

**Submission
No 6**

INQUIRY INTO INTEGRITY OF THE NSW BIODIVERSITY OFFSETS SCHEME

Organisation: Bathurst Regional Council

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Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme

Bathurst Regional Council Response

TERMS OF REFERENCE

1. That Portfolio Committee No. 7 - Environment and Planning inquire into and report on the integrity of the NSW Biodiversity Offsets Scheme, and in particular:

(a) the effectiveness of the scheme to halt or reverse the loss of biodiversity values, including threatened species and threatened habitat in New South Wales, the role of the Biodiversity Conservation Trust in administering the scheme and whether the Trust is subject to adequate transparency and oversight,

Speaking from the perspective of Bathurst Regional Council (Council), the Biodiversity Offset Scheme (BOS) is predominantly applied in the Local Government Area (LGA) to clearing in association with Part 4 Environmental Planning & Assessment Act (1979) development activities.

Council uses the Biodiversity Assessment and Approval Pathways for Local Government when assessing clearing associated with such development. There are three potential significant effects on threatened species, namely, land mapped on the Biodiversity Values Map, exceeding the relevant clearing thresholds or a significant impact identified through a Test of Significance.

Biodiversity Values Map. Most of the Bathurst LGA land identified on the Biodiversity Values Map are waterways, which are also assessed and regulated through existing approval pathways such as the Water Management Act and the Fisheries Management Act. There are two small areas of land that are identified on the map as threatened species habitat and as such the clearing of native vegetation in those areas would trigger the BOS. **The BOS has not been triggered via the Biodiversity Values Map process at this stage due to the very small area of land that has been identified in the Bathurst LGA despite threatened species and their habitat being found in a variety of local locations.** If additional threatened species habitat, such as for the endangered Purple Copper Butterfly, was included then this entry requirement would be more effective in curtailing clearing impacts on threatened species and their habitat.

Exceeding the area threshold. Due to the thresholds being based upon the minimum or actual lot size being relatively low, numerous developments in the Bathurst LGA have triggered the BOS under this process. In this way, the area threshold is an effective method for avoiding the clearing of native vegetation as developers will attempt to modify the location of their development (to an area with less impact) or the type of their development (and associated bushfire asset protection zone). The developments that have triggered entry into the BOS are usually those where the development clearing occurred prior to approval being granted or lodged. In these instances, the Biodiversity Development Assessment is applied retrospectively. Impacts cannot be avoided or reduced as the clearing already occurred. These developments often trigger a substantial credit obligation that can delay or cancel the development. The biodiversity offset credit obligations are also delayed.

Therefore, the area threshold is an effective method for avoiding impacts but only if all developers and property owners are aware of the requirement to gain approval before clearing for a development.

There are however circumstances where people have purchased rural residential allotments of land (in some cases before the introduction of the Scheme) only to find that the Biodiversity Offset Scheme now applies and that the financial impost under the Scheme makes development of the land impossible. In some cases, this has either significantly devalued land or rendered land meant for housing impossible to economically be developed. There are similarly circumstances where projects are either not pursued or are significantly delayed either because of the time taken to investigate or the costs associated with investigations necessary to fulfill the obligations. For example, where the underlying assumption is that a threatened species is present it triggers a credit obligation that must be offset financially unless it can be proven that it does not exist on site. This has the potential to delay and add costs to the development process. Similarly, there are equally many projects that are abandoned before investigations commence as the system is all “too hard”.

Test of Significance. The Test of Significance asks five questions as to whether an activity is likely to place a threatened species at risk of extinction. Unfortunately, this test ignores the fact that extinction results from cumulative impacts to threatened species, their habitats and vegetation communities – the so called ‘Death by a thousand cuts’. Individual developments are always unlikely to trigger the BOS in this way, unless it involves a species or vegetation community that is restricted to a very small area. **Council is not aware that this has been triggered through the current BOS or former Threatened Species Act process and therefore it is not an effective method of preventing biodiversity or threatened species loss.**

Council understands that the Biodiversity Conservation Trust (BCT) administers the scheme. However, most of the interactions that Council has are in relation to developments and not in relation to stewardship sites. Council cannot provide comment on the effectiveness, adequacy, or transparency of the BCT.

(b) the use of offsets by the NSW Government for major projects and strategic approvals,

The impacts of the BOS to major development are similar to that experienced by smaller developments, however the impact is on a far greater scale. The application of the BOS for a major development can and has in one instance in this Council’s region, added an additional major impost in the estimated cost of development of a major project of State Significance. This was initially estimated to be more than \$50M (30% of construction estimate) and subsequently reduced to approximately \$18M (10% of the estimated construction cost of the overall development). Such additional cost imposition may well result in the Benefit Cost Ratio (BCR) to be reduced to below the required level and effectively eliminating the proposal regardless of the positive financial and social advantages of proceeding with the development.

