

**Submission
No 37**

INQUIRY INTO INTEGRITY OF THE NSW BIODIVERSITY OFFSETS SCHEME

Organisation: Wollondilly Shire Council

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Our Reference: CM 1255#1163

Mr Stewart Smith
Director Committees
NSW Parliament
[c/o portfoliocommittee7@parliament.nsw.gov.au](mailto:c/o_portfoliocommittee7@parliament.nsw.gov.au)

31 August 2021

Dear Sir/Madam,

INQUIRY INTO THE INTEGRITY OF THE BIODIVERSITY OFFSET SCHEME – WOLLONDILLY COUNCIL SUBMISSION

Thank you for the opportunity given to Council to participate in and provide comment on the Parliamentary Inquiry into the integrity of the NSW Biodiversity Offset Scheme (BOS).

A submission has been prepared that relates to the Terms of Reference published with the announcement of the inquiry. The submission raises questions over the effectiveness of the intended outcome of the BOS to result in a no-net-loss of biodiversity across the State.

The submission outlines local issues regarding biodiversity offsetting and provides recommendations on how to improve the BOS, with particular relevance to Wollondilly Local Government Area. Also included in the submission, is a table of comments raised in Council's previous submission on the biodiversity legislative reforms in 2014, and an assessment of the current validity of the comments raised those years ago.

If you have any enquiries regarding aspects of Council's submission, please contact Bianca Klein, Council's Environmental Services Team Leader on .

Yours faithfully

Alexandra Stengl
Manager
WASTE AND ENVIRONMENT

Parliamentary Inquiry - Terms of reference

Wollondilly Shire Council (Council) understands that the inquiry will look into the Biodiversity Offset Scheme's administration, transparency and oversight, and will investigate the ability for private landowners to engage in it. The specific Terms of Reference are:

- 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,
- b) the use of offsets by the NSW Government for major projects and strategic approvals,
- 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
- d) any other related matters.

Overview of this submission

This submission is based on the experiences of Council and the local community it represents in regard to the experiences with the Biodiversity Offset Scheme since its introduction to Wollondilly in 2018 following the Transitional Arrangement period. Council lodged a submission on the Terms of Reference for the review of the Legislation, the draft Bill as well as a submission on the draft *Biodiversity Conservation Act* (BC Act).

The table provided in Attachment 1 provides comment on aspects raised in Council's 2014 submission on the draft BC Act and their current validity given the time since the implementation of the BOS. Many of the concerns raised remain valid.

Main Objective of the Biodiversity Offset Scheme

To protect biodiversity and ensure a no-net-loss outcome from development across NSW. Council are supportive of the intent of the Scheme and its biodiversity conservation goals. Council's submission on the biodiversity legislation reform welcomed the intent of the Biodiversity Offset Scheme and its objective of facilitating a no-net-loss of biodiversity outcome. The submission also raised a number of concerns, which align with the Terms of Reference outlined above for the current Parliamentary Inquiry, four years later.

Summary of previous concerns raised in Council's submission (July 2017) on the Biodiversity legislation reforms

- There is not adequate protection of biodiversity at local scale and adequate incorporation of local planning instruments and local data.
- Native vegetation in rural zoned land is vulnerable to incremental and cumulative losses.
- The unequal level of rigour in biodiversity assessment required for Part 4 developments compared with State Significant Infrastructure developments or Part 5 developments, where entering into the BOS is not mandatory.

Comments on comparison to the old Biobanking scheme

- The number of credits generated per hectare on a stewardship/biobanking site decreased under the new scheme, making conservation of biodiversity less feasible compared to the potential monetary gains available from development of the land instead.

