

INQUIRY INTO INTEGRITY OF THE NSW BIODIVERSITY OFFSETS SCHEME

Organisation: Local Government NSW

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Draft Submission to the Inquiry into the Integrity of the Biodiversity Offsets Scheme

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Opening

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing all NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

LGNSW welcomes the opportunity to provide its views on the NSW Biodiversity Offsets Scheme (the Scheme) and its effectiveness since its introduction. Local Government has an essential role in contributing to the conservation of biological diversity, including through planning and approval processes, community education and engagement activities, and as public land managers. Councils can develop biodiversity strategies and plans, protect biodiversity through their land use planning instruments, and manage biodiversity actively through specific programs and projects.

LGNSW has sought input from councils across NSW and hosted a forum which was attended by staff across more than 40 councils, demonstrating the significant level of interest and concern with the operation of the Scheme. Those views have been incorporated into this submission, and we are also aware several councils are also making their own submission.

Please note this is a draft submission until it is reviewed and endorsed by LGNSW's Board, and any amendments will be forwarded in due course.

Background

The NSW Parliament's Portfolio Committee on Planning & Environment self-referred this **Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme** on 24 June 2021.

The Terms of Reference provide that the Committee 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,
- 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.

The Committee is to report by 1 March 2022.

Response

Local Government supports the conservation of biological diversity and supports the Biodiversity Offset Scheme (the Scheme) in principle, however the Scheme is problematic in practice and requires changes to improve its functioning and outcomes.

Structural problems with the system include differences in rural vs urban application and outcomes, lack of defined thresholds (e.g. for Serious and Irreversible Impacts) and no ability to link offsets to the same region that is experiencing impacts. From an administrative perspective, councils have identified difficulties with the Scheme such as incomplete mapping or guidelines, and poor understanding of the Scheme by proponents and the wider community.

The Scheme is very complex and councils have different levels of experience with it and therefore have different information and support needs. Some councils have felt less supported since the NSW Government funding for Local Government support officers finished in 2020, or they have had difficulties in getting consistent advice on issues from the Department of Planning, Industry and Environment. We encourage the NSW Government to continue engaging closely with local government to use the experience and knowledge that has been built up in councils to improve the Scheme.

Councils have expressed a general concern that biodiversity offsets are not leading to net improvements in biodiversity. Particular concerns are in relation to widespread biodiversity loss in rural areas of NSW where the interaction of the Scheme and other vegetation management frameworks, including through the Local Land Services Act, are inconsistent or unclear. There are also concerns for coastal and other peri-urban councils where the capacity to achieve local offsets is very limited and in some instances appears unachievable.

In addition, the Scheme allows developers to pay into the fund to offset clearing they undertake now, but there is a time lag for credits to be retired and therefore biodiversity gains to be made on stewardship sites. This time lag creates uncertainty (due to limited visible and traceable gains) as to whether the Scheme is improving biodiversity outcomes.

LGNSW's recommendations on improvements to the Scheme are italicised below, and also summarised in the conclusion.

Scheme Effectiveness

Positive aspects

Councils have identified positive aspects of the Scheme, and in particular it provides a defined structure and systematic method for application, offering greater transparency, for example by enabling biodiversity to have a value assigned to it. In particular, the Biodiversity Assessment Methodology (BAM) provides a standardised process, and the consistent methodology in survey guidelines has enabled more species to be identified and better biodiversity outcomes to be identified.

The Scheme is an improvement on the case-by-case decision making on offsets which previously occurred. Some councils have found the Scheme has had some successes in encouraging redesign of developments to avoid biodiversity loss and in deterring poor development. Another positive aspect but one that is not as well recognised is that stewardship sites assist with mitigating carbon emissions, which is an important secondary benefit given NSW's focus on working towards net zero emissions.

Local government supports the retention of the Scheme, but there are several improvements that are required. It would not be a good outcome for the Scheme to be abolished altogether.

Areas for Improvement

While councils appreciate the structure and methodology that the Scheme provides, there are several significant improvements that are needed in the sector's view.

1. *Greater focus on 'avoid and minimise', and additional guidance on interpreting these terms.* Local government advocates for the protection and management of local biodiversity on an 'avoid, minimise, offset' basis. Councils are of the view that proponents are not adequately considering options to avoid and minimise, instead going straight to offset options. In addition, few are attempting to seek credits to retire (particularly in the local area) and instead opting to pay the Biodiversity Conservation Trust (BCT) to achieve the offset.