The initial estimate was based upon the original environmental site assessment which needed to assume the presence of all potential threatened species for input into the biodiversity

calculation. This could only be reduced by additional seasonal environmental assessment which then ruled out the presence of a significant number of plant and animal species. This process took over 12 months to conclude, adding cost and time to the project delivery.

(c) the impact of non-additional offsetting practices on biodiversity outcomes, offset prices and the opportunities for private landowners to engage in the scheme, and

Bathurst Regional Council does not believe that non-additional offsetting practices result in beneficial outcomes for biodiversity, as credits are created on land that was already protected and managed for biodiversity i.e., Nature Reserves. The removal of biodiversity offset through this process results in a net loss.

For private landholders to engage in the scheme, they need to enter into a Biodiversity Stewardship Agreement (BSA). Council understands that the ecological assessment to determine the credits available for a nominated site runs into the tens of thousands of dollars. This is considered to be a barrier to private landholders in engaging in the scheme. There is no guarantee that this investment will be returned especially if there is no developer interest in the credits that the BSA may generate. Council understands that there are very few stewardship sites (especially outside Greater Sydney region) listed since the inception of the new scheme. However, it is acknowledged that the scheme is still in its infancy and private landholder and developer interest may continue to grow over time.

(d) any other related matters

Permissible clearing in NSW

Native vegetation can be cleared under several approval pathways including Part 4 and Part 5 of the Environmental Planning & Assessment (EP&A) Act 1979, the Vegetation State Environmental Planning Policy (Vegetation SEPP), the Local Land Services (LLS) Act 2013, and Rural Fire Services (RFS) Act 1997.

The first three pathways (EP&A Act, Vegetation SEPP) follow a proper assessment process based upon acceptable assessment methodologies to avoid the clearing of native vegetation that may have a significant impact upon threatened species. The LLS Act provides a pathway to clear native vegetation which would otherwise trigger the BOS under the other pathways. For instance, the clearing of vegetation to maintain rural infrastructure is permissible under the LLS Act codes of practice, whilst it would require prior ecological assessment to clear if the infrastructure was being built in accordance with a Part 4 EP&A Act approval pathway. Council has been made aware of several occasions where the clearing of large amounts of native vegetation, including threatened ecological communities, threatened species habitat and remnant vegetation, occurred in the LGA. Upon investigation by the Department of Planning, Industry and Investment, Council was advised that the clearing activities complied with the LLS Act code of practice.

It has been reported in the 2019 NSW Statewide Landcover and Tree Study that there has been a significant increase in the clearing of permissible clearing of native vegetation across NSW since the introduction of the Biodiversity reforms.

Council acknowledges that the BOS has achieved some success in avoiding or reducing impact to biodiversity where development activities were involved, however native vegetation clearing is occurring on a much larger scale under the provisions of the LLS Act code of practice.

Vegetation to be cleared for a development such as a new rural dwelling is assessed in accordance with the provisions of the EPA&A, the BOS and is generally reviewed by the Rural Fires Service prior to approval. Approvals in rural settings usually involve the clearing of native vegetation for an Asset Protection Zone which, in conjunction with additional construction requirements, meet a level of compliance for building in bushfire prone area. It should be noted however, that the 10/50 Vegetation Clearing Code of Practice allows landholders in certain locations and situations to clear all trees within 10m and all understorey vegetation within 50m of their home. This allowance is regardless of the assessment taken as part of their development consent and advice provided by the local Rural Fire Service, unless there is a specific protection placed on the vegetation through a condition of consent.

Council has identified that the 10/50 Vegetation Clearing Code of Practice provides a broadscale code over the top of on ground and professional assessment that has occurred as part of a development approval, unless specific protections are put in place.

The ignorance defence

It is noted that Section 2.4 of the Biodiversity Conservation Act 2016 details the offences for damaging the habitat of threatened species or ecological communities. However, the Act (Section 2.4(2)) provides a defence for the person involved in such an activity if the person can establish that they did not know that it was habitat of that kind.

The protections provided to threatened species habitat and ecological communities are overruled by a defence based upon the ignorance of the perpetrator, which is not generally found in common law.

There is sufficient public record, such as the NSW BioNet, for landholders to assess the likely threatened species habitat and ecological communities that may be found on or near their property. **If the LLS Act Code of Practice requires people to first assess the likelihood of such habitat to exist in their area prior to clearing, the amount of important native vegetation being cleared could be reduced. The removal of this defence from the BC Act would also act as an additional deterrent for persons involved in the clearing of native vegetation without approval.**