

Submission
No 86

INQUIRY INTO INTEGRITY OF THE NSW BIODIVERSITY OFFSETS SCHEME

Organisation: Australian Conservation Foundation

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**AUSTRALIAN
CONSERVATION
FOUNDATION**

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Submission to the New South Wales Legislative Council Planning and Environment Committee

Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme

About ACF

ACF is Australia's national environmental organisation. We represent a community of more than 700,000 people who are committed to achieving a healthy environment for all Australians. For more than 50 years ACF has been a strong advocate for Australia's forests, rivers, people and wildlife. ACF is proudly independent, non-partisan and funded by donations from our community.

Submission overview and recommendations

ACF welcomes the opportunity to make a submission to this inquiry. In our view the embrace of biodiversity offsetting in NSW and in other Australian jurisdictions has not been accompanied by sufficient critical scrutiny of the effectiveness and integrity of these schemes. Our position is that while biodiversity offsets have a limited role to play in effective biodiversity protection regulation, the lack of appropriate constraints on their utilisation and poor system design means that these schemes are at best ineffective and at worst contribute to the ongoing decline in threatened species, native habitat, and biodiversity values.

Our submission is structured around the following recommendations:

1. **Offsets should be a last resort rather than a default option.** This needs to be supported by clear regulations to ensure that all reasonable efforts are made to avoid and minimise impacts before offsets are an option, and by a clear "net gain" objective for the system.
2. **Tighten offset rules.** There needs to be greater rigour in the critical elements of the system to ensure that when offsets are utilised, they are credible and effective. This includes tightening like for like rules, limiting the use of indirect offsets, removing the discretion to discount offsets, and ensuring offsets are available and ecologically feasible as a precondition of permission.
3. **Increase transparency and oversight to avoid integrity issues.** Investigative reporting has demonstrated that the discretionary character, regulatory complexity and large sums of money involved in the system create challenges in not only ensuring the effectiveness of the use of biodiversity offsets in NSW but also avoiding integrity issues. While the reforms

recommended above will go some way to addressing these issues, there is also a need for greater transparency and oversight in the operation of the system.

- 4. The NSW government should support better National Environmental Standards for offsets.** The NSW offsetting schemes operates in parallel to approvals including offsetting under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act) and the NSW government has sought to have the NSW system accredited under that Act. The 2020 Independent Review of EPBC Act was very critical of the current offsetting practices and recommended amongst other things the development of National Environmental Standards to address these issues. The New South Wales government should urge the Commonwealth government to adopt these recommendations.

General comments on the use of biodiversity offsets

Excessive reliance on biodiversity offsets undermines biodiversity protection – at best offsets are ineffective at protecting biodiversity, and at worst offsetting systems facilitate the destruction of irreplaceable habitat.

Biodiversity offsets are a mechanism to compensate for the destruction of habitat or other protected values as a result of development impacts. Ostensibly, they are an option of last resort after all avoidance and mitigation measures to avoid reduce impacts have been pursued. However, they seldom operate this way and often amount to the default approach after only cursory consideration of alternatives.

Generally, offsets are over-used in the regulatory tool-kit. While text book examples of biodiversity offsets suggest a mechanism which could send an important price signal and drive the internalisation of environmental harms/costs, this outcome is highly dependant on scheme design and can easily be compromised by rules that lack rigour or that allow excessive discretion. It is often more attractive for proponents to negotiate or game down offset liabilities with the regulator than accept an offset liability that reflects the negative environmental cost and externalities of their activity.

Even relatively mature or developed regulatory systems such as the NSW Biodiversity Offsets scheme can facilitate poor outcomes if key rules compromise the performance of the system against some notional best practice benchmark. While there is no ideal or perfect biodiversity offsetting system, guidance as to the elements of best practice offsetting necessary to avoid this design in failures have been researched and documented.

This divergence between optimal system design and implementation in practice arises because of a history that seems to be common across biodiversity offsetting schemes across at the Federal level

and across Australian States and Territories. What often starts as a relatively ad hoc of individual offsets arrangements negotiated with regulators is formalised as an offsetting system accompanied by an attempt to build in mechanisms to avoid recognised issues. As the implementation of this system proceeds, demands for flexibility and less stringent requirements accumulate, resulting in both increased complexity and increasingly compromised environmental outcomes. Adding increasing sophisticated trading and banking schemes does not of itself resolve these underlying issues, and indeed this additional complexity may obscure more fundamental problems with the system.

