

Submission
No 19

**INQUIRY INTO ENVIRONMENTAL PLANNING AND
ASSESSMENT AMENDMENT (HOUSING AND
PRODUCTIVITY CONTRIBUTIONS) BILL 2023**

Organisation: Environmental Defenders Office

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Preliminary analysis of the Environmental Planning and Assessment Amendment (Housing and Productivity Contributions) Bill 2023

2 June 2023

OVERVIEW

Our understanding is that:

- The Environmental Planning and Assessment Amendment (Housing and Productivity Contributions) Bill 2023 (**the Bill**) proposes to replace current Division 7.1, Subdivisions 4 and 5 (Special Infrastructure Contributions) of the *Environmental Planning and Assessment Act 1979* (NSW) (**EP&A Act**), with new provisions that establish a new housing and productivity contribution scheme.
- The reforms stem from a 2020 review of the NSW infrastructure contribution system undertaken by the Productivity Commission.
- The Bill proposes that a component of developer contributions paid under the new framework (to be known as the ‘strategic biodiversity component’) can be paid into a new Strategic Biodiversity Contributions Fund. The strategic biodiversity component is specifically imposed as a contribution to ‘measures to conserve or enhance the natural environment’ – which is defined with reference to specific sections of the EP&A Act and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**).
- This Bill relates specifically to applications for **strategic** biodiversity certification under the EPBC Act and *Biodiversity Conservation Act 2016* (NSW) (**BC Act**) (see proposed s 7.22(a)(i)).

Additionally, we note that existing special infrastructure contribution provisions (specifically Part 7, subdivision 4 of the EP&A Act) are used to obtain contributions for the Growth Centres Biodiversity Offset Scheme (GCBOS). The GCBOS was established in 2008 to offset impacts from the Western Sydney Growth Centres, which received biodiversity certification under the former *Threatened Species Conservation Act 1995* (**TSC Act**).¹ However, since then, the Biodiversity Offsets Scheme (BOS) and the Biodiversity Conservation Fund have been established under the BC Act.

Our review of the Bill focuses on the provisions relating to the proposed new Strategic Biodiversity Contributions Fund.

KEY ISSUES

In theory, EDO is not opposed to a framework that facilitates developer contributions as a means funding approved conservation measures. However, we note the following specific concerns:

- There is some potential uncertainty as to how the Bill may interact with the Biodiversity Offsets Scheme established under the BC Act and the Commonwealth *Environment*

¹ <https://www.bct.nsw.gov.au/growth-centres-biodiversity-offset-scheme>

Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy - see detailed comments in **Table 1**.

- EDO has ongoing concerns with the concept of biodiversity certification, and specifically strategic biodiversity certification, which should also be considered in the context of this Bill.²
- EDO also has ongoing concerns about the Biodiversity Offsets Scheme established under the BC Act, and its ability to deliver outcomes for biodiversity.³ These concerns should be considered in the context of this Bill.
- The BC Act (including Part 6 – Biodiversity offsets scheme and Part 8 – Biodiversity certification of land) is currently under review (5-year statutory review). The outcomes of that review may affect both the framework for biodiversity certification and framework for biodiversity offsetting.

Setting up a system to facilitate developer contributions to support the delivery of approved conservation measures is generally supported. However, outstanding issues regarding the interaction of the Bill with the BC Act must be resolved. Further, given the BC Act, including provisions relating to biodiversity certification and biodiversity offsetting are currently under review, it may be prudent to hold off implementing the parts of the Bill establishing the new Strategic Biodiversity Contributions Fund until after the Government has tabled its report on the 5-year statutory review of the BC Act, so long as there are no implications for collecting contributions for the GSBOS or any other approved strategic biodiversity certificate (such as the Cumberland Plain Conservation Plan).

More detailed analysis of the Bill is outlined in **Table 1** below.

² See:

- EDO, *Submission on the draft Biodiversity Conservation Bill 2016*, June 2016, available [here](#).
- EDO, *Submission on the Draft Cumberland Plain Conservation Plan*, October 2020, available [here](#).

³ See EDO, *Submission to the inquiry into the Integrity of the NSW Biodiversity Offsets Scheme*, September 2021, available [here](#).

