



LEGISLATIVE COUNCIL

PORTFOLIO COMMITTEE NO. 7

# Integrity of the NSW Biodiversity Offsets Scheme



Report 16

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7

Portfolio Committee No. 7 - Planning and Environment

# **Integrity of the NSW Biodiversity Offsets Scheme**

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Integrity of the NSW Biodiversity Offsets Scheme

Chair: Ms Sue Higginson MLC

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## Terms of reference

1. That Portfolio Committee No. 7 - Environment and Planning 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 terms of reference were self-referred by the committee on 24 June 2021.

## Clarifications to the Terms of Reference

### **1(b) - the use of offsets by the NSW Government for major projects and strategic approvals**

This 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.

### **1(c) - the impact of non-additional offsetting practices on biodiversity outcomes, offset prices and the opportunities for private landowners to engage in the scheme**

Non-additional offsets are offsets that don't 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.



## Committee details

### Committee members

<b>Ms Sue Higginson MLC*</b>	The Greens	<i>Chair</i>
<b>The Hon Mark Pearson MLC</b>	Animal Justice Party	<i>Deputy Chair</i>
<b>The Hon Scott Barrett MLC**</b>	The Nationals	
<b>Mr Justin Field MLC***</b>	Independent	
<b>The Hon Rose Jackson MLC</b>	Australian Labor Party	
<b>The Hon Aileen MacDonald MLC****</b>	Liberal Party	
<b>The Hon Shayne Mallard MLC</b>	Liberal Party	
<b>The Hon Penny Sharpe MLC</b>	Australian Labor Party	

\* Ms Sue Higginson MLC replaced Ms Cate Faehrmann MLC as a substantive member of the committee from 28 June 2022 and was appointed Chair of the committee on 20 July 2022. Ms Cate Faehrmann MLC was a substantive member and Chair of the committee to 20 June 2022.

\*\* The Hon Scott Barrett MLC replaced the Hon Peter Poulos MLC as a substantive member of the committee from 1 March 2022. The Hon Peter Poulos MLC replaced the Hon Ben Franklin MLC as a substantive member of the committee from 25 January 2022 to 1 March 2022.

\*\*\* Mr Justin Field MLC is a participating member from 13 August 2021 for the duration of the inquiry.

\*\*\*\* The Hon Aileen MacDonald MLC replaced the Hon Catherine Cusack MLC as a substantive member of the committee from 16 August 2022. The Hon Catherine Cusack MLC was a substantive member of the committee to 9 August 2022.

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## Chair's foreword

This inquiry had its origins in concerns from the community and media reporting about the declining state of biodiversity in New South Wales, the operation of the Biodiversity Offsets Scheme, and in particular that the scheme was being rorted to benefit some participants with insider knowledge.

Through the course of the inquiry, it became apparent that there are multiple problems with the scheme, including serious flaws in its design and operation that raise fundamental questions about whether it can achieve the stated goal of 'no net loss' of biodiversity.

The theory of biodiversity offsetting is that loss of biodiversity at a development site can be 'offset' with biodiversity protection elsewhere. For this to work, however, the 'details' of scheme design are critical: international principles for effective biodiversity offsetting must be incorporated.

Unfortunately, we heard that the design of the New South Wales scheme deviates markedly from best practice offsetting principles. Rather than being a last resort for offsetting unavoidable impacts of development, requiring ecologically equivalent offsets, and setting clear thresholds for where offsets should not be used, the scheme makes it easy for developers to meet their offset obligations through making a cash payment, with no guarantee that like-for-like offsets will ever be found. This kind of flexibility undermines the design integrity of the scheme and gears the scheme to facilitating development rather than protecting irreplaceable biodiversity values.

The committee heard serious concerns about the scheme's operation from almost every stakeholder group: landholders, ecologists, developers and local councils alike raised an array of practical issues that call into question the efficiency and effectiveness of the scheme. The market for biodiversity credits does not appear to be working for anyone, with developers facing uncertainty about the costs they will face and struggling to find the right credit type on the market, and landholders not incentivised to enter the scheme.

These issues with the scheme's operation, coupled with a lack of transparency, have led to a perception of many stakeholders that the scheme is profiting a few while failing to deliver meaningful protection for biodiversity.

This report makes 19 recommendations to government. Importantly, there are recommendations to strengthen the design integrity of the scheme so that it aligns with best practice principles for offsetting, and to embed those principles in legislation. There are also recommendations to address stakeholder concerns about the scheme's complexity, risk and barriers to entry, to improve functioning of the biodiversity credits market, and to make the scheme more transparent in order to earn the confidence of stakeholders and the public.

I acknowledge that since this inquiry commenced the government has started work to improve aspects of the scheme. While this is welcome, there is more work to do. I urge the government to take this committee's report and recommendations into account and ensure that the scheme's ecological integrity is improved so that irreplaceable biodiversity cannot be traded away in exchange for cash.

I thank all the participants who gave their time and expertise to assisting the committee understand the scheme in all its complexity. I also thank the committee members who have engaged constructively and collaboratively during the course of the inquiry.

A handwritten signature in black ink, appearing to read 'Sue Higginson', with a long horizontal stroke extending to the right.

Ms Sue Higginson MLC  
**Committee Chair**

# Recommendations

## Recommendation 1

35

That the Department of Planning and Environment review and reform the design of the Biodiversity Offsets Scheme, to ensure it meets best practice principles for biodiversity offsetting. The review should be undertaken in consultation with stakeholders, and the reform must ensure that:

- the avoid, minimise, offset hierarchy in the scheme is strengthened to ensure offsetting is genuinely used as a last resort only for unavoidable impacts of development
- clear thresholds for where offsets should not be used are established, in order to protect threatened species and ecosystems that cannot be offset elsewhere
- the ecological equivalence of offsets is significantly strengthened by tightening the geographic and species equivalence requirements of the like-for-like rules and curtailing the use of variation and ancillary rules
- offsets result in genuinely additional gains to biodiversity that would not have occurred otherwise
- indirect offsets available under the scheme are reduced, and, where this does occur, the transparency around this mechanism is increased
- the option to use mine rehabilitation as an offset under the scheme is removed
- the discretion to discount offset requirements for non-ecological reasons is reduced, and, where this does occur, the transparency around this mechanism is increased.

## Recommendation 2

35

That the NSW Government define a set of scientifically sound principles that govern the operation of the Biodiversity Offsets Scheme, and ensure these are embedded in the *Biodiversity Conservation Act 2016*.

## Recommendation 3

36

That the Department of Planning and Environment commission an independent expert review of the Biodiversity Assessment Method and its underlying assumptions, including:

- the use of 'averted loss' to calculate biodiversity gains at offset sites
- the value placed on landscape connectivity and preservation of high quality habitat
- how the method accounts for cumulative loss arising from multiple developments in an area.

## Recommendation 4

48

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 5

48

That the Biodiversity Conservation Trust:

- urgently implement an application and review process for developer payments into the Biodiversity Conservation Fund to ensure proponents have exhausted all other private market avenues prior to paying into the Fund, and

- in the event credit supply is unavailable on the market, have a process to demonstrate that genuine like-for-like offset credits will be available, and there is a plan to bring those credits online, prior to receiving payments.

**Recommendation 6****49**

That the Department of Planning and Environment and Biodiversity Conservation Trust develop and implement a resourced plan to ensure the Biodiversity Offsets Scheme promotes protection of strategically important biodiversity.

**Recommendation 7****64**

That the Department of Planning and Environment develop and implement a monitoring, evaluation, reporting and improvement framework for the Biodiversity Offsets Scheme in a way that enables:

- assessment of the scheme's impact on biodiversity at the local, regional and state level
- assessment and reporting on the scheme's performance against agreed principles for biodiversity offsetting
- assessment of cumulative impacts of development
- identification of unintended impacts of the scheme
- public reporting on the scheme's performance against biodiversity conservation goals
- ongoing learning to improve the scheme.

**Recommendation 8****64**

That the Department of Planning and Environment institute measures to improve the quality of biodiversity assessment reports, including:

- instituting a quality assurance process
- ensuring the guidance on surveying and use of the Biodiversity Assessment Method is complete and up to date
- ensuring the maps essential to the scheme, such as the Biodiversity Values Map, are accurate and up to date.

**Recommendation 9****65**

That the Department of Planning and Environment and the Biodiversity Conservation Trust institute measures to increase compliance monitoring and enforcement, and ensure appropriate ecological monitoring occurs on all biodiversity stewardship sites.

**Recommendation 10****73**

That the NSW Government review and reconsider the appropriateness of land clearing pathways under the *Local Land Services Act 2013*, working with landholders, with the aim of increasing and incentivising biodiversity protections on rural land.

**Recommendation 11****73**

That the Department of Planning and the Environment and Local Land Services, in consultation with landholders, develop and implement a plan to prevent land clearing on rural land regulated by the *Local Land Services Act 2013* that would have otherwise triggered or increased obligations under the Biodiversity Offsets Scheme.

- Recommendation 12** **87**  
 That the Department of Planning and Environment continue to investigate and implement options for reducing the costs, financial risks and complexities associated with establishing stewardship sites, without compromising the ecological integrity of the Biodiversity Offsets Scheme. This should involve consideration of:
- upfront cost and complexity of establishing a stewardship site
  - costs and risks incurred by landholders who have established a stewardship site but have not sold sufficient credits to receive management action payments
  - the availability of information and support to landholders interested in participating in the scheme.
- Recommendation 13** **87**  
 That the Department of Planning and Environment provide greater certainty for developers on the likely scale of biodiversity offsetting liabilities in the lead up to land rezoning decisions.
- Recommendation 14** **88**  
 That the Department of Planning and Environment continue to increase the level of support for local governments in their role as consent authorities in the Biodiversity Offsets Scheme.
- Recommendation 15** **104**  
 That the NSW Government continue to, as a matter of priority, take action to promote development of a functioning biodiversity credit market, ensuring that:
- structural issues stemming from the government acting as a regulator, facilitator and buyer in the market are addressed
  - the price distortion caused by the role of the Biodiversity Conservation Trust and the way payments to the Biodiversity Conservation Fund are calculated is remedied
  - there is transparency of market information about supply and demand for credits and credit pricing
  - the market is able to set prices in a way that recognises scarcity and incentivises landholder participation in the scheme.
  - the ecological credibility of the Biodiversity Offsets Scheme is maintained by upholding the 'like-for-like' principle.
- Recommendation 16** **105**  
 That the NSW Government review its handling of the transition from the BioBanking Scheme to the Biodiversity Offset Scheme with a view to building confidence in the long term operation of the biodiversity credit market.
- Recommendation 17** **105**  
 That the Department of Planning and Environment investigate and implement feasible options for making the Biodiversity Offsets Scheme more accessible and attractive for potential philanthropic and conservation-minded investors.
- Recommendation 18** **118**  
 That the Department of Planning and Environment and Biodiversity Conservation Trust increase transparency of the use of offsets to enable public scrutiny of the Biodiversity Offsets Scheme. This should include a centralised, publicly accessible database that:

- enables spatial viewing of development and stewardship sites, including site boundaries
- contains information about biodiversity stewardship agreements, such as type and quantity of credits, management actions and restoration uplift
- contains information about the ecological outcomes of biodiversity stewardship agreements
- contains information about which credits or offset sites have been used to offset which developments
- shows all offset obligations transferred to the Biodiversity Conservation Trust
- shows offset obligations for all major projects, including any discounting.

**Recommendation 19****119**

That the Department of Planning and Environment:

- continue to review arrangements for managing conflict of interest in the Biodiversity Offsets Scheme, with a view to providing transparent processes for declaring and managing conflicts of interest among scheme stakeholders
- review arrangements for the accreditation and monitoring performance of accredited assessors, with a view to ensuring the quality of ecological assessments in the scheme, and appropriate management of conflicts of interest.

## **Conduct of inquiry**

The terms of reference for the inquiry were self-referred by the committee on 24 June 2021.

The committee received 104 submissions and 3 supplementary submissions.

The committee held four public hearings: one via video-conference and three at Parliament House in Sydney.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts, tabled documents and answers to questions on notice.





# Chapter 1 Background

This chapter provides background information about biodiversity offsetting in New South Wales. It summarises the concept of biodiversity offsetting, provides a brief history of biodiversity offsetting practices, explains how the Biodiversity Offsets Scheme (the scheme) works, and includes an outline of the roles and responsibilities of key government agencies.

## Importance of native vegetation and habitat

- 1.1** The underlying tenet of any biodiversity offsetting scheme is the recognition that native vegetation forms a vital part of Australia's biodiversity<sup>1</sup> and provides many benefits, including preventing erosion and soil salinity, maintaining water quality, providing habitat, and acting as a carbon sink. It can also improve agricultural productivity. Conversely, clearing of native vegetation leads to the decline of native species, degrades land, increases soil salinity, and disrupts ecosystem functionality. Nevertheless, vegetation clearing may be necessary to facilitate development.<sup>2</sup>
- 1.2** Both government and non-government stakeholders to the inquiry noted the scheme was brought in against a backdrop of declining biodiversity in New South Wales. This is acknowledged in the NSW Government submission, citing data from the *NSW Biodiversity Outlook Report 2020*.<sup>3</sup> The *NSW State of the Environment Report 2021* found worsening trends in the permanent clearing rate for woody native vegetation, and for the extent, condition and ecological carrying capacity of native vegetation.<sup>4</sup> It also noted declining ecological condition and carrying capacity of existing ecosystems due to the 2019-20 bushfires.<sup>5</sup>

## What is biodiversity offsetting?

- 1.3** Biodiversity offsetting is a conservation mechanism that seeks to compensate for (or 'offset') the biodiversity impacts associated with native vegetation clearing and habitat loss. It is based on the theory that biodiversity values that are lost in one location (at a development site) can be compensated for by maintaining and improving another habitat location (an offset site).
- 1.4** In modern offset schemes (such as in New South Wales), developers and landholders that impact biodiversity become liable with a biodiversity offset credit obligation that must be met to offset the impact. Landholders with biodiverse habitat can generate credits by establishing offset sites on their land (within the scheme, these are referred to as biodiversity 'stewardship' sites). These credits can then be sold to developers to meet credit obligations of development sites.

