Submission No 85

INQUIRY INTO INTEGRITY OF THE NSW BIODIVERSITY OFFSETS SCHEME

Organisation: Humane Society International

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HUMANE SOCIETY INTERNATIONAL
AUSTRALIA

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

Introductory comments

Humane Society International (HSI) welcomes the NSW Parliamentary Committee for Environment and Planning examining the integrity of the NSW Biodiversity Offsets Scheme. HSI lacks confidence in biodiversity offsetting schemes since they are widely co-opted as a tool to facilitate ecologically destructive developments rather than a tool of last resort to genuinely offset unavoidable impacts. In practice, biodiversity offsets have become the default instead of a mechanism that is taken when all genuine attempts to avoid and mitigate ecological impacts have been exhausted. Offsets are applied in such a way that leads to net losses of biodiversity contributing to Australia's declining environmental trajectories. These points were well made by Professor Grame Samuel in his examination of biodiversity offsets in the 2020 review of the *Commonwealth Environment Protection and Biodiversity Conservation Act* (EPBC Act). While Professor Samuel's observations are national in perspective, they are also drawn from the experience in NSW.

In this submission we reference Professor Samuel's Final Report from the EPBC Review and its recommendations relating to offsets. In order for the NSW policy and planning approvals to be accredited under the EPBC Act, it must be demonstrated that it meets the standards as set out in the EPBC Act. As HSI discovered in documents resulted under Freedom of Information laws as a result of our successful proceedings in the Administrative Appeals Tribunal which concluded in 2018, the NSW offsets policy then had significant flaws. Most notably HSI found that the NSW Policy:

- does not require offsets to be 'like-for-like' under all circumstances;

- allows the developer's offset requirement to be discounted where the NSW Government considers that requiring appropriate offsets may cause a project to be unviable and the project is of significant social and/or economic benefit to the State;
- allows rehabilitation of mine sites post-mining to count towards a developer's offset requirement. This is not currently permitted under the EPBC standards and the Commonwealth considered that mine site rehabilitation should normally be considered a mitigation measure rather than an offset;
- does not adequately consider the risk of relying on offsets to protect biodiversity;
- allows for a time lag between an impact occurring and the related offset being established, which could potentially be significant;
- permits a much greater use of supplementary measures (e.g. funding for research) if direct offsets cannot be found than allowed under EPBC standards.

HSI considers the current NSW policy to be weaker again and urges the NSW Government to strengthen it. In this submission we set out what we consider to be essential to offsets policies, including recommendations made by Professor Samuel which are equally relevant for the NSW policy.

HSI considers that biodiversity offsets contribute to declining trajectories because efforts to ensure like for like and additionality are not required or not adhered to, as it the case with the NSW scheme. HSI is concerned that too often there is a long lag between damage to biodiversity and the proposed compensation of an offset such that only a loss of biodiversity is experienced in the near term, with all of its knock on ecological consequences. Further, biodiversity offsets are also often speculative in terms of the feasibility of the hoped for compensation, such that it may never eventuate. Our criticisms are also directed to the lack of transparency and accountability and the lack of monitoring and inadequate enforcement of offsetting schemes, including that in NSW.

(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.

HSI set out our recommendations for the administration and limits of biodiversity offsetting schemes in our report *Next Generation Biodiversity Laws – Best practice elements for a new Commonwealth Environment Act (2018)* by the Environmental Defenders Office NSW and Humane Society International Australia. In this report we recommended that the use of biodiversity offsets be strictly limited:

Resort to biodiversity offsets, if any, should be minimised and require a precautionary approach given the long timeframes and current uncertainty of offsetting being capable of delivering successful outcomes.140 Any offsetting (such as for vulnerable, near-threatened or non-threatened biodiversity and ecological communities) would require a scientifically robust National Offsets Policy

and consistent standards. Policy and standards must require that offsets are a last resort, after all efforts are made to avoid and minimise impacts; meet strict scientific like-for-like biodiversity principles; adopt a 'maintain or improve' standard to measure outcomes (or 'no net loss and preferably net gain'); and ensure offsets are protected in perpetuity (offsets cannot be offset). Offset calculations must be consistent with a precautionary approach, and no offsets would be available for future mine remediation due to lack of evidence of success. Furthermore, any offsetting must be consistent with recovery goals in recovery plans.