2. *Greater emphasis on 'like for like' offsets.* More needs to be done to ensure that development results in a net increase in biodiversity within the LGA or region in which the vegetation was removed. Species credit offsets should be like-for-like only and within the same sub-region.
3. *Offsets should be procured locally wherever possible,* to deliver a net biodiversity benefit in the affected LGA. However, many coastal (urbanised) or smaller LGAs do not have the property sizes or availability of properties to enable local offsets, prompting the establishment of stewardship agreements on council reserves and other land with limited development potential.
4. *Greater support to encourage the establishment of stewardship sites is needed,* particularly in coastal areas where much of the development is occurring. Councils have found that the private sector is less likely to set up stewardship sites as it is more lucrative to develop this land, particularly in urban / peri-urban areas. For example, a major infrastructure development proposed in Sydney required 15ha for offsets but property prices in Sydney are such that it is cheaper to pay the offset than buying sites to become stewardship sites.

Establishment of offset sites in regional areas also requires support so as not to stifle important development in smaller regional towns seeking to diversify their economic profile. A 2020 LGNSW conference resolution put forward by Gilgandra Council's calls for designated funding to support councils' offset costs associated with the Scheme that may be prohibitive to new midsize development where it can demonstrate a direct positive impact on population and job growth as well as diversification of regional economies. For example, smaller regional councils seek support to establish stewardships sites on council-owned land so that local credits can be available to offset local development biodiversity credit liabilities.

5. *Amend the framework to prevent incremental clearing.* Some councils have noted that landowners are choosing to clear vegetation prior to development application, and risking going to court or paying a fine as it is cheaper than going through the Scheme/BDAR process. An example is clearing for asset protection zones where only one or two trees are to be removed and preparing a BDAR is expensive.

The Scheme has disadvantaged 'mum and dad' landowners who bought a block of land years or decades ago with the intent to build the family home but are now finding that such development would trigger the Scheme with very expensive implications of site assessment, preparing a BDAR and purchasing offsets, sometimes in the tens and hundreds of thousands of dollars.

6. *Consider an alternative approach for minor developments barely exceeding thresholds to reinvest offsets costs locally.* Some councils suggest it would be useful if they could work with minor developments which only just exceed thresholds so that offset costs are reinvested directly back into biodiversity outcomes on the same site or in the LGA, rather than those funds being paid to the BCT to fund offsets elsewhere.
7. *Provide further guidance around Scheme application with respect to subdivisions.* In some cases councils are finding large subdivision proposals are being divided up so that they do not trigger the Scheme. In addition, some are not considering the likely total clearing of the subdivision, with residual lots that are zoned to support intensified future development often not being included. Proponents argue that the purpose of the subdivision as it applies to the residual lots is simply the creation of residual lots, and not to facilitate future

development. This is being argued even when there is a neighbourhood plan that clearly shows that the residual lots are zoned to support new or intensified urban land use and will be developed.

8. *Improve the nexus with other parts of the land and vegetation management framework.* Councils are observing widespread loss of biodiversity on rural agricultural land. For example, clearing is often occurring through the allowable activities / self-assessment pathway under the *Local Land Services Act 2013* (LLS Act) before development applications are submitted. In coastal areas, escalating land costs and increasing pressure from development has facilitated clearing under the LLS legislation. Once cleared, the land becomes subject to re-zoning which then allows for development. The loss or fragmentation of Threatened Ecological Communities through this avenue has minimal oversight or measurement of the cumulative impacts of this clearing.
9. *Provide a publicly accessible spatial map of offset sites.* The lack of a centralised repository of offset sites makes it difficult for proponents and developers to appreciate the overall picture of offsets in their region, and how proposals for clearing and/or stewardship sites may work together or against one another. The ePlanning portal is currently being enhanced to include various maps and could be used as the repository for this mapping, or the maps could be added to the Sharing and Enabling Environmental Data (SEED) portal.
10. *Offsets should be achieved (or achieved within an established timeframe) before clearing takes place.* The scheme allows developers to pay into the fund to offset clearing they undertake now, but there is a time lag for credits to be retired, and therefore biodiversity gains to be made on stewardship sites. This ultimately creates uncertainty in terms of whether the Scheme is improving biodiversity outcomes.
11. *Ensure vegetation mapping is complete.* Plant Community Type (PCT) mapping is lacking on the North Coast for example, the flow on effect being that assessments and discussions regarding offsets are of limited accuracy.
12. *Offset requirements (and pricing) to be identified earlier in the planning proposal process.* One example is where a developer seeks to rezone an urban property which would result in clearing above the Scheme threshold. As the developer is only required to prepare a BDAR at the DA stage, the developer doesn't know what the offset requirements may be nor the costs and offset implications may be until DA. In addition, proponents currently do not have to choose their offset option at proposal stage, and therefore councils must consider the application with no knowledge of where the offsets will occur, and the current scheme may result in the LGA not getting any local offset benefit (where they may be available).