<sup>1</sup> Biodiversity is the variety of living animal and plant life from all sources, and includes diversity within and between species and diversity of ecosystems. (Source: *Biodiversity Conservation Act 2016*, s 1.5(1).)

<sup>2</sup> NSW Parliamentary Research Service, *Native vegetation clearing in NSW: a regulatory history* (October 2014), p 1.

<sup>3</sup> Submission 97, NSW Government, p 2.

<sup>4</sup> NSW Environment Protection Authority, *NSW State of the Environment 2021* (December 2021), p 54.

<sup>5</sup> NSW Environment Protection Authority, *NSW State of the Environment 2021* (December 2021), p 54.

- 1.5 Offsetting creates a financial disincentive for developers to destroy biodiverse habitat while still enabling development to occur, at a cost. The cost of offsetting provides funding for landholders who wish to protect habitat on their properties.<sup>6</sup>

## History of biodiversity offsetting policies in New South Wales

- 1.6 The scheme commenced in August 2017, however, in the years leading up to its introduction, various iterations of the scheme were in place. Prior to 2008, biodiversity offsets were negotiated between the NSW Government and developers on a case-by-case basis with no consistent approach for securing offset sites.
- 1.7 In 2008, the NSW BioBanking Scheme was established as a voluntary scheme. In 2010, the NSW biodiversity credit market opened to trade BioBanking credits, which were calculated using the BioBanking Assessment Methodology.
- 1.8 In October 2014, the *NSW Biodiversity Offsets Policy for Major Projects* commenced. It applied only to major (state significant) projects. Under this policy, BioBanking agreements were required to secure offset sites. It was underpinned by a methodology outlined in the Framework for Biodiversity Assessment.<sup>7</sup>
- 1.9 In 2014 the government commissioned a review of biodiversity legislation, which concluded that multiple assessment pathways were inefficient and that there was too much subjectivity in decision-making surrounding the severity of biodiversity impacts, the appropriateness of assessment methods, and the adequacy of offsets. The review found that this led to uncertainty for proponents and a lack of transparency of decision-making by government consent authorities. It was recommended that a single, scientifically-based, and transparent method for assessing biodiversity impacts be developed, and that a single offsets policy should apply to all development.<sup>8</sup>
- 1.10 The NSW Government accepted the review recommendations, and reforms were introduced with the passage of the *Biodiversity Conservation Act 2016* (BC Act) (which replaced and consolidated previous nature conservation legislation) and amendments to the *Local Land Services Act 2013* (LLS Act). The scheme was part of this package of land management and biodiversity conservation reforms that were, according to the NSW Government, 'carefully negotiated to balance the interests of agriculture, development and biodiversity conservation'.<sup>9</sup> In his second reading speech, the Hon. Niall Blair stated: 'The objectives of these reforms are to arrest and

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<sup>6</sup> NSW Department of Planning and Environment, *How does the Biodiversity Offsets Scheme work?* (10 June 2021), <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/about-the-biodiversity-offsets-scheme/how-the-biodiversity-offsets-scheme-works> ; Submission 76, Deep River Group, p 6; NSW Department of Planning and Environment, *Our principles for the use of biodiversity offsets in NSW* (29 June 2021), <https://www.environment.nsw.gov.au/topics/animals-and-plants/conservation-programs/nsw-biodiversity-offsets-policy-for-major-projects/principles-for-use-of-biodiversity-offsets-in-nsw>.

<sup>7</sup> Submission 97, NSW Government, Attachment B, p 2.

<sup>8</sup> Submission 97, NSW Government, p 5; Media release, Hon Rob Stokes MP, Minister for Environment, 'The environment, farmers and industry to benefit from new offset policy', 8 September 2014.

<sup>9</sup> Submission 97, NSW Government, p 3.

ultimately reverse the current decline in the State's biodiversity while facilitating ecologically sustainable development.<sup>10</sup>

- 1.11** The NSW Government submission stated: 'The Biodiversity Offsets Scheme aims to facilitate ecologically sustainable development – that is, to allow decision-makers to understand the biodiversity costs when considering the overall costs and benefits of development and land use change and to use pricing and incentive mechanisms to deliver biodiversity conservation. It is designed to enable proponents to address environmental impacts from development flexibly and efficiently'.<sup>11</sup>
- 1.12** The scheme was established under Part 6 of the BC Act and commenced with the introduction of the associated regulations on 25 August 2017.<sup>12</sup>
- 1.13** In addition to the introduction of the above reforms, the LLS Act was amended with the introduction of Part 5A, which provided a different and separate approach to compensate vegetation clearing on rural land.<sup>13</sup> The interplay between the operation of these two acts are explored further in Chapter 5.

## How the Biodiversity Offsets Scheme works<sup>14</sup>

### What impacts trigger the Biodiversity Offsets Scheme?

- 1.14** The scheme is triggered when a development, project or activity meets an impact threshold. For example, by clearing native vegetation above a certain area, or significantly impacting a threatened native species or ecological community.<sup>15</sup> The term 'threatened' includes three categories of extinction risk (listed below in order of increasing threat status):
- vulnerable – is facing a high risk of extinction in Australia in the medium-term future
  - endangered – is facing a very high risk of extinction in Australia in the near future
  - critically endangered – is facing an extremely high risk of extinction in Australia in the immediate future.<sup>16</sup>

<sup>10</sup> Hon Niall Blair MLC, Second reading speech: Biodiversity Conservation Bill 2016 and Local Land Services Amendment Bill 2016, NSW Legislative Council, 9 November 2016.

<sup>11</sup> Submission 97, NSW Government, p 4.

<sup>12</sup> Submission 97, NSW Government, Attachment B, pp 1-2.

<sup>13</sup> Submission 97, NSW Government, p 3.

<sup>14</sup> The intent of this section is not to provide a comprehensive outline of how the Scheme operates. For a more detailed overview of how the Scheme works, please refer to the NSW Government's submission (No. 97).

<sup>15</sup> NSW Department of Planning and Environment, *When does the Biodiversity Offsets Scheme Apply?* (19 October 2021), <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/about-the-biodiversity-offsets-scheme/when-does-bos-apply>.

<sup>16</sup> *Biodiversity Conservation Act 2016*, ss 4.4-4.5.

### How biodiversity impacts are quantified

- 1.15** The Biodiversity Assessment Method is applied to calculate biodiversity losses at development sites and biodiversity gains at stewardship sites. Within the scheme, 'no net loss' (or offsetting of impacts) is achieved when, in the opinion of the Minister for Environment, the value of an offset is equivalent to impacts as calculated by the Biodiversity Assessment Method (on a project-by-project basis).<sup>17</sup>
- 1.16** Only accredited assessors that have been trained and accredited by the Department of Planning and Environment (the department) can apply the Biodiversity Assessment Method. To quantify biodiversity values, accredited assessors undertake field surveys to measure vegetation quality and the presence of flora and fauna. Assessors consider the area of impact, the types of ecological communities<sup>18</sup> and their conservation status, the habitat or species impacted, connectivity with other areas of habitat, the condition of the habitat and the expected benefits of land management actions.<sup>19</sup> Biodiversity values are quantified in the Biodiversity Assessment Method Calculator, which summates and expresses these biodiversity values as 'credits', of which there are two types.
- 'Ecosystem credits' represent both threatened and non-threatened vegetation communities. In many instances, threatened species are also represented by ecosystem credits if the occurrence of the species can be predicted by the vegetation or landscape, or the species is difficult to detect using surveys.
  - 'Species credits' represent habitat for a particular threatened flora or fauna species<sup>20</sup> that cannot be predicted by vegetation or landscape.<sup>21</sup>
- 1.17** Accredited assessors document their findings in a biodiversity development assessment report (for a development site), and a biodiversity stewardship site assessment report (for a stewardship site).<sup>22</sup>

### Approval pathways for land clearing activities

- 1.18** The approval pathway for land clearing activities and what triggers the scheme depends on the type of development or clearing activity being undertaken. There are different rules and approval pathways for:
- major projects

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<sup>17</sup> *Biodiversity Conservation Act 2016*, s 6.7 (3)(b).

<sup>18</sup> A naturally occurring group of plants, animals and other organisms living in a unique habitat.

<sup>19</sup> NSW Department of Planning and Environment, *Our principles for the use of biodiversity offsets in NSW* (29 June 2021), <https://www.environment.nsw.gov.au/topics/animals-and-plants/conservation-programs/nsw-biodiversity-offsets-policy-for-major-projects/principles-for-use-of-biodiversity-offsets-in-nsw>.

<sup>20</sup> Some threatened species are associated with both ecosystem and species credits, and are referred to as 'dual credit species'.

<sup>21</sup> Submission 97, NSW Government, p 6; Submission 58, Mr Alexander Cox, pp 2 and 14; Submission 49, Lock the Gate Alliance, p 5.

<sup>22</sup> Submission 97, NSW Government, p 6.

- local developments
- public works
- high risk agricultural activities on rural-zoned land
- clearing on urban and environment-zoned areas.

1.19 Each of these are discussed briefly below.

### ***Major projects approval pathway***

1.20 Major projects include 'state significant development' and 'state significant infrastructure' such as mines, roads and dams. The scheme automatically applies to all major projects. If the consent authority approves the project, it can attach a condition of approval requiring the proponent to offset the project's biodiversity impacts.<sup>23</sup>

1.21 Over the past four years, major projects were liable for around 90 per cent of ecosystem credit obligations and around 96 per cent of species credit obligations.<sup>24</sup>

### ***Local development approval pathway***

1.22 Local development is assessed by local councils and includes development such as residential and commercial building and subdivisions. The scheme applies to local development if any of the following triggers are met:

- the development is on the Biodiversity Values Map – this map shows coastal wetlands, old growth forest, high conservation value grasslands and land containing threatened species and ecological communities
- the area of clearing is above a certain threshold, which depends on the minimum lot size – for example, on a lot smaller than 1 ha,<sup>25</sup> 0.25 ha can be cleared without triggering the scheme
- the 5-part test of significance is met, for example, if the clearing will place a local population of a species at risk of extinction
- the clearing is on land declared as Areas of Outstanding Biodiversity Value<sup>26</sup>, such as the habitat of the Wollemi pine.<sup>27</sup>

1.23 If a local council is the consent authority and approves a local development which triggers any of the above thresholds, it must attach conditions requiring the proponent to offset the biodiversity impacts. The proponent must comply with the conditions, but has the option to

<sup>23</sup> Submission 97, NSW Government, Attachment B, p 2; Submission 92, Environmental Defenders Office, p 9.

<sup>24</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 24.

<sup>25</sup> For comparison, a soccer field is 0.714 ha.

<sup>26</sup> There are four declared areas.

<sup>27</sup> Submission 97, NSW Government, Attachment B, pp 3-5.

use variation rules, which provide some flexibility around 'like-for-like' offsetting requirements (described in Chapter 2).<sup>28</sup>

### ***Public works approval pathway***

- 1.24** Public works refers to activities where the developer is a public authority that is also the consent authority, for example, a local council undertaking road works. These activities require the Test of Significance to be applied to determine if the activity is likely to significantly impact biodiversity. If so, the public authority can either enter the scheme or prepare a Species Impact Statement. If a Species Impact Statement is prepared, the 'Environment Agency Head'<sup>29</sup> (in practice, the Coordinator-General of the Environment and Heritage Group, within the department) must concur with the proposed conservation measures, which may include a requirement to offset.<sup>30</sup>

### ***Approval pathway for high-risk agricultural activities on rural land***

- 1.25** Agricultural clearing activities on rural-zoned land are regulated under the *Local Land Services Act 2013* and Native Vegetation (Land Management) Code 2018. Clearing is undertaken with certification from Local Land Services and may involve 'set asides', which act somewhat like offsetting, but fall outside the scheme.<sup>31</sup> If the clearing is not permitted under the LLS Act, the clearing proposal falls under the scheme and is determined by the Native Vegetation Panel. So far, only one activity has been referred to the Native Vegetation Panel through this approval pathway.<sup>32</sup>

### ***Approval pathway for clearing on urban and environment zone lands***

- 1.26** Clearing activities in metropolitan regions or in non-rural zones outside of metropolitan regions (such as clearing for amenity or access) is regulated by the State Environmental Planning Policy (Vegetation in Non-Rural Areas) 2017. This planning instrument applies the scheme if it meets the area clearing threshold, or is on the Biodiversity Values Map, as described above in paragraph 1.22. The Native Vegetation Panel is the decision maker.<sup>33</sup>

### **Serious and irreversible impacts**

- 1.27** All biodiversity assessments must consider if there may be a serious and irreversible impact to a threatened species or ecological community that puts it at risk of extinction. Local developments that are determined to have a serious and irreversible impact cannot be approved. Major projects, public works and biodiversity certifications with a serious and irreversible impact

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<sup>28</sup> Submission 92, Environmental Defenders Office, pp 8-9.

