rushed in without adequate testing. While ecological consultants work to the BC Act on a daily basis and are key stakeholders in the implementation of the Act, only upon request were we given a chance to view the draft legislation. Formal review of the

legislation that would allow meaningful feedback was not an option available to us. Since its inception in 1998, the ECA NSW has pushed to be part of the ongoing review and update of relevant Acts, Biodiversity Offsets Scheme, and other supporting documentation. The ECANSW welcomes the Portfolio Committee No. 7 enquiry into the integrity of the Biodiversity Offsets Scheme. It is our hope that some of the fundamental issues with the Scheme are dealt with to ensure adequate protection of biodiversity in NSW into the future.

There are some mechanisms within the BC Act that permit a “develop now, offset later” approach to offsetting which currently sees the NSW Biodiversity Conservation Trust (BCT) not being able to meet their offset credit retirement needs (only acquit 20% of the obligations they had taken on as of September 2020<sup>i</sup>). Since the inception of the BC Act, rates of land clearing have increased in the State (Natural Recourses Commission 2019<sup>ii</sup>). This scenario was foreseen by our members, in particular because the NSW Government failed to make available the Category 1 and 2 land maps for rural NSW (completed 2 years ago) which are essential for assessing the clearing of land under the BC Act.

Current issues surrounding the ability of the Biodiversity Offsets Scheme to achieve its intended purpose, all point to the need for greater environmental protections. Our position is that there needs to be improvements to environmental assessment legislation in NSW, and as primary stakeholders in implementing the legislation, ECANSW feel that our members have important knowledge and experience that can be used to improve the offsets schemes ability to protect biodiversity.

Following are the key issues that ECANSW has observed with the Biodiversity Offsets Scheme as it currently stands:

(a) allowing developers to pass their offsetting obligations to the BCT allows them to get on with removal of native vegetation and biodiversity before it is actually offset and protected. Lacks guaranteed biodiversity protection. The idea of this pathway for acquittal of offset obligation was probably intended for smaller developers where the costs of producing own credits would be prohibitive (i.e. small residential landholders). This pathway should be restricted to these clients, and the use of stewardship site production or market credit purchase enforced for large clients (i.e. major projects, housing estates);

(b) zoning based entry thresholds mean that what is considered significant loss differs by arbitrary land zoning size. This lacks real world relevance, whereby 1.9 ha of clearing on land with a minimum lot size of 1000 ha would not trigger entry into the Biodiversity Offsets Scheme, but clearing of 0.26 ha of native vegetation on land with a minimum lot size of less than 1 ha would trigger the scheme. What is considered “significant loss” should be absolute regardless of zoning;

(c) allowance of EP&A Act Part 5 developments to opt in rather than being forced to consider offsetting of biodiversity loss like Part 4 projects. This means large areas of biodiversity loss are not being adequately accounted for. BOS should apply to Part 5 developments. Scrutiny of clearing of high biodiversity valued vegetation on rural lands should also be increased;

(d) obvious issues with a non-functioning market for credits. This issue has been raised with the department on multiple occasions. Before bringing in the Biodiversity Offsets Scheme, the system should have been trialled by the generation of offset sites and credits, which were then put on the market ready to trade. This would have stimulated an effective free market with credits whose price reflects the cost of offsetting. The attitude of “give it time” and “it will all work out” are not cutting it. It is good to see the Department are now taking this seriously by reviewing the operation of the market and its driving mechanisms. ECANSW would be a valuable stakeholder in this process as redesign of the system begins.

It is also becoming increasingly clear that the cost of developing an offset site is much more involved than was initially thought. For example, the immense number of contingencies that need to be built into 20 year management plans/budgets, and the fact that offset credit prices do not currently exceed alternative land uses in some areas (i.e. the amount of credits one could generate from a block of land in high growth areas like Sydney may not be able to meet the alternative income that could be generated by selling it to a developer). Adequate trialling of the system would have likely discovered that the real cost of generating these offset credits is much larger than the credit prices that were set over the last 5 years. As such, the BCT has likely taken on offset obligations at a price they cannot afford to acquit. Exercising their option of purchasing large tracts of land (taking advantage of economies of scale) and developing their own stewardship credits may be the only viable option for meeting current credit obligations. These land acquisitions should be made strategically in the landscape to rebuild linkage of fragmented landscapes (thus increasing biodiversity value).