Information about the offsets required (and pricing) should be accessible early in the development phase, such as at rezoning or masterplan stage rather than being left to the DA stage. This will help proponents understand how it affects viability of their proposal and can ultimately encourage better design upfront to avoid and minimise clearing.

13. *Improve robustness of offset credit markets and pricing.* Local government has concerns with the lack of a robust credit market, particularly outside the metropolitan centres, which can make the full cost of development hard to anticipate and/or difficult to determine the viability of creating a stewardship site. In highly urbanised areas, the limited extent of threatened biodiversity should be reflected in higher credit prices to allow for acquisition of

local land to increase the extent of biodiversity. In addition, the pricing of offsets is not adequately reflecting the true cost of generating the credits.

14. *Review framework for offset discounting to ensure it is robust.* Under the legislation councils have the ability to discount the offset requirements of a development. While this autonomy is welcomed and should be retained, it can also put council in a difficult position, for example when council and proponents' ecologists are pitted against one another (see points under Serious and Irreversible Impacts (SII) below).
15. *Review approaches to protection of small areas of biodiversity.* The Scheme does not readily enable the protection of small areas (less than 10 ha) or unconnected vegetation in the landscape. Stewardship agreements and conservation agreements are not suitable for this purpose. Application of small-scale offsets are highly problematic, either as a series of individual offset actions, or compiled into a larger body of work. When offsetting of small scale impacts under the scheme it is difficult to quantify net benefit, track and report, and administer.

A related issue raised by councils is that the BAM small area modules are ambiguous to use, and the terminology is somewhat confused. It is understood that the Department is preparing additional guidance documents to explain the planted native vegetation module in particular.

16. *Provide clear guidance on transfer of credit liability (where clearing occurred prior to the development application).* Councils are often faced with sites that were cleared in readiness for the DA and consultants conduct retrospective assessments using nearby vegetation as a reference site. If a DA is not progressed and/or the property is sold, the clearing results in a credit liability. Clarification about how this credit liability translates to the new development or owner is required.

Accreditation / Authorised Assessors

17. *Improve education and understanding of the Scheme by accredited assessors.* Councils are of the view that there is a general lack of understanding of the Scheme. In particular they are finding those preparing assessments tend to go straight to identifying offsets rather than seeking to avoid and minimise impacts first.
18. *BCT to strengthen the compliance and enforcement regimes and take appropriate enforcement action against assessors found to be in breach of the Act, Regulations or a condition of accreditation.* Complaints need to be investigated promptly for the benefit of all parties, and accreditation put on hold while investigations occur. Councils are concerned that there is a lack of recourse where the work of accredited consultants is not up to standard. For example, where a consultant has copied someone else's BDAR. Other examples of poor practice include consultants only proposing to offset species that are found during a short survey conducted in accordance with the BAM, or surveys being limited precisely to the species required by the BAM, rather than reviewing past species records for a site to identify relevant species.

Another example is where a council rejected a number of BDARs (by the same company) on the basis that the credit reports were inconsistent with the BDAR in that a number of ecosystem credits were missing, including no credits at all for some PCTs. The assessor advised council they were only required to attach a credit report, not to check it was accurate in relation to the type and number of credits required to offset the development.

19. *Provide special accredited training for BDAR reviewers and assessors in councils / determining authorities*, which should be different to the BAM Accredited Assessor Training. This would give greater confidence to councils in assessing BDARs and standing up for those decisions if they are challenged.
20. *Assist councils with access to accredited assessors dedicated to supporting certifying authorities*. Some councils (particularly smaller councils) need to review BDARs generated by accredited assessors but many don't have the expertise in house to review or challenge these reports, and may not have the volume of BDARs or resources to train internal staff. One option is for councils to share accredited assessors or access a panel of them, providing those assessors are not also representing proponents.