<sup>29</sup> At the time of writing, the legislation referred to the Chief Executive of the Office of Environment and Heritage, which no longer exists. In practice, this is currently the Coordinator-General of the Environment and Heritage Group within the Department of Planning and Environment.

<sup>30</sup> Submission 97, NSW Government, Attachment B, p 3.

<sup>31</sup> Submission 97, NSW Government, Attachment B, pp 3-4.

<sup>32</sup> Evidence, Mr David Witherdin, Chief Executive Officer, Local Land Services, 10 December 2021, p 50.

<sup>33</sup> Submission 97, NSW Government, Attachment B, p 4.

can be approved, but the consent authority must consider whether additional measures can be implemented to minimise the impact.<sup>34</sup>

### **Achieving like-for-like requirements**

- 1.28** The like-for-like principle is embedded within the scheme by dictating that impacted habitat must be offset with very similar vegetation, which is equally threatened, in the same geographical area. Impacted species must be offset with the same species, but can be located anywhere in New South Wales.<sup>35</sup> However, if a developer is unable to find like-for-like credits, and chooses not to use the other offset options, it can seek approval to offset using a broader suite of biodiversity entities by using the variation rules. This provides some flexibility from adhering to the like-for-like requirement.<sup>36</sup>

### **Options for meeting offset obligations**

- 1.29** The BC Act specifies that one of its core components is the use of market-based conservation mechanisms to offset biodiversity impacts.<sup>37</sup> The scheme's design has established three primary options to enable developers to meet their offset obligations:
- purchasing credits on an open market, generally from landholders who have established stewardship sites
  - establishing their own stewardship site, to generate credits
  - paying into the Biodiversity Conservation Fund, which then transfers the offset obligation to the Biodiversity Conservation Trust (the Trust) for it to acquit those obligations on their behalf. Since the scheme commenced, the vast majority of developers used this option.<sup>38</sup>
- 1.30** Developers can also fund a biodiversity conservation action that benefits the threatened entity being impacted, if the action is listed in the department's 'ancillary rules'.<sup>39</sup> Mining companies also have the option to ecologically rehabilitate a mine site to reduce the offset obligations associated with a portion of the ecological community or threatened species being impacted.<sup>40</sup>
- 1.31** Once offset obligations are met, the associated credits are 'retired' and cannot be used again.

<sup>34</sup> Submission 97, NSW Government, p 7.

<sup>35</sup> Submission 97, NSW Government, p 8; Biodiversity Conservation Regulation 2017 s 6.3 (4).

<sup>36</sup> Submission 97, NSW Government, p 8; Department of Planning and Environment, *Offset rules* (10 June 2021), <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/offset-obligations-and-credit-trading/offset-rules>.

<sup>37</sup> *Biodiversity Conservation Act 2016*, s 1.3(m).

<sup>38</sup> Submission 58, Mr Alexander Cox, p 5; Submission 97, NSW Government, pp 7-8; Submission 97, NSW Government, Attachment A, p 1; Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 19.

<sup>39</sup> NSW Department of Planning and Environment, *Offset rules* (10 June 2021), <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/offset-obligations-and-credit-trading/offset-rules>.

<sup>40</sup> Submission 97, NSW Government, p 8.



### ***How credits are purchased on the market***

**1.32** Required credits can be identified in the market on a 'credit supply register'. A developer would contact the credit holder and negotiate a price for the purchase.<sup>41</sup> A Spot Price Index of recent and past BioBanking credit trades provides the historically traded value of different species and ecosystem credits, which can provide guidance on their estimated value.<sup>42</sup>

### ***How stewardship sites are established***

**1.33** Landholders can earn income by establishing stewardship sites, and managing their land for conservation. Stewardship sites can be established over all or part of a property. A stewardship site is established by entering a biodiversity stewardship agreement with the Trust.

**1.34** Landholders first need to pay an accredited assessor to survey the habitat on their land and calculate the class, type and number of credits able to be generated. Credits can be generated:

- primarily, on the basis of averted loss – the Biodiversity Assessment Method assumes an ongoing biodiversity decline over 20 years if left unmanaged. By managing the land, those losses in vegetation and habitat condition can be averted, and credited.
- by undertaking additional active restoration management actions, such as planting trees and installing nesting boxes.<sup>43</sup>

**1.35** Accredited assessors also develop a proposed management plan for the site that sets out the proposed actions for conserving the site over a 20-year period, which is costed. The total cost of management equates to a Total Fund Deposit.

**1.36** Once a biodiversity stewardship agreement is finalised, the credits for that site are listed on relevant credit registers and can be sold. The biodiversity stewardship agreement is also registered on the title of the land, with the aim of protecting the habitat in perpetuity.

**1.37** Once credits are sold, the landholder must pay the Total Fund Deposit to the Trust, which is held in the Biodiversity Stewardship Payments Fund. Any money that is made from the sale of credits above the Total Fund Deposit can be retained as profit. Landholders also become exempt from paying land tax for lands established as a stewardship site.

**1.38** Landholders then receive annual management payments from the Trust held in the Biodiversity Stewardship Payments Fund to cover the cost of land management over 20 years. After 20 years, a landholder would continue to receive annual payments to maintain their site, and has the

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<sup>41</sup> NSW Department of Planning and Environment, *Find biodiversity credits to offset your credit obligation* (23 December 2021), <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/offset-obligations-and-credit-trading/find-biodiversity-credits-to-offset-your-credit-obligation>.

<sup>42</sup> NSW Department of Planning, Industry and Environment, *Spot Price Index for BioBanking Assessment Methodology Biodiversity Credits – User guide – free version* (2019), p iv.

<sup>43</sup> Evidence, Mr Alexander Cox, 22 October 2021, p 11; Department of Planning, Industry and Environment, *Biodiversity Assessment Method* (2020), pp 45, 51-55 and 157.

option to generate additional credits, for example, to be financially rewarded for any new threatened species that emerge on the site.<sup>44</sup>

### ***How payments into the Biodiversity Conservation Fund are calculated***

- 1.39** When developers choose to pay into the Biodiversity Conservation Fund and transfer their offset obligations to the Trust, the cost of their obligation is calculated using the Biodiversity Offsets Payment Calculator, which in October 2022 was replaced with the Biodiversity Conservation Fund Charge System. The calculator used an econometric model to estimate a market price for each credit type, with an added premium to cover risk and administrative costs that the Trust would incur.

### **Biodiversity certification**

- 1.40** Biodiversity certification (or 'biocertification') is an approach that allows biodiversity to be assessed upfront on a larger scale, instead of site by site at the development application stage. It is a more certain and efficient way for proponents with multiple parcels or a large lot to know what the biodiversity liabilities are on different parts of a development. An application for biodiversity certification must be accompanied by a biodiversity certification assessment report prepared by an accredited assessor. Subsequent individual development applications on biodiversity certified land no longer require biodiversity to be assessed.<sup>45</sup>
- 1.41** 'Strategic biodiversity certification' is a type of biodiversity certification that is only available to planning authorities. It can be used to achieve planning and biodiversity outcomes on a large scale, such as by facilitating movement corridors for fauna. It allows more offsetting options, such as adding land to national parks, using environment zones, or any other measure determined by the Minister for Environment.<sup>46</sup>
- 1.42** The Minister for Environment, or delegate, determines applications for biodiversity certification. If approved, a biodiversity certification can remain valid indefinitely.<sup>47</sup>

### **Roles and responsibilities of government agencies**

#### **The Biodiversity Conservation Trust's roles and responsibilities**

- 1.43** The Trust has a major role to play in the administration of the scheme. The Trust's key responsibilities include:

<sup>44</sup> Submission 97, NSW Government, pp 9 and 13; Biodiversity Conservation Trust, *Biodiversity Stewardship Agreement: Landholder Guide* (May 2021), p 9; Department of Planning and Environment, *Generating and selling biodiversity credits* (10 June 2021), <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/about-the-biodiversity-offsets-scheme/generating-and-selling-biodiversity-credits>.

<sup>45</sup> Submission 97, NSW Government, p 11; Submission 92, Environmental Defenders Office, p 24.

<sup>46</sup> Submission 97, NSW Government, pp 11-12; Submission 92, Environmental Defenders Office, pp 24-25.

<sup>47</sup> Submission 97, NSW Government, p 11; *Biodiversity Conservation Act 2016*, s 8.10 (1).

- facilitating the supply of credits by entering into biodiversity stewardship agreements with landholders<sup>48</sup>
- ensuring that landholders fulfil their management action responsibilities
- managing the Biodiversity Stewardship Payments Fund, which involves making annual management payments to stewardship site owners
- securing biodiversity offsets on behalf of proponents that have transferred their offset obligations to the Trust.<sup>49</sup>

**1.44** The Trust has a greater range of options than developers to acquit its offset obligations. The options are arranged in a hierarchy, with a preference to retire credits under the like-for-like rules, or the use of ancillary rules (funding a biodiversity conservation action that benefits the impacted entity<sup>50</sup>). Lower priority options include using the variation rules, biodiversity conservation actions not listed in the ancillary rules, and using the variation rules without considering location requirements. The Trust is also able to combine offset obligations from multiple proponents. Ultimately, any conservation measure that is approved by the Minister for Environment can be used to relinquish the Trust's obligations.<sup>51</sup>

**1.45** The Trust uses various credit procurement mechanisms to induce supply of species credits, which are more difficult to acquit than ecosystem credits. This includes competitive open tenders, and both open and targeted fixed-price offers. The Trust also has a 'credits wanted' register, a standing fixed-price offer, and runs credit tenders when there is a more competitive marketplace to source credits.<sup>52</sup>

**1.46** There is no statutory timeframe for the Trust to relinquish its offset obligations, however it has a policy to aim to acquit all offset obligations within five years, with a median timeframe of three years.<sup>53</sup>

### **The Department of Planning and Environment's responsibilities**

**1.47** On behalf of the Minister for Environment, the department's responsibilities include:

- establishing the scheme's policy, legislative and regulatory framework, including developing tools and methodologies such as the Biodiversity Offsets Payment Calculator, Biodiversity Assessment Method, and supporting databases and platforms
- providing accreditation for assessors
- transferring and retiring biodiversity credits, and maintaining public registers of credits

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<sup>48</sup> This responsibility has recently been transferred to the Credit Supply Taskforce, within the Department of Planning and Environment. Correspondence from The Hon James Griffin MP, Minister for Environment and Heritage, to Chair, 20 October 2022, p 2.

<sup>49</sup> Submission 97, NSW Government, p 10.

<sup>50</sup> For example, to undertake surveys for a particular species.

<sup>51</sup> Submission 97, NSW Government, Attachment D, pp 5-6.

<sup>52</sup> Evidence, Mr Paul Elton, Chief Executive Officer, Biodiversity Conservation Trust, 10 December 2021, pp 41-42.

<sup>53</sup> Submission 97, NSW Government, Attachment D, p 5.

- making recommendations for the biodiversity certification of land.<sup>54</sup>

1.48 Additionally, the department assists participants who engage with the scheme, and provides advice to the consent authority section of the department regarding the assessment of major projects.<sup>55</sup>

### **Responsibilities of consent authorities**

1.49 Consent authorities are responsible for determining whether or not to approve development or clearing activities. If approved, consent authorities set biodiversity offset obligations for developers. These authorities are also responsible for ensuring compliance with their conditions. The consent authorities are:

- for major (state significant) projects - the Minister for Planning (or delegate, such as the department, or the Independent Planning Commission)
- local councils – for local development under Part 4 of the *Environmental Planning and Assessment Act 1979* (EP&A Act)
- public authorities – for public works under Part 5 of the EP&A Act
- the Native Vegetation Panel – for clearing on rural land that is not exempt from the scheme, and clearing on non-rural land that is not related to a development application that triggers the scheme.<sup>56</sup>

### **Local Land Services' responsibilities**

1.50 Local Land Services has no official responsibilities in relation to the scheme. It assists landholders to navigate the rules for clearing on rural land, including the requirements of the Land Management (Native Vegetation) Code 2018. Local Land Services informed the committee that it has no compliance role to enforce land clearing requirements.<sup>57</sup>

## **Recent updates to the scheme**

1.51 In October 2020 an updated Biodiversity Assessment Method was released.<sup>58</sup>

<sup>54</sup> Submission 97, NSW Government, pp 9-10; *Biodiversity Conservation Act 2016*, s 9.7(1)(d).

<sup>55</sup> Submission 97, NSW Government, p 9; Evidence, Ms Michelle Dumazel, Executive Director – Biodiversity and Conservation Division, Department of Planning and Environment, 10 December 2021, p 38.

<sup>56</sup> Submission 97, NSW Government, pp 10-11.

<sup>57</sup> Evidence, Mr Witherdin, 10 December 2021, p 50.

<sup>58</sup> Submission 97, NSW Government, Attachment B, p 2.