Until the market is stimulated to trade effectively, the scheme will fail to achieve intended outcomes. Currently the BCT is likely to be the only buyer as they have taken on most of the last 5 years offset obligations. As they refuse to pay more than fair market price for credits (which they currently have some regulatory power over<sup>iii</sup>), the BCT are keeping market prices from adequately reflecting the total cost of offsetting (land purchase cost + establishment cost + management cost + opportunity cost). These major economic issues need addressing ASAP. The current review of Developer Charges and the BOP-C look to be attempting to address some of this issue;

(e) proposed removal of public viewing of credit prices from the Biodiversity Assessment Method (BAM) calculator mean ecological consultants will not be able to perform cost benefit analyses related to biodiversity loss. Without being able to put a cost on different project designs, ecological consultants cannot “sell” clients on designs that avoid and minimise biodiversity loss, e.g. we need to be able to calculate immediate costs for clearing associated with different asset protection zones (based on differing Bushfire Attack Level ratings). The client can then weigh up the costs of clearing native vegetation against the cost of additional fire protections for their building. The ultimate goal is to find the balance between minimising biodiversity loss and maximising asset protection. Having consultants apply to the BCT for credit prices on a case by case basis will create unacceptable delays in what is already an incredibly complex process, not to mention additional administration cost to the BCT;

(f) there is an underlying issue with offsetting in that it is often carried out on land that would have already been unsuitable for development (thus was already “protected”). Mechanisms within the BC Act for variations to offsetting using offset trading groups, mean the principles of like-for-like offsetting are not being upheld. This is mandated at the Commonwealth level under the Department of Agriculture, Water and the Environment ratification of the NSW Biodiversity Offsets Scheme. This mechanism was likely put in place to allow flexibility in the BCT meeting their offset obligations in a timely fashion. It should be removed for large developers. Without the guarantee of offsetting exactly what is lost, there will be biodiversity loss in NSW. This is most likely going to be an issue in high growth areas where little of the existing vegetation communities remain available for offsetting. In this scenario it would be better to mandate no further loss of these communities rather than offsetting with something considered arbitrarily similar. To date the Department have not made it clear whether there are thresholds in place that prevent development and clearing of rare biodiversity values. This is becoming a clear issue in Sydney’s Cumberland Plain and Hunter regions. ECANSW believe there should be mandated thresholds that state that we will not accept any more loss of Ecosystem or Species Credits to development once thresholds of remaining distribution/population sizes are met. A recent example is the discovery of a Regent Honeyeater population in a proposed dam extension. As it is a critically endangered species with extremely low number of wild individuals known, it would be prudent to not allow any further development on land where this species is in occupation. Thresholds could be based on proportion of original distribution, gross number of hectares left, or number of individuals left. Offsetting does not adequately prevent biodiversity loss for these rarer species and communities. Preservation and expansion is the only option;

(g) focus of the BAM on vegetation metrics is fair as a starting point for assessment. However, the accreditation of BAM assessors, which is based solely on those with botanical skills, does not recognise the specific knowledge and skills required to adequately assess fauna values and impacts. There is no requirement for the vegetation metrics (relevant for fauna habitat assessment) to be collected by accredited assessors, only the vegetation integrity calculations and consideration of threatened species habitat values. Anyone can use the calculator, and fauna ecologists rely on good data from their botanists as much as botanists rely on good fauna information from their zoologists. There needs to be recognition at an accreditation level that both fauna and flora are specialised disciplines, and inputs from both should be required to contribute to the formal assessment process;