- The aim of no-net-loss of biodiversity introduced by the BC Act has been criticised for weakening biodiversity conservation compared to previous framework. For example, allowing offsetting in the form of planting seedlings in place of mature trees (including hollow-bearing trees) does not create immediate equivalent biodiversity ‘offsets’.
- The cost of preparing a Biodiversity Development Assessment Report for small land owners (“mums and dads”) is in many cases, prohibitive. Therefore, the risk to biodiversity as a result of illegal clearing is increased.
- A research study completed by UTS [(Laure-Elise Ruoso & Roel Plant (2021))] identified that private landholders found the information on the Department’s website about the BOS was confusing.
 - Participants in this study also stated that the minimum lot size for Western Sydney is 15-20 hectares for a Stewardship Site to be financially feasible. This leaves small landholders disadvantaged if they want to participate in the BOS for conservation purposes.
- Funding received from Stewardship Sites does not necessarily recoup the opportunity cost of residential development.
- Ability for developers to pay directly into the Biodiversity Conservation Fund is sometimes perceived as an “easy-way-out”. This can be perceived to contradict the principle of the Biodiversity Assessment Method to avoid, minimise and to only consider offsets if the first two outcomes are not able to be achieved for a development.
 - Stakeholders need confidence in the Biodiversity Conservation Trust’s ability to be able to adequately and reasonably offset the appropriate credits through the acquisition of land with appropriate biodiversity values, which is becoming increasingly limited. For example, Cumberland Plain Woodland vegetation.

Points relative to Wollondilly LGA

- Offsets are often not acquired locally, within the LGA. Wollondilly is vulnerable to being subject to a net-loss of biodiversity as a result of the offsetting rules. However, it is noted that Wollondilly still has large areas of remnant bushland (outside of National Park and Catchment lands) that offer attractive stewardship site opportunities for offsetting development occurring elsewhere in Greater Sydney.
- Estimating Total Fund Deposit – landholder concern over whether this amount is underestimated, therefore inflating anticipated profits, as it is extremely difficult to predict future incursions of invasive weeds etc.
- Concern over the scheme with ownership and maintenance in longevity. If the land is truly valued for protection and it holds regional significance the land should be transferred to State ownership / guardianship.
- Councils are being faced as the choice of last resort for assets and liabilities, being the stewards for land of arguable national significance (protected under EPBC Act). This at its core doesn’t seem rational given other land holdings held in trust by the Crown and State.
- The scheme currently appears to benefit that larger land holders (due to cost), and therefore, seems to encourage or benefit higher development on greenfield areas. It almost encourages development within our metropolitan rural areas rather than discourage it.
- Measures for Environment (E2, E3 and E4) Zoned land should stay in the SEPP (Vegetation in non-rural areas) and not be decoupled to the Local Land Service Act. Councils in Western NSW are impacted by this more than Wollondilly LGA.

Biodiversity Values Map

- Council have expressed concern to the Department in relation to inconsistent and inaccurate application of the BV Map to land within the LGA.
 - Land with historical rural use and land consisting of exotic vegetation has been captured within the BV Map in some areas of the LGA. Under previous provisions of the Native Vegetation Act, certain clearing would be permissible for continued use purposes and Routine Agricultural Maintenance Activities on such land.
- Council appreciate the ability for landholders to submit a BV Map review application free of charge to the Department, but are cognisant of the potential delay in development application determination timeframes that this process is leading to. Although Council try to support the community; resources, that are already limited, are drawn on to have in depth conversations and to provide landholders with advice regarding the application of the BV Map to their properties.
- The application of the BV Map to Bushfire Prone Land is sometimes contentious and may lead to the jeopardising of legal Asset Protection Zone activities that have been occurring over a long-term on properties, where the BV Map now applies.
- The cost of preparing a BDAR for impacts to land within the Biodiversity Values Map encourages illegal clearing- the cost of a fine, if action legal action is enforced, is likely to be cheaper than preparing a BDAR and retiring credits.