- 1.52** In June 2022, the NSW Government announced that it would establish a new Biodiversity Credits Supply Fund, which is now operational.<sup>59</sup> The fund is managed by the Credit Supply Taskforce and has an initial investment of \$106.7 million to:
- buy credits from landholders upfront, based on forecasted demand for credits
  - sell those credits to developers at purchase price, with a 'small' mark up
  - re-invest proceeds to buy more credits.<sup>60</sup>
- 1.53** On 21 September 2022, the NSW Government released the terms of reference for its statutory 5-year review of the BC Act, as well as of Part 5A of the LLS Act (relating to the management of native vegetation), with a report due by 24 August 2023.<sup>61</sup>
- 1.54** In October 2022, the department replaced the Biodiversity Offsets Payment Calculator with the Biodiversity Conservation Fund Charge System.<sup>62</sup>
- 1.55** In August 2022, the Audit Office of NSW released its Performance Audit on the 'Effectiveness of the Biodiversity Offsets Scheme' and made various findings and recommendations, which the NSW Government has responded to. This report draws on relevant findings and updates referenced in the Audit Office report.<sup>63</sup>

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<sup>59</sup> Correspondence from The Hon James Griffin MP, Minister for Environment and Heritage, to Chair, 20 October 2022, p 2.

<sup>60</sup> NSW Department of Planning and Environment, *About the Biodiversity Credits Supply Fund and Taskforce* (31 October 2022), <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/about-the-biodiversity-offsets-scheme/about-the-biodiversity-credits-supply-fund>.

<sup>61</sup> NSW Department of Planning and Environment, *Terms of Reference: Statutory five-year review of the Biodiversity Conservation Act 2016* (21 September 2022).

<sup>62</sup> NSW Biodiversity Conservation Trust, *Biodiversity Conservation Fund Charge System*, <https://www.bct.nsw.gov.au/info/biodiversity-conservation-fund-charge-system>.

<sup>63</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022).

## Chapter 2 Design of the Biodiversity Offsets Scheme

Biodiversity offsets schemes are designed to compensate for unavoidable destruction of biodiversity caused by development with protection and enhancement of biodiversity elsewhere, resulting in 'no net loss', or better, of biodiversity. There are internationally-evidenced principles for effective biodiversity offsetting schemes. This chapter considers to what extent the Biodiversity Offsets Scheme (scheme) reflects these principles. In particular, it considers: the appropriateness of the 'no net loss' standard and how this is achieved in the scheme; application of the 'avoid, mitigate, offset' hierarchy; cases where offsetting should not be used and whether the scheme is designed to ensure offsets are genuinely additional. Further issues considered are: timing of offset delivery; use of indirect offsets; use of mine rehabilitation as an offset and discounting of offsets.

### Is offsetting an effective approach to conserve biodiversity?

**2.1** The NSW Government submission noted that the scheme is one component of the government's approach to combatting declining biodiversity.<sup>64</sup> It suggested that, without biodiversity offsetting, clearing related to development and land use change would be unmeasured and unmitigated, leading to accelerated biodiversity loss. It argued that, by creating a mechanism to value biodiversity, the scheme provides a way for this value to be factored into decisions.<sup>65</sup>

**2.2** However, not all stakeholders were convinced that biodiversity offsetting is the best approach to conserve biodiversity. The Environmental Defenders Office summarised some general criticisms about the principles and practicality of offsetting as a means to conserve biodiversity as follows:

... questions remain about the effectiveness of biodiversity offsetting and its ability to deliver the anticipated environmental outcomes. Critics of biodiversity offsetting point to difficulties in quantifying biodiversity values for market purposes, and in establishing offset markets (i.e. supply and demand requirements), challenges in re-creating nature, time lags in restoring areas, failure to account for declining baselines, failures to effectively manage offset sites and protect offset sites in perpetuity, and perverse outcomes, as reasons to adopt the use of biodiversity offsets with caution.<sup>66</sup>

**2.3** Several submissions to the inquiry questioned the premise of biodiversity offsetting, including the assumption that ascribing an economic value to biodiversity, rather than recognising its intrinsic value, will lead to its protection. It was also challenged that the loss of biodiversity in one location can be compensated with protection somewhere else. Comments questioning the concept of biodiversity offsetting included, for example:

- 'the assumption that ecological values associated with areas of natural environment can be translated into dollar values and bought and sold in a market system is a myth ... the second false assumption is that ecological systems can be destroyed in one area and then

<sup>64</sup> Submission 97, NSW Government, p 2.

<sup>65</sup> Submission 97, NSW Government, pp 2, 4.

<sup>66</sup> Submission 92, Environmental Defenders Office, pp 4-5.

recreated somewhere else to match the complexity and functions of the cleared natural vegetation community.<sup>67</sup>

- 'there can be no price put on the loss of a species ... or an entire ecosystem'<sup>68</sup>
- 'biodiversity offsets that are shams or "greenwash" achieve very little in actually protecting our native fauna and flora'.<sup>69</sup>

2.4 The following sections review evidence received on principles for effective biodiversity offsetting schemes, and the integrity of the design of the New South Wales scheme based on these principles.

## Principles for effective biodiversity offsetting schemes

2.5 There are internationally recognised principles that can aid the design of effective biodiversity offsetting programs. The Department of Planning and Environment's (the department's) website lists principles which it says are 'a useful framework when considering biodiversity impacts and appropriate offset requirements'.<sup>70</sup> Submissions to this inquiry highlighted principles articulated by the International Union for the Conservation of Nature (IUCN) and the Organisation for Economic Cooperation and Development (OECD) that are based on experience and research in many countries.<sup>71</sup> The work of the IUCN is summarised below to give some context to stakeholder comments about the design integrity of the scheme.

2.6 In 2016 the IUCN provided the following summary position on use of biodiversity offsets:

- Biodiversity offsets are **measurable conservation outcomes designed to compensate for adverse and unavoidable impacts of projects**, in addition to prevention and mitigation measures already implemented.
- Biodiversity offsets **are only appropriate for projects which have rigorously applied the mitigation hierarchy framework**, a widely accepted approach for biodiversity conservation.
- The aim of offsets is to **achieve No Net Loss (NNL) and preferably a Net Gain (NG) of biodiversity** when projects take place. Measures that are not designed to result in NNL and preferably NG are not biodiversity offsets.
- The achievement of **NNL/NG is dependent on measurable, appropriately implemented, monitored, evaluated and enforced offset** schemes.

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<sup>67</sup> Submission 11, Mr Noel Corkery, p 1. See also Submission 27, Name suppressed, pp 1-2.

<sup>68</sup> Submission 7, Ms Paula Morrow, p 1.

<sup>69</sup> Submission 30, Mrs Leanne George, p 1.

<sup>70</sup> NSW Department of Planning and Environment, *Our principles for the use of biodiversity offsets in NSW*, <https://www.environment.nsw.gov.au/topics/animals-and-plants/conservation-programs/nsw-biodiversity-offsets-policy-for-major-projects/principles-for-use-of-biodiversity-offsets-in-nsw>.

<sup>71</sup> Submission 29, Dr Judy Lambert, p 1; Submission 88, Mr Peter Maslen, p 1.

- **Biodiversity offsets must be a measure of last resort; and in certain cases offsets are not appropriate** and should not be used.<sup>72</sup>

2.7 The IUCN further identified the following elements as necessary to effective use of biodiversity offsets:

- **Measuring and exchanging biodiversity**, defensible and replicable measures and units of exchange, sufficient baseline surveys, and established exchange rules governing which residual impacts can be offset by what type of gains.
- **Additionality**, biodiversity offsets must secure additional conservation outcomes that would not have happened otherwise.
- **Timeframe**, the offset gain should last at least as long as the impact being addressed which in most cases means in perpetuity.
- **Uncertainty**, offsets must account for uncertainty by clearly documenting data sources, assumptions, and knowledge gaps.
- **Monitoring and evaluation**, continued surveys of impacts and offset activities to measure the losses and gains that have actually transpired.
- **Governance and permanence**, legal, institutional and financial measures must be in place to ensure the effective design and implementation of offset schemes. The mitigation hierarchy framework should be embedded in landscape and seascape level planning and legislation.<sup>73</sup>

2.8 The sections that follow consider evidence from the NSW Government and other stakeholders on how the scheme reflects the principles for offsetting schemes outlined above.

## Are biodiversity offsetting principles met in the New South Wales scheme?

2.9 The government stated that the scheme is built on ecological principles that promote regulatory integrity of biodiversity assessment and offsets. It provided the following outline of how the scheme reflects key principles:

- **Measuring and exchanging biodiversity:** The Biodiversity Assessment Method provides a single, transparent and repeatable method for quantifying the biodiversity values lost at development sites and gained at offset sites, thus provides a peer reviewed method for establishing loss and gains in biodiversity values.
- **Avoid, mitigate, offset:** The scheme requires proponents to first avoid and minimise impacts to biodiversity values, with the prospective cost of offsetting providing an economic incentive to avoid and minimise impacts.
- **Serious and irreversible impacts:** The scheme requires all assessments to consider if there may be a serious and irreversible impact to threatened species and ecological communities most at risk of extinction from potential development. In those instances,

<sup>72</sup> International Union for Conservation of Nature, *Issues Brief: Biodiversity Offsets* (2016). See also: Submission 88, Mr Peter Maslen, p 1.

<sup>73</sup> International Union for Conservation of Nature, *Issues Brief: Biodiversity Offsets* (2016), p 2.



consent authorities must take those impacts into consideration and determine whether there are any additional and appropriate measures required to minimise those impacts.

- **Offset rules prioritise like-for-like offsetting:** By regulation, offset obligations must be met by one or a combination of the following options, chosen by the proponent:
  - Retiring credits based on the like-for-like rules, and/or
  - Funding a biodiversity conservation action that benefits the threatened species or ecological community affected by the development
  - Committing to deliver mine site ecological rehabilitation that creates the same community or threatened species habitat, and/or
  - Making a payment to the Biodiversity Conservation Fund.
- **Offset obligations are met before the impact occurs:** Once a consent authority has set a condition to retire biodiversity credits, this must be complied with before any development is carried out that would impact on biodiversity values.<sup>74</sup>

**2.10** However, as outlined below, many stakeholders to this inquiry questioned the extent to which the New South Wales scheme delivers on best-practice principles for biodiversity offsetting. Environmental advocacy groups in particular argued that the New South Wales scheme is not designed in line with best practice principles. The NSW Nature Conservation Council summarised this view in its submission:

A significant body of academic literature and policy guidance exists which establishes principles for best practice biodiversity offsetting. These include ensuring offsets are only used as a last resort; not permitted for use in areas with high conservation value, which must be 'no go zones'; like-for-like; genuinely additional; required to achieve no net loss to biodiversity and are direct land-based offsets, not payment or indirect conservation measures ... The design of the current Biodiversity Offsets Scheme does not meet the best practice principles for offsetting. NSW has seen several iterations of biodiversity offset schemes over the last 20 years. In its design, the Biodiversity Offsets Scheme is the weakest and most flexible scheme so far.<sup>75</sup>

**2.11** The sections that follow examine stakeholder views on whether the design of the scheme is designed in line with best practice principles.

## Is 'no net loss' the right standard?

**2.12** The IUCN principles (paragraphs 2.6-2.7) articulate that effective biodiversity offsetting requires that, when biodiversity is unavoidably lost due to development projects, offsets must result in 'no net loss' or, preferably, 'net gain' of biodiversity.

**2.13** As noted in Chapter 1, the department advised that the scheme aims to ensure that where development will have a negative impact on biodiversity on a particular site, that will be offset elsewhere to a standard of 'no net loss', as calculated by the scheme's Biodiversity Assessment

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<sup>74</sup> Submission 97, NSW Government pp 6-8.

<sup>75</sup> Submission 95, Nature Conservation Council of NSW, p 7. See also: Evidence, Nature Conservation Council of NSW, 22 October 2021, p 43.

Method.<sup>76</sup> The scheme is designed to ensure offsets are secured 'in perpetuity' through a legally binding biodiversity stewardship agreement.

- 2.14** The department explained that the 'no net loss' standard is established in the *Biodiversity Conservation Act 2016*. Section 6.7(b) of the Act provides that, when establishing the Biodiversity Assessment Method, the Minister is to 'adopt a standard that, in the opinion of the Minister, will result in no net loss of biodiversity in New South Wales'.<sup>77</sup> Departmental witnesses further explained that the 'no net loss' standard under the scheme applies to individual projects.<sup>78</sup>
- 2.15** Some stakeholders to this inquiry questioned whether 'no net loss' is an appropriate standard, suggesting that 'net gain' or improvement should be the standard.<sup>79</sup> For example, the Environmental Defenders Office submitted that the 'no net loss' standard fails to recognise current trajectories of biodiversity loss, and is not enough to halt and reverse this trend. Therefore, the Environmental Defenders Office argued that the scheme should be designed to *improve* biodiversity values.<sup>80</sup>
- 2.16** Stakeholders also had concerns about how 'no net loss' is understood and applied under the scheme. The Environmental Defenders Office suggested the current legislative provisions around ensuring 'no net loss' are subjective and discretionary, and should be strengthened to require a standard that meets objective criteria.<sup>81</sup> The Blacktown and District Environment Group suggested the way 'no net loss' would be understood by the public, to mean *no net decline*, is not how it is understood in the scheme, as it calculates 'no net loss' against a baseline of continuing decline.<sup>82</sup> (See under 'averted loss', paragraph 2.26).
- 2.17** Stakeholders to this inquiry raised several design issues with the scheme that they suggest call into question whether it reflects best practice principles, and diminish the likelihood it will achieve 'no net loss' of biodiversity. These issues are considered below.