Table 1 – Detailed analysis of relevant provisions of the Environmental Planning and Assessment Amendment (Housing and Productivity Contributions) Bill 2023

Section of Bill	What is this referring to?	EDO comment
<p>Proposed section 7.25(a)(i): an approved conservation measure specified in the order conferring biodiversity certification on the land,</p>	<p>An ‘approved conservation measure’ is to be understood with reference to section 8.23(2) of the BC Act, which provides:</p> <p>(2) The measures that may be specified as approved conservation measures are the following measures to offset the impacts on biodiversity values of the clearing of native vegetation and the loss of habitat on the biodiversity certified land—</p> <p>a) in any case—the retirement of biodiversity credits,</p> <p>b) in the case of a strategic application for biodiversity certification—the reservation of land under the <i>National Parks and Wildlife Act 1974</i>, the adoption of development controls (or State infrastructure contributions) under the <i>Environmental Planning and Assessment Act 1979</i> that conserve or enhance the natural environment or any other measure determined by the Minister,</p> <p>c) any other measures declared by the regulations to be approved conservation measures.</p>	<p>We note the distinction between:</p> <ul style="list-style-type: none"> - Standard biodiversity certification – must offset biodiversity impacts by retiring biodiversity credits; the offsetting rules in the BC Act apply; and - Strategic biodiversity certification – must offset biodiversity impacts by retiring biodiversity credits and/or using additional conservation measures - see 8.23(2)(b); the offsetting rules in the BC Act do not apply (cl 6.2(5)(b) of the BC Regulation). <p>It appears that section 8.23(2)(b) of the BC Act already anticipates that State infrastructure contributions may be made as part of strategic biodiversity certification to support these actions. We understand that the Bill will continue to allow this to occur, with such contributions becoming the ‘strategic biodiversity component’ paid into a new Strategic Biodiversity Contributions Fund.</p> <p>However, in the case of section 8.23(2)(a) - the retirement of biodiversity credits - which is also available in the case of strategic biodiversity certification, it is unclear how the Bill interacts with the BC Act. Notably, the ‘offset rules’ under the BC do not apply in the case of strategic biodiversity certification (cl 6.2(5)(b) of the BC Regulation. Instead, the Department of Planning and Environment has prepared <i>Guidance for planning authorities - Conservation measures in strategic applications for biodiversity certification</i> to be applied in the case of strategic biodiversity certification.</p>

		<p>There are a number of fundamental issues regarding strategic biodiversity certification, and retirement of biodiversity credits as part of strategic biodiversity certification applications, that must be considered:</p> <ul style="list-style-type: none"> • There is uncertainty as to how the Bill will interact with the Biodiversity Offsets Scheme and the Biodiversity Conservation Fund. We note that in the second reading speech,⁴ Minister Scully suggests that the framework will be used to facilitate offset obligations: <i>“Importantly, the bill restricts the provision of infrastructure outside the region a contribution came from. That was another clear message from the community and development industry. The only exception to that is for measures to conserve or enhance the natural environment. This is because the Biodiversity Offsets Scheme might require offsets to be sourced from outside the region to facilitate development within it.”</i> • We can’t see anything explicit in the Bill that suggests that ‘retirement of biodiversity credits’ can be satisfied by payment into the new Strategic Biodiversity Contributions Fund, however, given that ‘approved conservation measures’ includes ‘the retirement of biodiversity credits’, that could be one possible construction of the Bill. (It is also unclear whether payment to the Biodiversity Conservation Fund is an option for strategic biodiversity certification as that sits under the offsetting rules, which as outlined above do not apply to strategic biodiversity certification).
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⁴ <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-130756'>

		<ul style="list-style-type: none"> • There is also the fundamental issue of whether strategic biodiversity certification should be subject to a different set of offsetting rules and options. This was briefly considered by the inquiry into the Biodiversity Offsets Scheme, with the Committee recommending that “That the Department of Planning and Environment review the Biodiversity Offset Scheme's biodiversity certification process to ensure that it meets best practice principles for offsetting, achieves positive environmental outcomes, and there is transparency in its use” (Recommendation 4). We understand that this is happening as part of the 5-year statutory review of the BC Act currently under review. <p>We note that the Productivity Commission’s 2020 report,⁵ grappled with the idea of incorporating biodiversity offset contributions into the developer contribution framework for strategic assessments. There were varying views amongst stakeholders.</p> <p>If, in the case of strategic biodiversity assessment, the Strategic Biodiversity Contributions Fund (SBCF) (which will be administered by the Planning Secretary) can be used to satisfy offset obligations, it will further decentralise the management of offsets⁶ and put the Planning Secretary in direct competition with BCT, which also has the burden of finding highly sought after offsets where developers have paid into the Biodiversity Conservation Fund.</p>
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⁵ <https://www.productivity.nsw.gov.au/sites/default/files/2020-12/Final%20Infrastructure%20Contributions%20Review%20Report.pdf>