Recommendations

- Provision of more readily available opportunities for private landholders to have their properties assessed by suitably qualified persons (Greater Sydney Local Land Services or BCT officers) for feasibility purposes, without the need to pay prohibitive consultant fees.
 - Or financial support for a feasibility assessment provided to private landholders, particularly for small landholders.
- Tighten credit trading rules to encourage local offsetting. Variations to like-for-like offsetting should not be permitted, or in the very least discouraged through incentivising local offsetting.
- Lowering financial barriers for small landholders by making administration costs proportional to land size and enabling the collective management of lands to allow economies of scale.
- Governance and legal support for smaller landowners so that trust arrangements can be established across good stands of important vegetation where multi lots may exist, to encourage equitable and easy participation from smaller landholdings.
- Consider tax free thresholds for the stewardship site funds so that there is an incentivised program to encourage participation and not to be wholly added to the taxable income of the landowner
- A more transparent application of biodiversity offsetting following the mitigation hierarchy. i.e offsetting should be the last resort.
- Noting that the NSW Plant Community Type mapping review is underway; a BV Map review based on the updated mapping when published is considered to be of high importance in Wollondilly LGA. Currently, the BV Mapping is at a scale that is too coarse and often includes land that does not constitute high biodiversity.
- Consider implementing native vegetation clearing thresholds to BV Mapped land. The instant BOS trigger for clearing native vegetation within BV mapped land is supported, but in

instances where only one tree or a few shrubs are proposed for removal, this seems unreasonable. Council also allows clearing of trees within 3 metres of a dwelling without additional permit/approvals. In some instances, this provision contradicts the BV Map.

- The cost of this scheme, as well as other 'additional schemes such as affordable housing' all add to the 'total development costs' and there needs to be high level strategic oversight to understand the synergies and impacts upon each other. In this light, there should be acknowledgment and cooperation between Contributions reform and this review.
- Given that Wollondilly in the Sydney Basin holds the significant lion's share of the Cumberland Plain Woodland and land identified for protection, there should be transparency in commensurate funding to secure that land given the significant impacts offset from development within the Sydney basin.
- Any State review into BOS is to align with the Productivity Commissioner's *Review of Infrastructure Contributions in New South Wales – Final Report* which made the following recommendation in regards to biodiversity:
 - Recommendation 5.4: Create a new category of contributions specific to biodiversity
 - i. Create a new contribution category under Part 7 of the EP&A Act for biodiversity offsets.
 - ii. Prepare and implement a biodiversity contribution for areas subject to biodiversity certification.
- Increase education and awareness of the BOS to private landholders for conservation and development purposes.

Attachment 1 - Validity of Council comments in its submission on the draft BC Act and associated documentation

Raised issue in Council's Submission (2014)	Recommendation of Council's submission	Observations from implementation of the Biodiversity Offset Scheme	Current validity
Absence of recognition of planning instruments, policies and associated mapping at the local level to achieve positive outcomes for the protection and regulation of biodiversity within the Wollondilly LGA.	There needs to be requirements for offsetting to occur on a localised context and also refer to local planning instruments and associated mapping.	The Offsetting Scheme where applies has not provide any statutory requirement to offset biodiversity losses locally. Council is seeking to implement a range of measures to achieve this outcome within this significant constraint.	Valid
The Offsetting Policy and incorporation of a number of measures within the <i>Framework for Biodiversity Assessment</i> into this Policy in regard to State Significant Developments circumnavigate local processes.	Applicable sections of the offsetting scheme need amending to reflect Council's basic position that Part 4 and State Significant Developments must be assessed with the same rigour during the finalisation of the biodiversity reform package.	Council has raised questions over the scientific basis of biodiversity offsetting associated with mining applications prepared under the Scheme. The introduction of Guidelines exempting State Significant Development from BDARs is viewed as highlighting a lower level rigour of assessment for such applications.	Valid
There concerns that the introduction of the reform package will hinder Council's efforts to maintain and enhance local biodiversity and retain the overall Rural Living vision for the Wollondilly LGA.	The measures within the package need to be consistent with currently accepted scientific definitions and recognise the natural resilience of grassland in disturbed areas.	The scientific basis of the BAM in allowing for the identification of native grasses on a development site is recognised. However, issues have been experienced with low Vegetation Integrity Scores for grassland areas as a consequence of the comparatively low diversity of species.	Partially valid