Serious and Irreversible Impacts

21. *Develop a framework for determining Serious and Irreversible Impact (SAIL) as a priority*. The legislation does not provide thresholds for when an impact is likely to be 'serious and irreversible', therefore the assessment and decision on what is SAIL is subjective. The lack of thresholds is particularly problematic when council refuses an application and developers pit councils' expertise and reasoning against that of ecologists. In the absence of broader guidance on SAIL, western Sydney councils have been building a threshold checklist to support the consideration of SAIL. However there needs to be a consistent approach state-wide. Stronger science and policy direction from the NSW Government plus case law is required to support councils to make this important legal decision about when something is a SAIL.
22. *Define Serious and Irreversible Impacts for Threatened Ecological Communities (TECs), Endangered Ecological Communities (EECs) and Critically Endangered Ecological Communities (CEEC) to specify quantifiable impact thresholds beyond which development cannot be approved*. These thresholds should be established in consultation with experts (as was committed to during the biodiversity reforms), based on current knowledge and be regularly updated to respond to changes in the entity's conservation status.
23. *The Biodiversity Values map should include all SAIL listed communities (eg CEECs)*. Currently, clearing of these communities to trigger entrance to the Scheme relies on either the community being mapped on the BV Map (which not all are) or it requires the clearing to exceed area thresholds. This can result in SAIL impacts on CEECs, leading to gradual loss of critically endangered vegetation in particular and is not in keeping with the intent of the *Biodiversity Conservation Act 2016* and the Scheme. Existing state vegetation mapping could be used as a basis to update the BV map. Alternatively, identification of any CEECs in the proposal should trigger entry into the Scheme.

Biodiversity Conservation Trust

24. *Local government calls on the Biodiversity Conservation Trust (BCT) to work more closely with the sector to achieve local offsets and extinguish credits where they were generated*. The BCT is establishing biodiversity stewardship sites west of the divide, but councils believe a greater emphasis is needed in coastal areas particularly given much of the development triggering offsets are in coastal areas.
25. *Generate LGA-level annual reports on ecosystem and species credits generated and retired and make them publicly available*. Information on where and when a credit is retired is difficult to access, and councils are not routinely being advised of where this is occurring. LGA-level reports would assist councils to review Development Control Plan and Local

Environmental Plan provisions to better reflect the biodiversity values in need of increased protection. This information may also be used to assess the cumulative impacts of the Scheme itself and should be made publicly available along with the spatial information on offset sites (recommended earlier in this submission).

26. *BCT to improve Biodiversity Values (BV) map update processes.* Section 7.3(3)(j) of the *Biodiversity Conservation Regulation 2017* provides for councils to submit data to the Minister for inclusion in the map. Some councils have requested the BCT include threatened species data they hold for inclusion in the BV Map. Despite the data being in the required format, councils have been informed that agencies are not ready to process data from local government and no updates have occurred.

27. *BCT to increase resources available to assist individuals to set up stewardship sites.* Setting up stewardship sites is complicated, and landholders with properties which would make good stewardship sites have given up advising the system is too complex. Even councils find it challenging to establish sites. Funding for the additional resources could be secured by adding a component for this support in the offset charge calculator.

Councils are concerned that the offsets calculator underestimates the true cost of retiring credits (ie through the establishment of stewardship sites). It is understood the BCT is currently reviewing the developer charges framework.

Offsets for Major Projects & Strategic Approvals

The Committee clarified that this element relates to the use of offsets for state significant development (SSD) and state significant infrastructure (SSI) major projects, including as part of strategic assessments (or biodiversity certifications) and the offsetting conditions that consent authorities apply to these types of projects.

The use of offsets for SSD/SSI is reasonable however major projects can be linear, which the BAM has difficulty accounting for. There are also examples of major projects being broken into smaller projects so as to sit below the SSD/SSI threshold and not to trigger the Scheme e.g. staging of a solar farm development or a road corridor.

While information regarding offsetting is available on a project by project basis, councils suggest a collated yearly report of offsets sites created (as recommended earlier in this submission) would help to keep the community informed on the overall biodiversity outcomes from offsetting in relation to major projects and strategic approvals.

Non-Additional Offsetting

The Committee defined 'non-additional offsets' as offsets that do not provide any additional conservation values or increase in biodiversity values, but still generate credits to enable the loss of existing biodiversity values. For example, converting existing nature reserves into offset credits.

Councils acknowledge that establishing stewardship agreements in large council reserves and other areas with limited development potential provides limited net biodiversity increase. Councils would prefer to see biodiversity outcomes maximised, however in some cases there are few areas that are suitable as stewardship sites or few that are being set up by the private sector. The choice for a council can be to either establish a stewardship agreement on reserved land and accept the obligatory 20% discount in credits and the resulting net loss in biodiversity, or see offset credits leave the LGA or region altogether.

Establishing a stewardship site is often challenging for councils because once the offset is established the council must ensure the sale of credits is transparent, equitable and fits with their policies. For example, how does council assess potential sale of credits to third parties vs using credits to offset its own development? Is it appropriate for council to sell credits to developments that they would otherwise not support? As already stated, councils would prefer to see offset sites created by a range of landholders, however there are circumstances where council-owned land is the most suitable / only option, and greater support for councils in establishing these sites that maximise biodiversity outcomes is welcomed.