## Measuring biodiversity loss and gain in the scheme

- 2.18** As noted above, one of the IUCN principles for an effective scheme is that there should be a way to measure and exchange biodiversity, with defensible and replicable measures and units of exchange, sufficient baseline surveys, and established exchange rules governing which residual impacts can be offset by what type of gains. The measurement of biodiversity should consider aspects such as the area of impact, the types of ecological communities and species affected,

<sup>76</sup> Submission 97, NSW Government, p 5.

<sup>77</sup> Answers to questions on notice, Department of Planning and Environment, 10 February 2021, p 11.

<sup>78</sup> Evidence, Ms Michelle Dumazel, Executive Director, Biodiversity and Conservation Division, Department of Planning and Environment, 10 December 2021, p 49.

<sup>79</sup> See, for example: Submission 29, Dr Judy Lambert, p 2; Submission 92, Environmental Defenders Office, p 6.

<sup>80</sup> Submission 92, Environmental Defenders Office, p 11.

<sup>81</sup> Submission 92, Environmental Defenders Office, p 11.

<sup>82</sup> Submission 36, Blacktown and District Environment Group, p 10.

connectivity with other areas of habitat, the condition of the habitat and the conservation status of any threatened entities.<sup>83</sup>

### **The Biodiversity Assessment Method**

**2.19** The government explained that the need for a replicable and defensible way to measure and exchange biodiversity is achieved in the New South Wales scheme with the Biodiversity Assessment Method, which, it says:

- provides a 'single, transparent and repeatable method for quantifying biodiversity values'
- reduces the subjectivity of environmental assessments
- is based on the 'best available science, data and knowledge of biodiversity' in New South Wales.<sup>84</sup>

**2.20** In further information, the department explained that the biodiversity assessment method

- establishes the standard of 'no net loss' of biodiversity values in New South Wales as required by section 6.7(3)(b) of the *Biodiversity Conservation Act 2016*
- has been peer-reviewed and draws on published data on BioNet, a repository for biodiversity data managed by the department, which includes NSW wildlife observation records, classification of native plant communities, threatened species information and spatial layers
- must be applied by accredited assessors
- provides a consistent method for assessing biodiversity values both from proposed development and from management actions undertaken at a stewardship site
- is to be used to calculate residual impacts of development that cannot be avoided, to calculate the number and class of biodiversity credits required to offset those impacts to achieve the legislative standard of no net loss.<sup>85</sup>

**2.21** Some stakeholders to this inquiry welcomed the Biodiversity Assessment Method. Local Government NSW commended it for providing a standardised process and consistent methodology in survey guidelines, enabling more species to be identified, which resulted in improved biodiversity outcomes.<sup>86</sup>

**2.22** However, many others suggested there are weaknesses in the method that undermine the credibility of the way biodiversity is measured and exchanged in the scheme. In particular, there were questions about the scientific validity and rigour of the underlying assumptions and

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<sup>83</sup> International Union for Conservation of Nature, *Issues Brief: Biodiversity Offsets* (2016), p 2; NSW Department of Planning and Environment, *Our principles for the use of biodiversity offsets in NSW* (29 June 2021), <https://www.environment.nsw.gov.au/topics/animals-and-plants/conservation-programs/nsw-biodiversity-offsets-policy-for-major-projects/principles-for-use-of-biodiversity-offsets-in-nsw>.

<sup>84</sup> Submission 97, NSW Government, p 6.

<sup>85</sup> Answers to questions on notice, Department of Planning and Environment, 10 February 2022, p 11.

<sup>86</sup> Submission 78, Local Government NSW, p 4.

calculations embedded in the Biodiversity Assessment Method as well as anomalies in classification of species or ecosystems.

- 2.23** The Nature Conservation Council of NSW noted that there are important details that underpin the Biodiversity Assessment Method, stipulating what and how ecological factors are counted and weighted, which inform calculations on quantities of offsets required to compensate impacts. The council submitted that: 'These methodological details and assumptions have big ramifications for ecological outcomes and must be carefully tuned based on the best available science.' It asserted that: 'the rigour of the current Biodiversity Assessment Method settings requires comprehensive review.'<sup>87</sup>
- 2.24** A number of local government representatives also pointed to weaknesses in the methodology. For instance, Lake Macquarie Council City Council argued the method, as well as having high administrative costs, has a number of loopholes that can lead to inaccurate assessment of biodiversity at a site, and contains generic formulas, calculations and monetary contributions that are not always comparable to land values and the value of biodiversity lost.<sup>88</sup>
- 2.25** A number of submissions highlighted what they considered specific anomalies with the Biodiversity Assessment Method, which represented some threatened species as ecosystem credits (rather than species credits), meaning those species were not adequately offset.<sup>89</sup> This led one author to describe it as a 'deeply flawed' system which will result in net loss or local extinction of some species that are only defined as an ecosystem credit.<sup>90</sup>

### **Use of 'averted loss' in the calculation of offsets**

- 2.26** A key issue raised about the Biodiversity Assessment Method was the assumptions about future vegetation loss that are embedded in calculations to estimate the credit value of stewardship sites.
- 2.27** Mr Alexander Cox, a PhD candidate from the Australian National University who had researched the scheme, explained that, to estimate biodiversity gain at a stewardship site, the Biodiversity Assessment Method assumes ongoing decline in vegetation and habitat quality in the absence of management interventions. Hence, much of the 'gain' of managed offset sites is derived by 'averting loss', based on the assumption that biodiversity values would continuously decline in future in the absence of a biodiversity stewardship agreement.<sup>91</sup>
- 2.28** Mr Cox stated that, '[w]hile stewardship sites establish legal covenants to protect land from future development, ... they provide no genuinely additional habitat to compensate for the land clearing which they purportedly offset.' The heavy reliance on averted loss to calculate biodiversity 'gains' under the scheme, he argued, means that biodiversity offsetting under the current scheme will only be able to maintain biodiversity values against a declining baseline, in

<sup>87</sup> Submission 95, Nature Conservation Council of NSW, p 8.

<sup>88</sup> Submission 62, Lake Macquarie City Council, p 5.

<sup>89</sup> See, for example: Submission 49, Lock the Gate Alliance, p 5.

<sup>90</sup> Submission 9, Name suppressed, pp 2-4.

<sup>91</sup> Submission 58, Mr Alexander Cox, pp 2-3.

effect 'locking in loss'.<sup>92</sup> Mr Cox concluded that the use of averted loss to calculate biodiversity gains at stewardship sites is 'particularly egregious when considering the assumed rates of background loss ... may actually exceed current rates of vegetation clearing'.<sup>93</sup>

- 2.29** The Nature Conservation Council of NSW similarly suggested that the assumptions made in the method about future loss are 'problematic', because they incorporate a measure of 'averted loss', that assumes future clearing with no protection at an offset site.<sup>94</sup> According to the Nature Conservation Council, an expert review of the draft method in 2016 concluded that the measures of averted loss incorporated were 'unreasonably high'. It also cited research showing rates of assumed averted loss in offsetting schemes in Australia have been 'consistently overestimated'.<sup>95</sup> The Nature Conservation Council contends that this 'key pitfall of offset policy design discredits any claim to no net loss'.<sup>96</sup>
- 2.30** Similarly, Tweed Shire Council indicated that the assumption was flawed because it did not account for ecosystem resilience and natural regeneration, and suggested that it results in net loss of biodiversity.<sup>97</sup> Dubbo Regional Council believed it was counter-intuitive for the scheme to focus on the protection of degraded sites that could be improved through rehabilitation actions, but inadequately reward the protection of good quality remnant vegetation.<sup>98</sup>

### **Offsetting as a last resort: the 'avoid, minimise, offset' hierarchy**

- 2.31** As noted above (paragraph 2.6), an accepted principle for biodiversity offsetting is that offsetting is only appropriate for projects that have rigorously applied the mitigation hierarchy framework of 'avoid, minimise, offset', with offsetting used only as a last resort.
- 2.32** The government advised that the scheme requires all development proponents to first avoid and minimise impacts to biodiversity values, with the prospective cost of offsetting serving as an economic incentive to minimise impacts.<sup>99</sup> The submission stated 'avoid, minimise and offsetting requirements form part of a development application's conditions of consent'.<sup>100</sup>
- 2.33** Some inquiry participants suggested that the existence of the scheme has been enough to incentivise some developers to minimise the amount of land clearing they undertake, and reduce impacts to biodiversity through project design, in order to avoid the costs of offsetting.<sup>101</sup> The

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<sup>92</sup> Submission 58, Mr Alexander Cox, pp 2-3.

<sup>93</sup> Submission 58, Mr Alexander Cox, pp 2-3.

<sup>94</sup> Submission 95, Nature Conservation Council of NSW, p 8. See also Submission 36, Blacktown and District Environment Group, p 10.

<sup>95</sup> See also Submission 29, Dr Judy Lambert, p 6, cites research by Maron et al (2015), Gordon et al (2015) and Gibbons et al (2016) warning that biodiversity gains procured from averted loss offsetting can easily be overstated.

<sup>96</sup> Submission 95, Nature Conservation Council of NSW, p 8.

<sup>97</sup> Submission 91, Tweed Shire Council, p 4.

<sup>98</sup> Submission 61, Dubbo Regional Council, p 5.

<sup>99</sup> Submission 97, NSW Government, p 7.

<sup>100</sup> Submission 97, NSW Government, p 7.

<sup>101</sup> Submission 58, Mr Alexander Cox, p 4; Submission 13, Coffs Harbour City Council, p 1; Submission 50, Penrith City Council, p 1; Submission 61, Dubbo Regional Council, p 2.

Planning Institute of Australia reported that there is evidence that developers have modified development proposals to avoid or reduce biodiversity impacts so that they do not have to participate in the scheme.<sup>102</sup> Similarly, Local Government NSW reported that some councils found the scheme has had some success in encouraging design redevelopments to avoid biodiversity loss and deter poor development.<sup>103</sup>

- 2.34** In contrast, several other stakeholder groups questioned whether the scheme puts enough emphasis on avoiding, or minimising impact. The Environmental Defenders Office suggested the avoid, minimise, offset hierarchy is poorly implemented in New South Wales, and called for clear guidance on steps that must be undertaken and evidenced before offsets can be used.<sup>104</sup> The office further argued the mitigation hierarchy should be clearly set out in relevant planning legislation as a mandatory pre-condition before any offsetting is considered.<sup>105</sup>
- 2.35** Several local councils observed that the principles of 'avoid, minimise and offset' are not rigorously applied, and claimed that there is little evidence of avoidance in the first instance.<sup>106</sup> Miss Karen Love, Strategic Environmental Projects Coordinator, Port Macquarie Hastings Council, said that the avoid, minimise, offset hierarchy is not being used in practice, and that offsets are, in fact, the first port of call.<sup>107</sup> Staff of Port Macquarie Hastings Council highlighted a lack of definition or guidance on the mitigation hierarchy in the legislation, with the definition of 'avoid' and 'minimise' left to interpretation of proponents.<sup>108</sup>
- 2.36** Summarising input from more than 40 local councils, Local Government NSW said councils are of the view that proponents are not adequately considering options to avoid and minimise, instead going straight to offset options.<sup>109</sup> Local Government NSW suggested there is a need for greater focus on 'avoid' and 'minimise', and additional guidance in interpreting these terms.
- 2.37** The committee was keen to understand if there is any evidence of how the avoid-minimise-offset hierarchy is applied under the scheme. Ms Michelle Dumazel, Executive Director, Biodiversity and Conservation Division, Department of Planning and Environment, advised that proponents needed to explain in the biodiversity assessment report what impact has been avoided and how it has been minimised so as to understand the offset.<sup>110</sup> She also advised that, for major project approvals, the department does work with proponents on how they could avoid or mitigate impact, which is attractive to proponents as it reduces their cost under the scheme. She said that impacts avoided are not necessarily documented in a way that can demonstrate impact averted.<sup>111</sup>

<sup>102</sup> Submission 52, Planning Institute of Australia, pp 4-5.

<sup>103</sup> Submission 78, Local Government NSW, p 4.

<sup>104</sup> Submission 92, Environmental Defenders Office, p 12.

<sup>105</sup> Submission 92, Environmental Defenders Office, p 5.

<sup>106</sup> See, for example: Submission 47, Port Macquarie Hastings Council, p 1.

<sup>107</sup> Evidence, Miss Karen Love, Strategic Environmental Projects Coordinator, Port Macquarie Hastings Council, 10 December 2021, p 11.

<sup>108</sup> See, for example: Submission 47, Port Macquarie Hastings Council, p 1.

<sup>109</sup> Submission 78, Local Government NSW, p 4.

<sup>110</sup> Evidence, Ms Dumazel, 10 December 2021, p 38.

<sup>111</sup> Evidence, Ms Dumazel, 10 December 2021, p 49.