(h) focus of BAM re-accreditation on being able to prove producing minimum numbers of assessments have been completed, ignores the fact that the first principle of the scheme is to “avoid and minimise impacts”. This means that consultants who are doing their job well, changing projects to minimise vegetation loss and avoid entry into the BOS are compromising their ability to be re-accredited. Further issues arise with differences between the experience one can get from conducting large numbers of plots on one project, as compared to the decisions that need to be made over multiple smaller projects. Not only that, but the market may not provide enough assessments for all accredited consultants, especially those who operate in smaller geographic areas. These complex

projects can take a long time to complete, so minimum numbers of assessments can discriminate against those with smaller businesses and smaller staffing capacity. Why should someone be denied re-accreditation having completed any BAM assessments, while another person is newly accredited having never conducted any BAM assessment before? Re-accreditation should focus on the quality of work produced by those consultants previously, and consideration of their knowledge of the process;

(i) the idea that 20 years of management is long enough to ensure that an offset is going to meet its required role of providing offsets to impacts to biodiversity as a result of development shows a serious misunderstanding of the time scales required for vegetation and fauna habitat to be restored. Hollows can take hundreds of years to develop, and nest boxes used to “improve/generate” habitat in the 20 year interim have been shown to be largely ineffective (ECANSW Worksop, 2019). With increased extreme weather events predicted, no amount of contingency is going to guarantee offsetting of biodiversity loss 20 years prior. Therein lies the fundamental flaw with offsetting. We remove biodiversity value (species habitat) now, but don’t replace it with biodiversity value for at least another 20 years, other than providing protection for a small amount of biodiversity value that may have already been protected. In the interim period, the species in question may already be pushed beyond the point of recovery;

(j) In order to actually improve biodiversity values in NSW going forward, there need to be more strategic level thinking incorporated into the process. There is currently no mandate to consider if a development is removing an important vegetative link in the landscape (which has additional value that needs preserving), though an attempt has been made by using Native Vegetation Cover (NVC) as a proxy. The current procedure for offset generation also lacks a strategic approach to restoring landscape function. Developers are incentivised to lock up the existing treed areas on or near their proposal. This does not provide any increased value to landscape function. BCT should be looking to strategically acquire land (or have a list of parcels of land they think offsetters should be purchasing) that form linkages between blocks of native vegetation in a fragmented landscape, building resilience into the system going forward;

(k) Five years on, some supporting infrastructure and documentation is still missing. Not only are a large proportion of species survey guidelines still missing (including key species like Koala), but things as simple as keys to identify the plant species present in plots. PlantNet keys are 40 years old, and in some Genera, there are 20 new species that cannot be keyed out. More experienced botanists are aware of this, but how many of the young accredited assessors and botanists are? Samples that currently cannot be keyed out are sent to the NSW Herbarium, but can take up to eight months to be returned. This is unacceptable in terms of assessment timeframes. Resources that underpin the BAM should be made up to date ASAP. PlantNet, a NSW Herbarium resource, needs a significant injection of funds to get the plant keys up to date. This has significant consequences for the work of ecological consultants as they work to ensure adequate biodiversity offsetting of development activities.

(l) There are still some grey areas with regards to definitions under the BC Regulation, leading to open interpretation of where clearing is allowed or not. An example is Clause 7.3(4) which states:

*(4) Despite anything to the contrary in this Part, proposed development (other than subdivision) does not exceed the biodiversity offsets scheme threshold merely because it is to be carried out on a lot included in the Map if the lot was the result of a subdivision carried out before the commencement of the Act and the lot is within land zoned R1 to R4, RU5, B1 to B8 or IN1 to IN3 under an environmental planning instrument.*

There is no timeframe attached to this, meaning subdivisions made prior to any environmental assessment (e.g. 1920's) technically don't trigger the BOS. There are also issues with the consideration of remnants in the Planted Native Vegetation Streamlined Module. Rather than waiting for these legal technicalities to be sorted out in a court of law, they should be tightened up by making clearer definitions in the first instance.

(m) To this day there are still BAM Support enquiries which just get left unanswered. Some of these have direct consequences for calculation of credits. One example is missing linkages in the database behind the BAM-C. There are multiple instances where a PCT is defined as a TEC but cannot be selected as such in the credit calculations. These impact appropriate offsetting of the habitat. Lack of response to such enquiries (from as far back as 2018) means cases just have to be submitted as this would be an unacceptable delay from a clients perspective. Reviews to BAM-C database issues should be picked up and rectified immediately.