The phenomenon is evident in the history of the development of biodiversity offsets in NSW as documented by the Nature Conservation Council in their comprehensive 2016 review of the “weakening and widening” of NSW biodiversity offsetting schemes:¹

Table 2: Desirable features of offsetting schemes in NSW.

FEATURE	Environmental Outcomes Assessment Methodology (NVA 2003)	BioBanking Assessment Methodology (TSCA 1995)	Biodiversity Certification Assessment Methodology (TSCA 1995)	OEH Principles for Biodiversity Offsetting (EP&A Act 1979)	Biodiversity Offsets Policy for Major Projects (EP&A Act 1979)	Draft Biodiversity Assessment Methodology (BC Bill 2016)
Excludes discounting of offsets credits	YES	YES	YES	YES	YES	NO
Excludes supplementary measures	YES	YES	YES	YES	NO	NO
Excludes mine rehabilitation	YES	YES	YES	YES	NO	NO
Clear standard for environmental outcomes	YES	YES	YES	YES	NO	Partial/pending
Does not allow payment in lieu of genuine offsets (Offsets Fund)	YES	YES	YES	YES	Partial/pending	NO
Red flags	YES	YES	YES	NO	NO	Partial/pending
Impacts on water quality, salinity and soil	YES	NO	NO	NO	NO	Partial/pending
Like for like offsetting	YES	NO	NO	NO	NO	NO
Key:	= Positive environmental outcomes		= Negative environmental outcomes			

¹ Nature Conservation Council (2016) *Paradise Lost. The weakening and widening of NSW biodiversity offsetting schemes, 2005-2016*. Table 2 at page 7.

1. Offsets should be a last resort rather than the default option

Biodiversity offset system design must be informed by the inherent limitations of offsetting as a mechanism to protect and restore biodiversity values. The demand for biodiversity offsets is derived from the destruction of biodiversity values. While an offset considered in isolation might, given the appropriate conditions, create opportunities for landholders and provide the development of markets, and deliver environmental benefits it will still be driven by regulatorily facilitated destruction of biodiversity values and the necessary fiction that these are fungible.

Two propositions flow from this starting point. Firstly, offsets ought to be a last resort and only available in strictly limited circumstances. We note that in their analysis the Environmental Defenders Office has concluded that the avoid, mitigate, offset hierarchy as currently implemented fails to require genuine attempts to avoid and minimise impacts and needs to be strengthened.² Detailed guidance and some level of objective prescription will invariably be required to implement an effective mitigation hierarchy as reliance on project proponent's own assessment and claims without such guidance makes the scrutiny of such claims by regulators very difficult.

Secondly, the overall objective for the offsetting system will be important in ensuring that the scheme supports biodiversity protection objectives. Policies across Australia have varying objectives, such as 'no-net loss' (NSW) or 'improve and maintain' (Federal).

Research has highlighted that all Australian policies only deliver benefits when measured against assumed counterfactuals that inflate the rate of biodiversity loss. As noted in the study:

*"crediting baselines in Australian offset schemes risk exacerbating biodiversity loss. The near ubiquitous use of declining crediting baselines risks 'locking in' biodiversity decline across impact and offset sites, with implications for biodiversity conservation more broadly"*³

This lock-in is further exacerbated by the shifting of risks in relation to the non-delivery of offsets (through external events or regulatory failure) on to the environment.

One way to attempt to avoid lock-in of biodiversity decline through offsetting schemes is make the availability of offsets conditional upon an actual improvement in biodiversity values. The NSW Biodiversity Offset Scheme merely aims for a "no net loss" – this objective should be elevated to ensure that the scheme delivers a "net gain".

² Recommendation 12 in Environmental Defenders Office (2020) *Restoring the balance in NSW native vegetation law*.