- 2.38** The department advised that information on avoid, minimise and offset requirements for a particular project is publicly available in the biodiversity development assessment report published by consent authorities, and in the project conditions if the project is approved, but not held on a central data base.<sup>112</sup>
- 2.39** In its review of the scheme, the Audit Office of NSW found that there was room for the department to strengthen its standards and guidance for accredited assessors to ensure impacts from development are first avoided and minimised. It noted that the department has stated it is developing additional guidance on avoiding and minimising impacts.<sup>113</sup>

### **Thresholds for where offsets should not be used – 'serious and irreversible' impact**

- 2.40** An issue that arose in the inquiry was whether sites that contain exceptionally high value biodiversity should be able to be offset at all. The IUCN principles state that biodiversity offsets must not be used in certain circumstances, such as: 'when a project may result in the extinction of species ... or the values that will be lost are specific to a particular place, and therefore cannot be found elsewhere.'<sup>114</sup>
- 2.41** Noting that the concept of 'serious and irreversible impact' is fundamentally about protecting threatened species and ecological communities that are most at risk of extinction, the government's submission stated that clause 6.7 of the Biodiversity Conservation Regulation 2017 establishes principles for determining if an action will have a serious and irreversible impact on biodiversity values.<sup>115</sup> According to the submission:
- the scheme requires all assessments to consider if there may be a serious and irreversible impact
  - an accredited assessor is required to include any relevant advice in their assessment report
  - the relevant consent authority is responsible for determining if an action will have a serious and irreversible impact, with guidelines published by the department to support this decision
  - for local development or clearing proposals, applications determined to have serious and irreversible impact cannot be approved
  - for major projects, Part 5 activities (public works)<sup>116</sup> and biodiversity certifications, applications determined to have serious and irreversible impacts can be approved by the

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<sup>112</sup> Answers to questions on notice, Department of Planning and Environment, 10 February 2022, p 1.

<sup>113</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), pp 36-37.

<sup>114</sup> International Union for Conservation of Nature, *Issues Brief: Biodiversity Offsets* (2016), p 2.

<sup>115</sup> Submission 97, NSW Government, p 7.

<sup>116</sup> 'Part 5 activities' refers to public works, under Part 5 of the *Environmental Planning and Assessment Act 1979*.

approval authority, which must take those impacts into consideration and determine if additional measures can be implemented to minimise the impact.<sup>117</sup>

- 2.42** Departmental representatives advised that the 'serious and irreversible' impacts requirements essentially replace the 'red flags' used in previous schemes to denote species or ecological communities that are so vulnerable that development impacting them should not occur.<sup>118</sup> Dr Louisa Mamouney, Director, Biodiversity Offsets Scheme Branch, Department of Planning and Environment, stated that, for populations of endangered species with very limited geographic distribution, or that are unlikely to respond to restoration methods, consent authorities can decline to approve development on the grounds that there are serious and irreversible impacts.<sup>119</sup>
- 2.43** Many environment advocates expressed concern about the lack of effective 'red flags' or 'no go areas' to prevent serious and irreversible impact on threatened communities. Ms Rachel Walmsley, Head of Policy and Law Reform, Environmental Defenders Office, suggested the lack of 'red flags' means 'we have come to a point in New South Wales where everything is amenable to offsetting', meaning the scheme does not meet basic principles to deliver intended biodiversity outcomes.<sup>120</sup> She stated that: 'turning biodiversity into a tradeable commodity without a comprehensive system of red flags simply puts a price on extinction.'<sup>121</sup>
- 2.44** The Nature Conservation Council of NSW argued that the serious and irreversible impacts test in the scheme sets the bar 'incredibly low', only acting to stop clearing if a threatened species or ecological community is already in a state of decline, and the scheme needs more boundaries about where offsetting can and cannot be applied.<sup>122</sup> In evidence, the council stated:
- The current system only stops destruction if it is likely to issue the final blow and push a species or ecosystem to extinction. Even then, there are avenues that can legally permit activity likely to cause extinction. We must identify what areas, species and ecological communities are too important to lose and designate absolute protection.<sup>123</sup>
- 2.45** Other stakeholders were concerned that there is insufficient clarity in the scheme's definition of 'serious and irreversible impact'. Local Government NSW noted that the legislation does not provide thresholds for when an impact is likely to be 'serious and irreversible', hence the assessment and decision is subjective. Concerns about lack of quantifiable thresholds were voiced by several local government representatives.<sup>124</sup> Local Government NSW concluded that there needs to be a consistent approach statewide, with defined, science-based serious and irreversible impact thresholds for at-risk ecological communities beyond which development

<sup>117</sup> Submission 97, NSW Government, p 7. See also: Evidence, Evidence, Dr Louisa Mamouney, Director, Biodiversity Offsets Scheme Branch, Department of Planning and Environment, 10 December 2021, pp 42-44.

<sup>118</sup> Evidence, Ms Dumazel, 10 December 2021, pp 43-44.

<sup>119</sup> Evidence, Dr Mamouney, 10 December 2021, pp 42-43.

<sup>120</sup> Evidence, Ms Rachel Walmsley, Head of Policy and Law Reform, Environmental Defenders Office, 22 October 2021, p 42.

<sup>121</sup> Evidence, Ms Walmsley, 22 October 2021, p 42.

<sup>122</sup> Submission 95, Nature Conservation Council of NSW, p 8.

<sup>123</sup> Evidence, Nature Conservation Council of NSW, 22 October 2021, p 43.

<sup>124</sup> See, for example: Evidence, Miss Love, 10 December 2021, p 11.



cannot be approved. It further suggested the Biodiversity Values Map should be updated to include all such ecological communities, without which gradual loss of critically endangered vegetation can occur.<sup>125</sup>

- 2.46 Departmental representatives noted the department is aware of the need for more guidance in terms of serious and irreversible impacts, and said new guidance was forthcoming.<sup>126</sup>

### Equivalence of offsets – the 'like-for-like' principle

- 2.47 One of the offsetting principles is that biodiversity affected by a project should be offset with something 'ecologically equivalent'.<sup>127</sup> This is termed 'like-for-like' offsetting. The IUCN notes that no two areas of habitat or species are identical, and some biodiversity will always be lost in offset exchanges.<sup>128</sup> The IUCN's policy statement says:

Biodiversity affected by the project should normally be conserved through an ecologically equivalent offset. In some circumstances, where there is good scientific justification, it could be appropriate for the offset to conserve a different kind of biodiversity which is of higher conservation priority than the type affected ('like-for-like or better').<sup>129</sup>

- 2.48 Ensuring ecological equivalence, or 'like-for-like offsets', is seen by environmental advocates as 'fundamental to the ecological integrity and credibility of any offset scheme'.<sup>130</sup> The extent to which, and the way in which the principle is expressed in the New South Wales scheme has generated some mixed views among stakeholders.

#### Like-for-like offset rules

- 2.49 The NSW Government submission stated that the scheme prioritises 'like-for-like' offsets under its regulations.
- 2.50 According to the department's website, the scheme's like-for-like rules require that:
- impacts on native vegetation must be offset with vegetation that is in the same local area as the impact (based on near or adjacent IBRA<sup>131</sup> subregions) and:

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<sup>125</sup> Submission 78, Local Government NSW, p 8.

<sup>126</sup> Evidence, Ms Dumazel, 10 October 2021, p 43.

<sup>127</sup> See, for example: International Union for the Conservation of Nature, 'IUCN Policy on Biodiversity Offsets', WCC-2016-Res-059-EN, p 3.

<sup>128</sup> International Union for the Conservation of Nature, 'IUCN Policy on Biodiversity Offsets', WCC-2016-Res-059-EN, p 3.

<sup>129</sup> International Union for the Conservation of Nature, 'IUCN Policy on Biodiversity Offsets', WCC-2016-Res-059-EN.

<sup>130</sup> Submission 92, Environmental Defenders Office, p 5.

<sup>131</sup> IBRA stands for Interim Biogeographic Regionalisation for Australia. Although termed 'interim', they have been in place for over twenty years. Evidence, Mr Dean Knudson, Deputy Secretary, Biodiversity, Conservation & Science, Department of Planning and Environment, 10 December 2021, p 42; Evidence, Dr Mamouny, 10 December 2021, p 42.

- If a threatened ecological community was impacted, the offset must be for the same threatened ecological community, or
- If native vegetation that is not a threatened ecological community was impacted, the offset must be vegetation that is the same vegetation class and in the same or higher offset trading group.

In addition, if the impacted vegetation contained hollow hearing trees then the offset site must also contain hollow bearing trees.

- Impacts on threatened species (that are not associated with a particular type of vegetation) must be offset with the same threatened species. This offset can be located anywhere in NSW.<sup>132</sup>

**2.51** The NSW Government submission explained that the above rules mean native vegetation impacted must be offset with very similar vegetation in the same geographical area, and of the same, or higher, threat status.<sup>133</sup> Offsets for an impacted threatened species must be the same species, but can be located anywhere in New South Wales.<sup>134</sup>

#### Variation and ancillary rules

**2.52** The government submission noted that if a proponent can demonstrate they were not able to find like-for-like credits after taking 'reasonable steps', and chooses not to use the other offset options, they can seek approval to offset with a broader suite of biodiversity using the 'variation rules'. There are some threatened species to which the variation rules cannot be applied, and while variation rules allow for a broader range of vegetation and species to be used as offsets, they must have the same or higher threat status.<sup>135</sup>

**2.53** Even further flexibility is allowed by 'ancillary rules', which the department is able to make 'to support the biodiversity offset rules'.<sup>136</sup> Currently there are ancillary rules which allow, subject to approval, a broad suite of activities to be considered as offsets, such as targeted surveys, research and threat identification delivered through the Saving Our Species program.<sup>137</sup> The Biodiversity Conservation Trust also has additional flexibility to meet its offset obligations under the ancillary rules, such as undertaking conservation actions targeted at critically endangered entities.<sup>138</sup>

<sup>132</sup> NSW Department of Planning and Environment, *Offset rules* (10 June 2021), <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/offset-obligations-and-credit-trading/offset-rules>.

<sup>133</sup> Submission 97, NSW Government, p 8.

<sup>134</sup> Submission 97, NSW Government, p 8.

<sup>135</sup> Submission 97, NSW Government, p 8; NSW Department of Planning and Environment, *Offset rules* (10 June 2021), <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/offset-obligations-and-credit-trading/offset-rules>.

<sup>136</sup> Submission 97, NSW Government, p 9.

<sup>137</sup> Submission 97, NSW Government, p 16; NSW Department of Planning and Environment, *Offset rules* (10 June 2021), <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/offset-obligations-and-credit-trading/offset-rules>.

<sup>138</sup> Submission 97, NSW Government, p 16; NSW Department of Planning and Environment, *Offset rules* (10 June 2021), <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/offset-obligations-and-credit-trading/offset-rules>.

### **Flexibility in the like-for-like requirements – tension between ecological outcomes and a functioning market**

- 2.54** The committee heard some diverging views on the suitability of flexibility in the 'like-for-like' requirements. Several stakeholder groups, including environment advocates,<sup>139</sup> ecologists,<sup>140</sup> local councils<sup>141</sup> and community organisations<sup>142</sup> criticised the degree of flexibility allowed in what is classified as 'like-for-like' under the scheme. Several pointed out that there is more scope to avoid like-for-like offsets in this scheme than previous ones.<sup>143</sup>
- 2.55** Several submissions put forward the view that offsets are only genuinely 'offsets' when they are protecting the same species or community as those impacted.<sup>144</sup> The Ecological Consultants Association of NSW suggested that: 'without the guarantee of offsetting exactly what was lost, there will be biodiversity loss in New South Wales.'<sup>145</sup>
- 2.56** Specific issues with the degree of flexibility in the like-for-like and variation rules under the scheme raised by ecologists, environment advocates and local council representatives included:
- too much geographic flexibility meaning offset can be sourced well away from where the development impact occurs, leading to increased possibility of local extinctions<sup>146</sup>
  - allowing offsetting of vegetation in the same plant class rather than the same plant community<sup>147</sup>
  - variation rules meaning that in some cases offsets do not even need to be of the same species, so long as the offset species is the same or higher threat status<sup>148</sup>
  - excessive flexibility in the rules applicable to the Biodiversity Conservation Trust.<sup>149</sup>

<sup>139</sup> See, for example: Submission 95, Nature Conservation Council of NSW, pp 4 and 7; Submission 92, Environmental Defenders Office, p 1; Submission 86, Australian Conservation Foundation, p 5; Submission 29, Dr Judy Lambert, pp 2-4, Submission 49, Lock the Gate Alliance, p 2.

<sup>140</sup> See, for example: Submission 27, Name suppressed, p 5; Evidence, Ms Belinda Pellow, President (Acting), Ecological Consultants Association of NSW, 22 October 2021, p 3.

<sup>141</sup> See, for example, Submission 37, Wollondilly Shire Council, p 4; Submission 62, Lake Macquarie City Council, p 3; Submission 75, Shellharbour City Council, p 2; Submission 77, Singleton Council, p 1; Submission 93, Northern Rivers Joint Organisation – Natural Resource Management Managers Group, p 2.

<sup>142</sup> See, for example: Submission 14, Friends of Grasslands, pp 1-2; Submission 18, Hunter Bird Observers Club, p 4; Submission 38, Mulgoa Valley Landcare Group Inc, p 4; Submission 51, Better Planning Network, p 10; Submission 71, National Parks Association of NSW, p 3.

<sup>143</sup> See, for example, Evidence, Mr Steven House, Director, Meridolum, 9 December 2021, p 13; Submission 95, Nature Conservation Council of NSW.