We also recommended that biodiversity schemes "would not permit biodiversity 'offsetting' of impacts on critical habitat, endangered or critically endangered species and ecological communities. This recognises that some assets are too significant (or outcomes too uncertain) to 'offset'. This approach also reinforces incentives to conserve species at a landscape scale to avoid extinction risk in the first place.

HSI also commends to the Committee the report by the Environmental Defenders Office *Restoring the balance in NSW native vegetation law Solutions for healthy, resilient and productive landscapes* which examines (pages 24-26) the problems with the administration of biodiversity offsets in NSW since the land management biodiversity conservation reforms of 2017 and under the *NSW Biodiversity Conservation Act 2016* . HSI supports the EDO's recommendations to improve how offsets are managed in the state.

The EDO recommendations from the report are:

Strengthen the Biodiversity Offsets Scheme, including by:

- *Imposing a clear and objective 'no net loss or better' environmental standard under the BOS and BC Act;*
- *Requiring genuine attempts to avoid and minimise impacts on threatened species be demonstrated before the BOS can be applied;*
- *Tightening like-for-like offsetting requirements and variation rules;*
- *Significantly limiting indirect offset options such as biodiversity conservation measures and mine rehabilitation;*
- *Setting stricter parameters around the payment of money to the BCT in lieu of direct offsets;*
- *Removing the option to discount offset requirements based on non-ecological considerations;*
- *Empowering the BCT to refuse to accept an offset liability for a proponent where, in their opinion, it would not be possible for them to obtain like-for like offsets under tightened rules; and*
- *Ensuring that formulas used to determine credit pricing incorporate increasing scarcity and do so in a non-linear fashion to ensure that it becomes increasingly expensive to purchase credits for increasingly scarce species and ecosystems.*

d) Any other related matters

HSI would like to make the Committee aware of the consideration that has been given to biodiversity offsets in the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) by **Professor Graeme Samuel**. HSI engaged closely with this review and was a member of Professor Samuel's Consultative Group. While Professor Samuel's perspective was national, his observations equally apply to what is approved under both the EPBC Act and NSW laws.

In his Final Report on the EPBC Review Professor Samuel states that *"The environment and our iconic places are in decline and under increasing threat. The EPBC Act does not enable the Commonwealth to effectively protect and conserve nationally important environment and heritage matters. It is not fit for current or future environmental challenges".* He gives a list of reasons for this which includes the following in relation to biodiversity offsets:

Environmental offsets have become the default, rather than the exception after all practical options to avoid or mitigate impacts have been exhausted. (pg 39)

This focus on project-by-project assessment and approvals sets the EPBC Act up to deliver managed decline, not sustainable maintenance or recovery. The impact of development is not counterbalanced with legislated recovery processes. This is exacerbated by an EPBC Act environmental offsets policy which is ineffective at compensating for loss and inconsistently implemented. The decision-making hierarchy of 'avoid, minimise and only then offset' is not being applied – offsets are too often used as a default measure not as a last resort (Chapter 8). (pg 44)

Professor Samuel *"Offsets are a tool that should limit environmental decline resulting from development and increase restoration".*

Professor Samuel describes the following types of offset (Reference Box 27 page 138):

> ***Averted loss offsets*** *These offsets are met by purchasing and improving an otherwise at-risk area of land with the same habitat as that which is destroyed or damaged by the development. The land is then protected from future development. The protection of land through an averted loss offset does not add to the amount of habitat. When considered with the habitat loss from the development, a net reduction of habitat results.*
> ***Restoration offsets*** *These offsets are met by creating new (or recovering old) habitat from highly degraded land. A development with a restoration offset can result in a net gain of habitat.*

> ***Advanced offsets*** *Advanced environmental offsets are those that are 'supplied' in advance of an impact occurring. The offset area is set aside for potential future use by the owner, or to sell to another developer. The current offset policy allows advanced offsets for:*
> *• protecting and improving existing habitat (averted loss)*
> *• creating new habitat from highly degraded land (restoration).*

He then goes on to observe that most offsets are averted loss offsets which are leading to a net loss of habitat.