Raised issue in Council's Submission (2014)	Recommendation of Council's submission	Observations from implementation of the Biodiversity Offset Scheme	Current validity
	The reform package needs amendment to contain sufficient statutory strong measures which would require proposals to retain areas of identified value and not immediately subject these areas to offsetting measures as currently occurs.	The Biodiversity Offset scheme has been identified as providing a deterrence to small developments but not larger developments. In this respects while providing a scientific based accounting for biodiversity losses, it has been observed to have not been effective in protecting areas of biodiversity value within the Wollondilly LGA.	Valid
There are concerns that the introduction of the reform package will hinder Council's efforts to maintain and enhance local biodiversity and retain the overall Rural Living vision for the Wollondilly LGA.	The proposed thresholds within the offsetting scheme require amendment to encourage the improvement of the liveability of large proposals through the provision of open space areas based on the location of native biodiversity.	The achievement of integrated positive outcomes has not been able to be achieved for developments where the thresholds for the offsetting scheme are activated.	Valid
	The offsetting scheme needs to be amended to detect and protect areas which have biodiversity value to minimise development resulting in incremental impacts at a localised scale.	The Offset Scheme has been observed to permit clearance of high biodiversity value, (such as Critical Endangered Ecological Communities) subject to preparation of BDAR and offsetting (at unknown locations).	Valid
	The finalised koala habitats be protected from development through updated provisions in regard to Serious and Irreversible Harm and/or Areas of Outstanding Value.	This amendment with specific SAIL criteria is viewed as necessary to achieve sufficient protection. The application of the BC Act has presented considerable constraints to local strategies and activities to conserve and enhance koala habitat.	Valid

Raised issue in Council's Submission (2014)	Recommendation of Council's submission	Observations from implementation of the Biodiversity Offset Scheme	Current validity
The offsetting measures in the Biodiversity Offset Scheme are viewed as resulting in a potential net loss of biodiversity on a localised scale.	There is considered difficulty in achieving an on-going demonstration over the on-going achievement of the <i>no net loss of biodiversity within NSW</i> outcome of the <i>Biodiversity Conservation Act 2016</i> at a localised scale smaller than defined Sub Bio Regions (preferably within individual Local Government Areas).	The no net loss outcome in regard to credit retirement requirements and credits generated is supported in principle. However, the implementation of the BOS has been observed to not provide any specific details regarding the achievement of this outcome on a specific biodiversity outcomes on a localised scale smaller than defined Sub Bioregions	Valid
The offsetting measures in the Biodiversity Offset Scheme are viewed as resulting in a potential net loss of biodiversity on a localised scale.	The retention of the Improve or Maintain Outcome of the former <i>Threatened Species Conservation Act 1995</i> is the preferred approach by Staff to achieve positive biodiversity outcomes on a localised scale.	The DPIE Condition Template has been observed to not permit Council to require the adoption of a certain retirement option (such as paying funds or credit retirement).	Valid
	The complex mathematical equations and the retiring of credits across NSW rather than a localised scale is viewed as not being transparent and understandable to the general public.	Community feedback expressing concern over vegetation clearance in accordance with the biodiversity offsetting framework has been received for a number of development sites.	Valid
	The Averted Loss Concept adopted by the BAM is not considered to recognise on-ground works outside of biobanking stewardship agreements which are either voluntary or funded by alternate means such as local government as well as OEH grant funding.	The ecological basis for the concept detailed in the BAM 2020 is supported in principle. However, the BAM has observed shortcomings in protecting areas of bushland in good condition (should be outcome) due to the low level of gain that is able to be obtained from such areas.	Partially valid