<sup>144</sup> Submission 92, Environmental Defenders Office, p 5; Submission 29, Dr Judy Lambert, p 4.

<sup>145</sup> Submission 2, Ecological Consultants Association of NSW, p 4; Submission 92, Environmental Defenders Office, p 12.

<sup>146</sup> Submission 77, Singleton Council, pp 3-4.

<sup>147</sup> Submission 92, Environmental Defenders Office, p 12; Submission 77, Singleton Council, pp 3-4; Submission 21, Clarence Valley Council, pp 2-3, Evidence, Ms Heather Mitchell, Natural Resource Management Officer – Biodiversity, Clarence Valley Council, 10 December 2021, p 20.

<sup>148</sup> Submission 92, Environmental Defenders Office, p 12; Submission 84, Animal Liberation, p 5.

<sup>149</sup> Submission 77, Singleton Council, pp 3-4.

- 2.57** Evidence from both councils and planners suggested that the scheme's flexibility on like-for-like offsetting means there is little incentive for developers to secure like-for-like offsets. Port Macquarie Hastings Council staff observed that proponents 'rarely (if ever)' seek like-for-like credits, as such credits either don't exist or it would take too long to find them.<sup>150</sup>
- 2.58** The Planning Institute of Australia described the biodiversity offsets and credit system as a "black box" – whose rules allow too many non "like-for-like" offsets and do not send a consistent or predictable market signal reflecting the conservation value of the land'.<sup>151</sup> It said that, in the experience of its members 'like-for-like offsetting is too rarely achieved'.<sup>152</sup> The Planning Institute of Australia noted reports from members that difficulties faced by developers acquiring like-for-like offsets leads to money being paid to the Biodiversity Conservation Fund, and mature vegetation is not protected.<sup>153</sup>
- 2.59** Several community advocacy groups gave evidence about particular instances where offsets were not 'like-for-like' in a way that protected the target species or ecological community.<sup>154</sup> The Georges River Environmental Alliance gave several case studies of 'offset failures', where developments have proceeded without environmentally equivalent offsets being secured.<sup>155</sup> Mr Barry Durman, representing Save Sydney's Koalas, suggested that the development affecting the Campbelltown koala population was able to be offset with 'marginal-quality habitat in west Appin', which is 'as far, far away as you can get from like-for-like', and compromises the koala population.<sup>156</sup>
- 2.60** Several submissions called for a tightening of the 'like-for-like' rules in the scheme, and reducing the flexibility allowed by the variation and ancillary rules, to ensure that offsetting is only allowed where there is an ability to offset with the same species or ecological community close to the development impact.<sup>157</sup>
- 2.61** However, the committee also heard from some stakeholders that the 'like-for-like' provisions in the scheme are not flexible enough, and that rules that are too strict will inhibit development of a viable credit market or alternative local conservation actions.
- 2.62** Representing the perspective of developers, Urban Taskforce Australia argued the specificity of offset credit type required hampers development of a functioning offset market. Mr Tom Forrest, Chief Executive Officer, Urban Taskforce Australia, suggested that the species list is too long and specific, and the particular species that is being listed on a particular site cannot be readily found on another site. This, he suggested, is a 'market failure' that undermines the credibility and viability of the scheme. He suggested that, instead of individual species credits,

<sup>150</sup> Submission 47, Natural Resource Management and Planning staff – Port Macquarie Hastings Council, p 1.

<sup>151</sup> Submission 52, Planning Institute of Australia, p 1.

<sup>152</sup> Submission 52, Planning Institute of Australia, p 2.

<sup>153</sup> Submission 52, Planning Institute of Australia, p 4.

<sup>154</sup> See, for example: Submission 65, Georges River Environmental Alliance, pp 2-9.

<sup>155</sup> Submission 65, Georges River Environmental Alliance, pp 2-9.

<sup>156</sup> Evidence, Mr Barry Durman, Member, Save Sydney's Koalas, 22 October 2021, p 20.

<sup>157</sup> See, for example, Submission 35a, Henribark, pp 3, 13; Submission 77, Singleton Council, pp 1, 3-4; Submission 92, Environmental Defenders Office, pp 12-13.

there should be a gradation of classes of endangered species that could be grouped together and priced accordingly.<sup>158</sup>

**2.63** NSW Farmers' Association suggested that restrictive rules for like-for-like, without variation options undermine opportunity for landowners to fashion agreements where there would be significant biodiversity gains. The association suggested 'the driving force in this restriction is the attempt to centralise control of offsetting, and a misguided ideal of objective that like-for-like and government endorsed metrics are the only valid outcomes.'<sup>159</sup>

**2.64** The Environment Institute of Australia and New Zealand suggested that greater flexibility in the scheme would allow for more innovative but effective conservation practices. The institute's submission stated:

'We believe that it would be desirable to have greater flexibility within the scheme to allow application of judgement or innovative practices in some situations, noting that these will be the exception rather than the norm. For example, in some limited instances, a more effective outcome for a threatened species could be a broadscale pest or predator control program, rather than management on a specific site.'<sup>160</sup>

### 'Additionality' of offsets

**2.65** As noted, one essential feature of effective biodiversity offset schemes is that offsets are 'additional'. That is, they secure conservation outcomes that would not have happened otherwise, or are not already required by law.<sup>161</sup>

**2.66** The NSW Government submission stated that non-additional offsetting practices are understood to mean offsets that do not provide any additional conservation value or increase in biodiversity values. For example, if the land used to provide an offset was already subject to a form of protection or legal obligation to manage the biodiversity, such as a nature reserve. The government argued that this principle was strengthened under the scheme, as land is not eligible to generate credits if the Minister is of the opinion that the owner of the land is already under a legal obligation to carry out biodiversity conservation measures on the land.<sup>162</sup>

**2.67** However, the department also noted that some land may be eligible to be a biodiversity stewardship site while having an existing obligation to perform management actions. For example, land classed as 'community' or 'operational' land under the *Local Government Act 1993* or land reserved under the *Crown Land Management Act 2016* may be used, although with a twenty per cent reduction in the credits that would otherwise have been generated.<sup>163</sup>

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<sup>158</sup> Evidence, Mr Tom Forrest, Chief Executive Officer, Urban Taskforce Australia, 8 April 2022, p 11.

<sup>159</sup> Submission 94, NSW Farmers' Association, p 5.

<sup>160</sup> Submission 90, Environment Institute of Australia and New Zealand, p 5; Evidence, Dr Bryan Jenkins, President, 22 October 2021, p 27.

<sup>161</sup> International Union for Conservation of Nature, *Issues Brief: Biodiversity Offsets* (2016), p 2. See also: Submission 95, Nature Conservation Council of NSW, Attachment 1, p 8.

<sup>162</sup> Submission 97, NSW Government, p 12.

<sup>163</sup> Submission 97, NSW Government, p 12.

- 2.68** Several stakeholders pointed to design features of the scheme that call into question whether offsets are genuinely 'additional' in terms of securing conservation outcomes that would not have happened otherwise, and additional to what is already required by law. 'Non-additionality' of offsets was an issue raised by several stakeholders as detracting from the likelihood the scheme will work to preserve biodiversity.<sup>164</sup>
- 2.69** Stakeholders also pointed out examples in New South Wales where 'offsets' are claimed in areas that are already protected as conservation reserves, or other areas protected under existing legislation or obligations.<sup>165</sup>
- 2.70** The Ecological Consultants Association of NSW submitted that there is an issue with offsetting being carried out on land that would have already been unsuitable for development, thus was already 'protected' and not additional.<sup>166</sup>
- 2.71** Several community groups pointed to examples where land that was already protected as a council reserve was counted as an offset, and questioned the 'additionality'. Mr Saul Deane, Urban Sustainability Campaigner, Total Environment Centre, gave the example of Noorumba Reserve being used to generate koala credits for development at Gilead, when it had been a council reserve for 20 to 30 years.<sup>167</sup>
- 2.72** The use of mine rehabilitation as an offset was also criticised as not delivering additional benefit not already required by law – an issue considered further below from paragraph 2.89.<sup>168</sup>

### Timing of offset delivery

- 2.73** In articulating how the scheme is built on ecological principles, the NSW Government submission explained that the scheme requires offset obligations to be met before development impact occurs. Once a consent authority has set a condition to retire biodiversity credits, the *Biodiversity Conservation Act 2016* requires this to be complied with before any development is carried out that would impact on biodiversity values.<sup>169</sup>
- 2.74** Despite the requirement that biodiversity credit obligations must be met before development commences, stakeholders to this inquiry suggested that there are mechanisms within the scheme that allow for a 'develop now, offset later' approach, meaning threatened species are impacted before equivalent offsets are achieved.<sup>170</sup>
- 2.75** One mechanism which creates a time lag between development impacting a site and delivery of offset on-the-ground is the ability for developers to make a payment to the Biodiversity

<sup>164</sup> See, for example: Submission 27, Name suppressed, p 7; Submission 29, Dr Judy Lambert, p 6.

<sup>165</sup> See, for example: Submission 29, Dr Judy Lambert, p 6.

<sup>166</sup> Submission 2, Ecological Consultants Association of NSW, p 4.

<sup>167</sup> Evidence, Mr Saul Deane, Urban Sustainability Campaigner, Total Environment Centre, 22 October 2021, p 24.

<sup>168</sup> See, for example: Evidence, Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, 22 October 2021, p 36.

<sup>169</sup> Submission 97, NSW Government, p 8.

<sup>170</sup> See, for example: Submission 2, Ecological Consultants Association of NSW, p 2.

Conservation Fund to discharge their offset obligations. The Ecological Consultants Association of NSW submitted that 'allowing developers to pass their offsetting obligations to the Biodiversity Conservation Trust (Trust) allows them to get on with the removal of native vegetation and biodiversity before it is actually protected', as there may be a time lag after the developer has paid funds before the Trust is able to source suitable credits.<sup>171</sup> The association suggested this indicates a lack of guaranteed protection.<sup>172</sup> (The issue of whether the Trust is able to acquit its obligations is considered in chapter 3).

- 2.76** The Ecological Consultants Association of NSW contended that, even where an offset is 'secured' prior to development, the improvements to species habitat anticipated through land management activity may take more than 20 years to eventuate, meaning in the interim period the species may be pushed beyond the point of recovery.<sup>173</sup>

### **Protection of offsets in perpetuity?**

- 2.77** A key principle for offsetting is that the offset gain should last at least as long as the impact being addressed, which in most cases means in perpetuity.
- 2.78** The NSW Government submission noted that biodiversity stewardship agreements under the scheme are in-perpetuity and registered on land title, meaning that current and future landholders must carry out management actions in accordance with the agreement.<sup>174</sup>
- 2.79** Some stakeholders expressed a lack of confidence that the scheme was really securing offset sites in perpetuity. Dr Judy Lambert noted the *Biodiversity Conservation Act 2016* makes provision for conservation agreements that are for periods other than 'in perpetuity' and that the Minister has powers in the Act to terminate or vary a conservation agreement.<sup>175</sup> She said 'We have seen various examples of an area set aside as a biodiversity offset subsequently having a major development approved which will destroy that offset value'.<sup>176</sup>
- 2.80** Mr Gary Dunnett, Executive Officer, National Parks Association of NSW, argued that better statutory mechanisms need to be developed to ensure that agreed offsets are permanently managed for conservation outcomes. He noted that more secure long-term arrangements would be the transfer of offset sites to public ownership and management.<sup>177</sup>
- 2.81** The Ecological Consultants Association of NSW raised doubts about whether the 20 years provision for management actions built into biodiversity stewardship agreements is enough to deliver the expected gains to offset impacts elsewhere, noting that, for example, tree hollows can take hundreds of years to develop, and increased extreme weather events create uncertainty about whether expected improvements will be achieved.<sup>178</sup>

<sup>171</sup> Submission 2, Ecological Consultants Association of NSW, p 2.

<sup>172</sup> Submission 2, Ecological Consultants Association of NSW, p 2.

<sup>173</sup> Submission 2, Ecological Consultants Association of NSW, p 5.

<sup>174</sup> Submission 97, NSW Government, p 9.

<sup>175</sup> Submission 29, Dr Judy Lambert, p 5.

<sup>176</sup> Submission 29, Dr Judy Lambert, p 5.

<sup>177</sup> Evidence, Mr Dunnett, 22 October 2021, p 35.

<sup>178</sup> Submission 2, Ecological Consultants Association of NSW, p 5.

## Indirect offsets

**2.82** As noted in Chapter 1, the scheme allows several ways to meet an offset obligation. Instead of finding a direct, like-for-like, land-based offset, proponents may fund a biodiversity conservation action that benefits the specific threatened species or community, commit to mine site ecological rehabilitation that benefits the same ecological community or make a payment to the Biodiversity Conservation Fund.<sup>179</sup> Environmental groups, including the Environmental Defenders Office and Nature Conservation Council of NSW, suggested use of indirect offsets undermines the design integrity of the scheme, as not ensuring like-for-like or genuinely additional offsets.