Professor Samuel further observers:

> *The 'avoid, mitigate, offset' hierarchy is a stated intent of the policy. This is not how the policy has been applied in practice. Proponents see offsets as something to be negotiated from the outset, rather than making a commitment to fulsome exploration (and exhaustion) of options to avoid or mitigate impacts. This is in part because the proponent has generally made the decision to develop a particular site before a referral is made under the EPBC Act. This limits real consideration of broadscale avoidance.*
>
> *Once a proposal is referred, assessment officers have limited scope and time to work with proponents to avoid and mitigate impacts. This becomes a 'nice to do', rather than a core focus of their efforts. An offset has become an expected condition of approval, rather than an exception. The policy allows proponents to meet their offset condition by creating new habitat from highly degraded land – an approach the Review terms a 'restoration offset' – however, this rarely occurs. Most offsets are averted loss offsets that deliver only weak protection of remnant habitats of MNES that may have never been at risk of development. This is reinforced by the lack of a formal requirement to adequately demonstrate that the area set aside for the offset was sufficiently likely and able to be cleared for future development.*

Professor Samuel observed the following in relation to biodiversity offsets approved under the EPBC Act:

> *The current EPBC Act environmental offsets policy states that after all reasonable efforts are made to avoid impacts, remaining impacts should be mitigated to reduce the impacts on MNES, and any residual impact can be offset. However, this is not how it has been applied in practice. Some proponents see offsets as something to be negotiated from the outset, rather than making a commitment to fulsome exploration (and exhaustion) of options to avoid or mitigate impacts.*

Conditions of approval most often require proponents to protect areas of habitat similar to the area that has been destroyed or damaged by the project, but compliance and enforcement of these conditions is ineffective.

Immediate changes are required to the environmental offsets policy to ensure that offsets do not contribute to environmental decline. Offsets should only be acceptable:

- *when they are applied in accordance with the recommended National Environmental Standards for MNES*
- *where an offset plan demonstrates that they can be ecologically feasible*
- *where outcomes from offsets can be properly monitored and measured.*

In the longer term, offsets should be enshrined in law. The EPBC Act should require:

- *offsets to be ecologically feasible and deliver genuine restoration in areas of highest priority*
- *a decision-maker accept offsets that encourage restoration offsets to enable a net gain for the environment to be delivered before the impact occurs*
- *a public register of offsets for all Commonwealth, State or Territory offsets sites, designated as a national interest environmental dataset.*

These settings would incentivise early investment in restoration. If offsets were to be supported with greater certainty under the EPBC Act, this could catalyse a market response. Proponents are generally not in the business of managing habitats as their core business. There are, however, expert land managers and specialist project managers who deliver these services. The right policy and legal settings would provide certainty for these players to invest in landscapes, confident that proponents will be in the market to purchase offsets based on these investments down the track.

Although the policy allows restoration ahead of impacts ('advanced offsets'), they are difficult to deliver under the current settings. There is no guarantee that the Environment Minister will accept an advanced offset, nor is it possible to accurately determine the area of offset required before an approval is granted. This makes investing in an advanced offset a risky proposition. Consequently, proponents focus on protecting what is left rather than promoting restoration. Offset requirements are applied as a condition of approval. These conditions are not adequately monitored to ensure appropriate management and efforts to enforce compliance are weak (Chapter 9). There is no transparency of the location, quality or quantity of offsets. There is no register of offsets and, in the absence of such a tool, the same area of land may be 'protected' more than once. The Review concludes that the EPBC Act environmental offsets policy requires fundamental change.

Professor Samuel offers the following recommendations for the Commonwealth biodiversity offsets policy (Box 28 page 140):

The environmental offsets policy and its implementation should also be immediately improved to ensure:

- *consistency with the National Environmental Standards*
- *offsets are ecologically feasible and deliver genuine protection and restoration in areas of highest priority.*

In the first instance, these improvements should be delivered immediately by making the following amendments to the policy.