³ Martine Maron, Joseph W. Bull, Megan C. Evans, Ascelin Gordon, *Locking in loss: Baselines of decline in Australian biodiversity offset policies*, Biological Conservation, Volume 192, 2015,

2. Tighten offset rules.

If offsets are to be utilised, it is critical that the rules in relation to when they are required and what counts as an offset do not undermine biodiversity protection objectives. The Environmental Defenders Office have thoroughly analysed the design and implementation of the NSW biodiversity offsetting system against “benchmarks” derived from expert commentary on biodiversity system design, identifying a number of shortcomings requiring reform of the current rules.⁴ We support their recommendations which include the following:⁵

- *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 Biodiversity Conservation in lieu of direct offsets;*
- *Removing the option to discount offset requirements based on non-ecological considerations;*
- *Empowering the Biodiversity Conservation Trust 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.*

3. Increase transparency and oversight to avoid integrity issues

This Inquiry was prompted *The Guardian* investigations into failures to deliver offsets sites, and the purchase of offset credits from properties linked to consultants.⁶ It is notable that these issues were revealed through diligent and persistent investigative journalism rather than by being picked up through transparency and oversight measures built into the system.

⁴ See for example Environmental Defenders Office (2020) *Restoring the balance in NSW native vegetation law*

⁵ Ibid at 41.

⁶ “Too many loopholes’: NSW inquiry to scrutinise use of environmental offsets”
<https://www.theguardian.com/environment/2021/jun/25/nsw-inquiry-to-scrutinise-use-of-environmental-offsets>

Although these issues have their origins in earlier version of NSW biodiversity offsetting schemes, serious questions remain as to whether they would be avoided under the current arrangements.

An additional risk evidenced by the Guardian investigations is the heavy reliance of biodiversity offsetting schemes on experts and other consultants. The role of these experts as consultants, advisers and assessors means they that they play an important role in quality assurance and also have access to valuable information that may give rise to ethical issues.

As we have highlighted in work on the susceptibility of environmental regulatory systems to corruption, excessive discretion in environmental laws elevates the risk of both “hard” and “soft corruption”. While criminalising corrupt behaviour and having anticorruption bodies in place are both important in dealing with this issue, the more fundamental approach is to design these risks out of the regulatory scheme as much as possible.⁷ We encourage the Committee to thoroughly scrutinise the operation of the current system of biodiversity offsetting with this risk in mind – closing “loopholes” and reducing excessive discretion in the system will not only assist in improving overall effectiveness but will also contribute to a reduction in integrity risks.

4. NSW biodiversity offsets and the national system of biodiversity protection

At the Commonwealth level, the second 10 yearly independent review of the EPBC Act was very critical the current approach to biodiversity offsets under that Act. Many of the Review’s conclusion reinforce the points outlined above.

According to the Review “the current offsets policy . . . contributes to environmental decline rather than active restoration” and “The EPBC Act environmental offsets policy has major shortcomings in both its design and implementation”.

“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.

⁷ Australian Conservation Foundation and Environmental Justice Australia (2017) *Corruption in environmental decision-making*.

*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."*⁸

The NSW offsetting schemes operates in parallel to approvals including offsetting under the EPBC Act and the NSW government has sought to have the NSW system accredited under that Act. While operation of the EPBC Act offsetting regime is presumably outside the scope of this inquiry, the relationship between the two schemes and the intention to seek closer integration between the two systems is something that Committee should be aware of.

Notably, a key recommendation by Professor Samuel is the development of National Environmental Standards to an improved focus on environmental outcomes across all jurisdictions. Draft Standards for Matters of National Environmental Significance developed by Professor Samuel with input from key stakeholders include standards for improved approaches to offsetting including emphasis on the use of offsets only after proper attempts have been made to avoid and minimise biodiversity loss, and a requirement that offsets be available and ecologically feasible.

Regrettably the Commonwealth government has refused to adopt the standards recommended by the Independent Review, indicating instead an intention to adopt standards that simply reflect the current inadequate provisions of the EPBC Act. This approach is said to have been supported by the National Cabinet which of course includes the NSW Premier. We urge the Committee to recommend that the NSW government not only improves the NSW offsetting system but also advocates for a common approach to improvement across all jurisdictions by urging the Commonwealth government to adopt the Standards recommended by the Independent Review.

⁸ Samuel, G 2020, *Independent Review of the EPBC Act – Final Report*, Department of Agriculture, Water and the Environment at page 138.

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The Australian Conservation Foundation is Australia's national environment organisation. We stand up, speak out and act for a world where reefs, rivers, forests and wildlife thrive.

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