Much of the land clearing observed across the state in the last five years falls outside of the Biodiversity Offsets Scheme. This also needs looking at. Some legislative instruments leave the assessment of biodiversity value in the hands of those with no qualification to assess it. Agricultural landowners would not allow someone without knowledge of farming practices to come in and tell them when to harvest or how many stock to sell on any given date. If the State of NSW truly seeks to stem biodiversity loss, we need to leave assessment of impacts on threatened biodiversity to those with knowledge of how these impacts can be avoided or minimised (i.e. appropriately-qualified and experienced ecological consultants). Clearing of native vegetation on rural lands should not be any different to any other land tenure.

The Biodiversity Offsets Scheme is based on systems developed by Victoria and Queensland. Consultants from these States have also reported unprecedented land clearing and weakness in the biodiversity protections offered by their respective State legislations. This has led to a situation where ecological consultants from these States and NSW see the Commonwealth EPBC Act as the last line of defence in protecting Biodiversity, a matter that is frequently raised at stakeholder engagement meetings with DAWE. There are underlying issues with NSW Biodiversity Offsets Scheme which need to be addressed by a working group of stakeholders ASAP to help the scheme achieve intended outcomes.

ECANSW support the administering of the Biodiversity Offsets Scheme by the BCT, but caution that the removal of public credit prices may create doubts as to their integrity (as well as undermining the ability of consultants to demonstrate "avoid and minimise" principles).

The BCT need to get on top of their “five-year net even” policy of ensuring offset obligations they have taken on since the schemes inception five years ago are produced and retired ASAP. Only acquitting 20% of their obligation over a 5 year period is unacceptable, and pushes the offsetting of biodiversity values that have already been approved for removal even further than 20 years into the future. For threatened species that were allowed to be impacted, where is their replacement/protection for the next 25 years? Offsets must be set up and generated before developers are allowed to remove biodiversity values. Some threatened fauna species will move from one area to another and find new homes, but not if there is nowhere to go in the interim. This is creating distrust of the system and the BCT’s ability to achieve intended goals. Lack of a functioning credit market, public credit prices and the increasing costs to assessment and management of offset sites is creating a barrier to entry for private landowners who wish to engage in the scheme.

ECANSW would also like to raise its concerned about the way the NSW Government is handling the ecological assessment relating to the proposed Warragamba Dam wall extension. We note that the accredited assessor who produced the BDAR was asked to change their assessment (unclear whether this was driven by the Government or the Company itself) to downplay the impacts of the project on biodiversity loss relating to a Critically Endangered Species. We applaud the assessor for standing their ground, but it raises questions about how the NSW Government plays by its own rules, and/or the type of companies it is contracting to conduct its ecological assessments. This is an example of the Biodiversity Offsets Scheme being manipulated for financial and political purposes rather than aiming to retain or adequately offset the loss of biodiversity values. The fact there has been no thorough investigation into this is concerning. The consultant in question raised the issue with the department, and a private inquiry was launched, but there has been no public statement released, and the consultant lost their job.

In conclusion the ECANSW have concerns about the Biodiversity Offsets Schemes ability to achieve adequate biodiversity protections and prevent loss of biodiversity. We welcome any involvement in developing improvements to the Scheme in future.

You can contact \_\_\_\_\_ at \_\_\_\_\_ if you wish to discuss this matter further with us.

Thanks for your consideration.

Kind regards,

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<sup>i</sup> BOS webinar “Biodiversity credit open fixed price offer, NSW Biodiversity Conservation Trust (BCT)”, access online 9 December 2020; <https://vimeo.com/showcase/6271450>

<sup>ii</sup> Land management and biodiversity conservation. Final advice on a response to the policy review point July 2019



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2019reforms[https://drive.google.com/file/d/1aYqKtF7A9JrHyrOWCjPF\\_4nZoQPHZkE8/view](https://drive.google.com/file/d/1aYqKtF7A9JrHyrOWCjPF_4nZoQPHZkE8/view)

<sup>iii</sup> BOS Webinar “A new approach to establishing the developer charge for payments into the Biodiversity Conservation Fund” access online 17 June 2021; <https://vimeo.com/showcase/6271450>