⁶ Noting that the management of the Biodiversity Stewardship Agreement application processes has been handed over from the BCT to the Credit Supply Taskforce

		<p>In our view, now that biodiversity offsetting has been formalised in the BC Act, it may be clearer and more consistent to regulate biodiversity offsets separately to developer infrastructure contributions (noting however the need for the current NSW biodiversity offsetting scheme to be significantly strengthened).</p> <p>This would likely require:</p> <ul style="list-style-type: none"> - an amendment to the BC Regulation to apply the offset rules to strategic biodiversity certification; and - an amendment to the Bill to explicitly rule out payment into the Strategic Biodiversity Contributions Fund as a way of satisfying the ‘retirement of biodiversity credits’; and instead allow payments to the Biodiversity Conservation Fund. <p>The SBCF could be used however for contributions for other approved conservation measures.</p>
<p>Proposed section 7.25(a)(ii): other approved measures referred to in the <i>Biodiversity Conservation Act 2016</i>, section 8.3(3),</p>	<p>Section 8.3(3) of the BC Act provides: (3) The following related matters may also be specified in an order conferring biodiversity certification as other approved measures—</p> <ol style="list-style-type: none"> a) any requirements determined by the Minister as to the timing of the implementation of the proposed conservation measures, b) any requirements determined by the Minister as to monitoring, reporting or auditing of the implementation of proposed conservation measures, c) any other matters declared to be related matters by the regulations. 	<p>While noting EDO’s broader concerns about biodiversity certification, EDO is not opposed to a framework that facilitates developer contributions as a means of funding these other approved measures.</p>
<p>Proposed section 7.25(a)(ii):</p>		<p>Generally, this facilitates costs recovery and is supported.</p>

<p>costs and expenses incurred by the Minister, the Planning Secretary, a council or another prescribed person in making an application for biodiversity certification under that Act,</p>		
<p>Proposed section 7.25(b)(i): for the purposes of an endorsed policy, plan or program, within the meaning of the <i>Environment Protection and Biodiversity Conservation Act 1999</i> of the Commonwealth, section 146A, or</p>	<p>These proposed sections aim to capture strategic assessments approved under Part 10 of the EPBC Act and specifically any policy, plan or program endorsed under those strategic assessment provisions.</p> <p>We expect these provisions to be applied where an area of land the subject to biodiversity certification under the NSW BC Act also seeks strategic certification under the EPBC Act (although there is no requirement that they be interdependent on each other).</p>	<p>Generally, consistent with our view above, the payment of developer contributions to meet obligations under an endorsed policy, plan or program is supported. However, it is unclear how these provisions may interact with any offsetting requirements under the EPBC Act.</p> <p>A strategic assessment approval may set out conditions attached to the approval (EPBC Act, s 146B(2)(e)). This could include conditions relating to biodiversity offsetting requirements. The <i>Environment Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy</i> applies to strategic assessments under Part 10 of the EPBC Act.</p>
<p>Proposed section 7.25(b)(ii): under the conditions of an approval of the taking of actions or a class of actions under that Act, section 146B</p>		<p>While the Commonwealth Environmental Offsets Policy does not envisage payments as an alternative to offsets, it does allow for a limited amount of other compensatory measures, including research and education.</p> <p>It is unclear if, under the provisions of the Bill, the NSW Minister can require contributions to be paid into the Strategic Biodiversity Contributions Fund as a way of meeting Commonwealth offsetting obligations – namely those other compensatory measures.</p>

		<p>Consistent with our comments above, it may be better for biodiversity offsetting to be managed under a single framework (noting the NSW BOS requires significant strengthening and must be consistent with any National Environmental Standard for biodiversity offsetting), and use the Strategic Biodiversity Contributions Fund for additional conservation actions endorsed in a policy, plan or program.</p>
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