Other matters

28. *Produce succinct educational materials to explain the impacts and obligations of the Scheme.* Overall there seems to be a general lack of awareness of the Scheme, what a stewardship site is and how and where offsets can be utilised. If made available early in the development process, educational materials could improve Scheme outcomes (improve focus on avoidance and minimise principles first) and could also help encourage participation in the Scheme by landowners with potential stewardship sites.
29. *NSW Government to undertake a review of the need to include exemptions in the Biodiversity Conservation Act 2016 for events and other minor development.* Part 7 of the Act requires a proposed development or activity to undertake a test to determine whether it is likely to significantly affect threatened species or ecological communities, or their habitats. The requirement to undertake the test of significance and produce an ecology report is of particular concern where the proposed development or activity relates to an annual event or the like where new DAs are required, to continue the use of the land for that purpose (i.e. to hold the event). These events are usually run on very tight budgets and to require an ecology report for such events, where the cost could be in the order of \$10,000 to \$20,000, often means that the event becomes economically unviable and this has an enormous (in some cases disastrous) effect on the economic development of the LGA in which the event was to be located. In addition, these events often don't involve any clearing of vegetation and can involve the use of the same land for many years, such that there is no material effect on flora or fauna.

There are significant penalties associated with a failure to comply with the Act for both the Council and council officers. As many councils, particularly in regional NSW, do not have the expertise to undertake a test of significance they take a cautious approach and request an ecology report before determining a DA for even relatively minor events. A possible solution would be for the Act to enable exemptions for one off events and other minor development where no clearing is to take place from having to undertake the test of significance.

Conclusion

Local Government NSW welcomes the opportunity to provide feedback on the implementation of Biodiversity Offsets Scheme in NSW and identify areas of improvement. Overall, local government is supportive of retaining and improving the Biodiversity Offsets Scheme. This submission includes several recommendations for improvements, many of which inter-relate. Some recommendations are relatively simple and administrative in nature, and there is a general call for more concerted efforts in education, compliance and enforcement. Other recommendations will necessitate more significant changes to the regulatory framework.

LGNSW would be pleased to discuss these recommendations and possible pathways towards improving the functionality of, and outcomes provided by, the Biodiversity Offsets Scheme.

Summary of Recommendations

1. Greater focus on 'avoid and minimise', and additional guidance on interpreting these terms is required.
2. Greater emphasis on 'like for like' offsets is required.
3. Offsets should be procured locally wherever possible.
4. Greater support to encourage the establishment of stewardship sites is needed.
5. Amend the framework to prevent incremental clearing.
6. Consider an alternative approach for minor developments barely exceeding thresholds to reinvest offsets costs locally.
7. Provide further guidance around Scheme application with respect to subdivisions.
8. Improve the nexus with other parts of the land and vegetation management framework.
9. Provide a publicly accessible spatial map of offset sites.
10. Offsets should be achieved (or achieved within an established timeframe) before clearing takes place.
11. Ensure vegetation mapping is complete.
12. Offset requirements (and pricing) to be identified earlier in the planning proposal process.
13. Improve robustness of offset credit markets and pricing.
14. Review framework for offset discounting to ensure it is robust.
15. Review approaches to protection of small areas of biodiversity.
16. Provide clear guidance on transfer of credit liability (where clearing occurred prior to the development application).
17. Improve education and understanding of the Scheme by accredited assessors.
18. BCT to strengthen the compliance and enforcement regimes and take appropriate enforcement action against assessors found to be in breach of the Act, regulations or a condition of accreditation.
19. Provide special accredited training for BDAR reviewers and assessors in councils / determining authorities.
20. Assist councils with access to accredited assessors dedicated to supporting certifying authorities.
21. Develop a framework for determining Serious and Irreversible Impact (SAIL) as a priority.
22. Define Serious and Irreversible Impacts for Threatened Ecological Communities (TECs), Endangered Ecological Communities (EECs) and Critically Endangered Ecological Communities (CEEC) to specify quantifiable impact thresholds beyond which development cannot be approved.
23. The Biodiversity Values map should include all SAIL listed communities (eg CEECs).
24. Local government calls on the BCT to work more closely with the sector to achieve local offsets and extinguish credits where they were generated.

25. Generate LGA-level annual reports on ecosystem and species credits generated and retired and make them publicly available.
26. BCT to improve Biodiversity Values (BV) map update processes.
27. BCT to increase resources available to assist individuals to set up stewardship sites.
28. Produce succinct educational materials to explain the impacts and obligations of the Scheme.
29. NSW Government to undertake a review of the need to include exemptions in the *Biodiversity Conservation Act 2016* for events and other minor development.

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