Raised issue in Council's Submission (2014)	Recommendation of Council's submission	Observations from implementation of the Biodiversity Offset Scheme	Current validity
	The Biodiversity Offset Scheme needs amendment to permit low level clearance or partial clearance, (such as Asset Protection Zones) for low scale developments such as dwellings to avoid likely significant expense for applicants of such proposals.	A level of inequity has been observed in this context in requiring significant expense for small landholders in preparing a BDAR when biodiversity losses cannot be avoided	Valid
The potential loss of biodiversity conservation tools currently utilised by Council Officers within the TSA and NVA and replacement with conservation tools that facilitate development without sufficiently rigorous assessment.	The linkage with Environment Planning and Assessment Act is supported. However, the Act prevents the application of site specific conservation measures such as a site specific offsetting strategy where the BOS applies to achieve positive biodiversity outcomes on the development site.	Council as a preferred position requires the offsetting of biodiversity losses on the development site. However, Council is not permitted to require this for developments where the Biodiversity Offset Scheme applies.	Partially valid
The benefits of offsetting and the need for a development threshold and scientific basis of the Biodiversity Assessment Methodology is recognised. However, the Offsetting Scheme and associated Methodology is viewed as enabling a net biodiversity loss, particularly on a local scale.	Criteria for Areas of Outstanding Biodiversity Value be amended to include areas of local significance and not be restricted to State and Bio Regional.	There are have been no Areas listed in Wollondilly and this is viewed as being unlikely based on the current criteria.	Valid
	The BAM and associated provisions in the Regulation be amended to require strong statutory measures which require as mandatory the avoidance of areas of recognised high biodiversity significance.	The BAM is recognised as containing avoidance measures. However, the Offsetting Scheme has been observed to permit vegetation clearance across a development site with resulting adverse impacts to local biodiversity.	Valid
The benefits of offsetting and the need for a development threshold and scientific basis of the Biodiversity Assessment Methodology is	The BAM include provisions that require the distribution of funds paid into the Biodiversity Conservation Fund by proponents within a nominated timeframe.	There has been observed to be an absence of transparency in payment of funds to the Trust without any details over location and timing of retirement of credits.	Valid

Raised issue in Council's Submission (2014)	Recommendation of Council's submission	Observations from implementation of the Biodiversity Offset Scheme	Current validity
recognised. However, the Offsetting Scheme and associated Methodology is viewed as enabling a net biodiversity loss, particularly on a local scale.	The variation rules for plants are considered generic and need to be made more stringent to enable biodiversity credits to be retired to ensure direct offsetting of the plant species removed on a development site.	There is uncertainty over the direct offsetting of plants removed under the scheme as a result of a lack of information to Council on such offsetting.	Valid
	The Stream-line assessment module requires amended to only apply to development beneath the Area Threshold and not located on the Biodiversity Values Map as amended to incorporate local data.	While experience has been limited, this Module has been observed to have not adequately identified the full biodiversity values of a development site when applied.	Valid
The Criteria for Serious and Irreversible Impact are considered to be too broad and discretionary to allow for an accurate determination which can be conveyed to proponents.	Precise Serious and Irreversible Impact criteria is considered highly important and needed for Endangered Ecological Communities (EEC) given that any clearance will cause a decline of a community that is currently observed, estimated, inferred or reasonably suspected to be in a rapid rate of decline or have a very limited geographic distribution and therefore require refusal by Council.	An absence of specific transparent ecological based criteria that would enable a consent authority to accurately identify whether a development represents SAll to listed entities has been observed.	Valid
The Criteria for Serious and Irreversible Impact are considered to be too broad and discretionary to allow for an accurate determination which can be conveyed to proponents.	The development of a specific Plain English guideline that would allow for an accurate identification and determination by consent authorities is important that this process is viewed as the only mechanism to refuse or require amendment to certain developments with significant biodiversity impacts under the proposed assessment and approval pathway.	A more applicable guideline than the current DPIE Guidance document has not been prepared since the commencement of the Biodiversity Offset Scheme.	Valid