1) Biodiversity offsets can only be considered after all possible measures to avoid and mitigate the impacts of an action have demonstrably been taken. Avoidance and mitigation measures must include, but not be limited to, consideration of:

- *the appropriateness of project scoping, footprint relocation and/or reduction*
- *changed timing of project activity*
- *design-based avoidance and minimisation.*

2) Offset activities must be

- *done in accordance with the suite of National Environmental Standards*
- *ecologically feasible and achievable.*

3) Offset plans must

- *be supported by relevant robust scientific evidence that considers the appropriateness and feasibility of the offset*
- *clearly define offset activities. Averted loss offsets should only be used where there is an imminent and demonstrable risk of loss and where the land is not otherwise protected by the EPBC Act and the National Environmental Standards for MNES (for example, if it is part of a project that has previously been approved under the Act)*
- *include time-bound milestones that clearly identify the required absolute increases of approved indicators – for rehabilitation and restoration offsets milestones, this must be in accordance with the International Principles and Standards for the Practice of Ecological Restoration (Gann et al. 2019)*
- *outline corrective courses of action that will be taken where increases in the indicators or milestones have not been achieved*
- *define who will fund, manage, monitor and report on the ongoing outcomes of the offset area, including indicators and milestones.*

4) Offset sites must:

- *conform with offset components in relevant regional plans and strategic assessments*

- *be identified and legally secured prior to commencement of the approved impact – delays between impact and full achievement of required offsets gains must be minimised and appropriate discount factors applied*
- *not be used more than once, noting that the one site may provide offsets for impacts on multiple MNES – offsets must be additional to existing actions and regulatory obligations*
- *clearly demonstrate management of activities that ensure attainment and maintenance of the required improvement of indicator(s) for the duration that the migratory species, threatened species or threatened ecological community is affected by the impact.*

5) The policy must be reviewed at least every 3 years to ensure that it is achieving its objectives.

To help remedy the problems Professor Samuel identified, and give effect to his recommendations, he drafted a National Environment Standard for Threatened Species and Threatened Ecological Communities which established standards for biodiversity offsets. Professor Samuel's draft standard states that decisions involving threatened species and ecological communities should:

1. *Employ all reasonable measures to avoid and then to mitigate impacts to **listed threatened species and ecological communities**.*
2. *Employ **achievable** and **ecologically feasible offsets** to counterbalance residual significant impacts, only after all reasonable steps to avoid and mitigate impacts are taken.*

The draft standard further requires that:

*Offsets must be **achievable** and **ecologically feasible**:*

- *An **offset** is **achievable** where demonstrated scientific knowledge exists on how to restore the habitat with a high confidence of success, and its long-term protection is assured (for example through conservation covenants or conservation agreements), and*
- *An **offset** is **ecologically feasible** where it can be demonstrated that the species or community can be reliably restored in a timeframe proportionate to effectively address the impact of the action and enough space exists to undertake restoration (not ecologically or tenure constrained).*

It should be noted that the draft standard overall would require that decisions should maintain and improve habitat and population numbers for threatened species and the extent and condition of threatened ecological communities, avoiding adverse impacts and ensuring no net reductions, not exacerbating key threatening processes and addressing cumulative impacts.

While Professor Samuel's recommended standards have been well received by many stakeholders, the Australian government has not yet agreed to enact them. Nevertheless, HSI suggests that the

NSW Government would be prudent to ensure its biodiversity offsetting scheme aligns with Professor Samuel's recommended standard, since they were well received by stakeholders, and this may be the direction of national law reform and future accreditation of state processes.

Finally in relation to Professor Samuel's recommendations HSI would note that we consider confidence in regional schemes for biodiversity offsets is premature, including in NSW where it is currently administered through the Biodiversity Offsets Scheme. The monitoring and evaluation of threatened species and threatened ecological communities is not sufficiently developed, nor baselines effectively established, to be able to determine no net loss calculations across landscapes. Until our biodiversity monitoring and evaluation systems are far more advanced, HSI considers it necessary to insist on project-based offsets with direct compensation adhering to like for like, proportionality and additionality principles.

Conclusion

We hold deep concerns over the administration of biodiversity offsets in NSW, in principle and practice. We are concerned that the scheme is overseeing net losses of biodiversity and contributing to declining trajectories of species and ecological community endangerment rather than helping to turn them around.

In particular, HSI reiterates recommendations to ensure that biodiversity offsets:

- are a last resort rather than default measure and only undertaken after all measures for avoidance and mitigation have been exhausted;
- are not an excuse to approve a development that should not be approved due to unacceptable impacts;
- are like for like and additional;
- are supported by robust scientific evidence that they are feasible and achievable;
- for averted loss are only used when the threat of loss is real and imminent;
- must minimise delays between impact and achievement of compensation;
- be properly recorded in a public register;
- monitored with corrective action for failure to achieve milestones; and
- properly enforced.

References:

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