### Conservation actions

**2.83** A paper by the Nature Conservation Council of NSW raised concern about the ability to use conservation actions (such as research or education) that do not directly protect or manage land as an offset. It noted that the NSW Scientific Committee has previously called for the rejection of the use of 'supplementary measures' as offsets. Its advice was: 'the proposal that a proponent can provide funds for supplementary measures that do not involve protecting and managing a site, or by paying into the Fund, is clearly a case of developers being able to buy themselves out of any obligation to protect biodiversity in any meaningful way'.<sup>180</sup>

**2.84** The Environmental Defenders Office submitted that allowing alternative 'biodiversity conservation measures' such as research or targeted surveys to be counted as credits in lieu of genuine direct offsets undermines like-for-like standards of biodiversity offsetting. It argued that this approach 'is essentially trading off a permanent impact for an activity that may or may not yield a direct environmental outcome in the future'.<sup>181</sup> The Environmental Defenders Office submitted that the use of indirect offset options should be limited.<sup>182</sup>

### Payment to the Biodiversity Conservation Trust

**2.85** The option for developers to discharge offset obligations by making a payment to the Biodiversity Conservation Fund is a key area of concern for many environmental stakeholders. Several submissions raised concern about whether a 'no net loss' standard is likely to be achieved while developers have the option to discharge their obligations by making a payment to the Trust.<sup>183</sup>

**2.86** Many stakeholders asserted that making a payment to the Trust, rather than directly securing offsets, has become a default option for developers.<sup>184</sup> To some extent this appears to be by

<sup>179</sup> Submission 97, NSW Government, p 8.

<sup>180</sup> Submission 95, Nature Conservation Council of NSW, Attachment 1, p 34.

<sup>181</sup> Submission 92, Environmental Defenders Office, p 13.

<sup>182</sup> Submission 92, Environmental Defenders Office, p 13.

<sup>183</sup> See, for example: Submission 50, Penrith City Council, p 3.

<sup>184</sup> See, for example: Submission 58, Mr Alexander Cox, pp 5-6.



design: the government submission said that while there is no obligation for developers to choose this option, it can be a 'faster and simpler option' for developers.<sup>185</sup>

**2.87** With regard to the design integrity of the scheme according to the principles outlined above, stakeholders argued that the option to pay into the Biodiversity Conservation Fund rather than directly source credits is problematic because:

- With the onus placed on the Trust to find a relevant credit, there is a possibility of development proceeding where no like-for-like offset can be found.<sup>186</sup>
- It means land clearing may proceed before appropriate offsets are sourced, thus there is a time lag between development impact and offsetting.<sup>187</sup>
- The Trust is allowed to use funds for 'other biodiversity conservation actions' rather than obtain like-for-like offsets.<sup>188</sup>
- The greater geographic flexibility for the Trust to source credits means offsets may not be local to where the development impact occurred.<sup>189</sup>
- The ease of making a payment to the Trust rather than having to source credits can mean the avoid-minimise-offset hierarchy is less likely to be observed.<sup>190</sup>

**2.88** The Environmental Defenders Office recommended setting stricter parameters around the payment of money to the Biodiversity Conservation Fund in lieu of directly obtaining offsets, and enabling the Trust to refuse to accept an offset liability where it would not be possible to obtain like-for-like offsets.<sup>191</sup>

## Use of mine rehabilitation as an offset

**2.89** There were strong concerns about allowing future mine rehabilitation to be used as an offset, with environmental stakeholders pointing out this raises issues of a time lag, uncertainty whether the anticipated offset would be realised, and non-additionality.

**2.90** Ms Walmsley suggested the use of mine rehabilitation as offsets shows the scheme has 'gone beyond the bounds of ecological credibility'. She pointed out that a mine could be approved now, yet mine rehabilitation 'offsets' might not actually occur for 40 years. Ms Walmsley argued that the assumption that a mine site can be adequately restored over-estimates the ability for restoration, given the lack of intact soil structure and microbiome, and noted that a lot of plant

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<sup>185</sup> Submission 97, NSW Government, p 16.

<sup>186</sup> Submission 92, Environmental Defenders Office, p 13; Submission 14, Friends of the Grasslands, p 2.

<sup>187</sup> See, for example: Submission 95, Nature Conservation Council of NSW, Attachment 1, p 34.

<sup>188</sup> Submission 92, Environmental Defenders Office, p 13.

<sup>189</sup> See, for example: Evidence, Mr Ziggy Andersons, Coordinator Environmental Services, Singleton Council, 10 December 2021, p 7; Evidence, Miss Love, 10 December 2021, p 11.

<sup>190</sup> See, for example: Evidence, Mr Cox, 22 October 2021, p 15; Evidence, Ms Walmsley, 22 October 2021, pp 45-56.

<sup>191</sup> Submission 92, Environmental Defenders Office, p 13.

community types take at least 20 years to restore ecological function – and much more for some ecosystems.<sup>192</sup>

- 2.91** A submission from an ecologist similarly described use of mine rehabilitation as offsets as 'ecological nonsense' on the grounds that mine rehabilitation is, or should be, a standard condition of consent, thus is not creating any additional, or certain, ecological gains:

Mine rehabilitation is not an additional obligation of a mining company, it should be a standard condition of consent as it was in the past. Even so it is highly unlikely the biodiversity values of any former mine site can be restored to a sufficient quality that would merit the use of these sites as an offset for extant vegetation.<sup>193</sup>

### Discounting of offsets

- 2.92** Another area of concern for stakeholders is the provision for a developer's offset 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 or economic benefit to the state.<sup>194</sup>
- 2.93** The Environmental Defenders Office noted that for local development, a consent authority may reduce or increase the number of biodiversity credits assessed as required in the biodiversity development assessment report if it determines this is justified 'having regard to the environmental, social and economic impacts of the proposed development'. For local development, the consent authority must give reasons for this decision.
- 2.94** For state significant development or infrastructure, the Environmental Defenders Office observed that the Minister for Planning has significant discretion whether or not to require a proponent to retire biodiversity credits to offset impacts, and is not required to justify or provide reasons for their decision.<sup>195</sup>
- 2.95** The Environmental Defenders Office submitted that the option to discount offset requirements based on non-ecological considerations is inconsistent with the principle that offsets should be science based, and 'is another avenue whereby the ecological validity and integrity of an offset can be undermined under current NSW laws'. The submission recommended that the ability to discount offsets be removed, or, if a discounting mechanism is retained, it should be strictly limited to discounts based on ecological reasons, and if reasons are provided for decisions.<sup>196</sup>

### Committee comment

- 2.96** The committee notes that biodiversity is a critical aspect of functioning ecosystems, a healthy planet, and ultimately human wellbeing. Protecting biodiversity is not about putting 'plants over people': people *need* plants (and animals) – in the form of healthy, diverse, natural ecosystems – for their very survival.

<sup>192</sup> Evidence, Ms Walmsley, 22 October 2021, p 44.

<sup>193</sup> Submission 27, Name suppressed, p 7.

<sup>194</sup> See, for example: Submission 85, Humane Society International, p 2.

<sup>195</sup> Submission 92, Environmental Defenders Office, p 16.

<sup>196</sup> Submission 92, Environmental Defenders Office, p 1.

- 2.97** As we have heard repeatedly throughout this inquiry, New South Wales's biodiversity is under threat. We cannot afford to hasten the extinction of what biodiversity remains through a scheme that trades off threatened species for cash.
- 2.98** The committee recognises that biodiversity offsetting is attempting to strike a balance between development and environmental protection by providing a mechanism through which biodiversity loss caused by development can be offset with gains elsewhere. We understand this scheme intends to aid decision makers in quantifying the ecological impacts of development, while enabling developers to offset any unavoidable impacts. However, we are concerned that the design of this scheme has swung too far in favour of facilitating development, at the expense of irreplaceable biodiversity values.
- 2.99** There are established best practice principles for biodiversity offsetting, as outlined in international literature, which have to varying extents been built into the current and past offsetting schemes in New South Wales. However, we are concerned that the scheme abandons many of these principles, and provides too much scope for development to occur without a genuine, additional, ecologically equivalent offset being in place. The flexibility allowed to destroy important biodiversity without ensuring genuine biodiversity gains elsewhere sets the scheme up to fail.
- 2.100** The committee strongly endorses the view that biodiversity offsetting should only be a last resort to compensate for unavoidable impacts of development, not a go-to option for developers. Where offsets are used, they must be genuinely additional and result in overall benefit – a net gain, rather than the lesser 'no net loss'. Offsets must be ecologically equivalent to what is lost to development, or development should not occur. We should not have 'variation rules', either for developers or the Biodiversity Conservation Trust, that bypass the like-for-like principle. Offsets must be in place before development impact occurs.
- 2.101** There are multiple ways the scheme's design needs to be strengthened to bring it into line with the fundamental principles for effective offsetting. They include:
- strengthening the application of the avoid, minimise, offset hierarchy in the scheme to ensure offsetting is genuinely used as a last resort only for unavoidable impacts of development
  - establishing clear thresholds for where offsets should not be used, in order to protect threatened species and ecosystems that cannot be offset elsewhere
  - significantly strengthening the requirement for ecological equivalence of offsets by tightening the geographic and species equivalence requirements of the like-for-like rules and curtailing the use of variation and ancillary rules
  - ensuring offsets result in genuinely additional gains to biodiversity that would not have occurred otherwise
  - reducing pathways for using indirect offsets, and, where this does occur, increasing the transparency around this mechanism
  - removing the option to use mine rehabilitation as an offset under the scheme
  - reducing or removing discretion to discount offset requirements for non-ecological reasons, and increasing transparency around this mechanism.

- 2.102** The committee appreciates that the scheme is complex with multiple stakeholders – hence we are of the view that specific design changes need to be made after careful review and consultation. Therefore we recommend that the department review the scheme against best practice principles and reform it as necessary to achieve the intent outlined above.

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### **Recommendation 1**

That the Department of Planning and Environment review and reform the design of the Biodiversity Offsets Scheme, to ensure it meets best practice principles for biodiversity offsetting. The review should be undertaken in consultation with stakeholders, and the reform must ensure that:

- the avoid, minimise, offset hierarchy in the scheme is strengthened to ensure offsetting is genuinely used as a last resort only for unavoidable impacts of development
- clear thresholds for where offsets should not be used are established, in order to protect threatened species and ecosystems that cannot be offset elsewhere
- the ecological equivalence of offsets is significantly strengthened by tightening the geographic and species equivalence requirements of the like-for-like rules and curtailing the use of variation and ancillary rules
- offsets result in genuinely additional gains to biodiversity that would not have occurred otherwise
- indirect offsets available under the scheme are reduced, and, where this does occur, the transparency around this mechanism is increased
- the option to use mine rehabilitation as an offset under the scheme is removed
- the discretion to discount offset requirements for non-ecological reasons is reduced, and, where this does occur, the transparency around this mechanism is increased.

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- 2.103** Noting the lack of clarity of offsetting principles governing the current scheme, we recommend that a set of scientifically sound principles for effective biodiversity offsetting be defined and enshrined in legislation governing the scheme. We note the upcoming statutory review of the *Biodiversity Conservation Act 2016* provides an opportunity to define such a set of principles and recommend that they are embedded appropriately in the Act.

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### **Recommendation 2**

That the NSW Government define a set of scientifically sound principles that govern the operation of the Biodiversity Offsets Scheme, and ensure these are embedded in the *Biodiversity Conservation Act 2016*.

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- 2.104** The credibility of an offsets scheme depends on having a robust, scientifically valid mechanism to quantify biodiversity losses and gains. Evidence before this committee called into question the validity of the data and assumptions underpinning the Biodiversity Assessment Method used in the scheme. The committee was particularly concerned about the significant use of 'averted loss' to calculate supposed gains to biodiversity at stewardship sites. This gets to the heart of whether offsets are genuinely providing biodiversity gains to compensate for what is lost. The

committee appreciates that the science is complex, hence we recommend that the department commission an independent expert review of the Biodiversity Assessment Method, including an examination of the underpinning assumptions.

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### **Recommendation 3**

That the Department of Planning and Environment commission an independent expert review of the Biodiversity Assessment Method and its underlying assumptions, including:

- the use of 'averted loss' to calculate biodiversity gains at offset sites
  - the value placed on landscape connectivity and preservation of high quality habitat
  - how the method accounts for cumulative loss arising from multiple developments in an area.
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## Chapter 3 Strategic conservation outcomes

This chapter considers whether the Biodiversity Offset Scheme's design enables a strategic approach to conserving the most important ecosystems and habitat. It notes the biodiversity certification process as the scheme's mechanism to enable strategic offsetting on a larger scale. It then considers the Biodiversity Conservation Trust's role and performance in securing and managing offset sites on behalf of developers, and whether it is able to use this role to achieve strategic conservation outcomes. Finally, it reviews a number of issues raised about the scheme's design and operation not supporting strategic conservation outcomes, including: how the scheme deals with cumulative loss, protection of key habitat and wildlife corridors, whether it supports biodiversity protection at a local level, and whether it adequately accounts for risks caused by climate change.

### Does the scheme foster strategic biodiversity conservation outcomes?

3.1 The scheme is only one part of the *Biodiversity Conservation Act 2016* (BC Act), and not necessarily designed to have a strategic focus, but rather to allow individual developments to offset their impact.<sup>197</sup> There are, however, a number of ways it could be used strategically to deliver biodiversity conservation outcomes: the biodiversity certification mechanism in the scheme allows biodiversity offsetting at a larger scale. In addition, the role of the Trust in pooling developer funds and acquiring credits on behalf of developers should enable a more strategic approach to biodiversity conservation.

### Biodiversity Certification

3.2 'Biodiversity certification' (also referred to as 'biocertification') is a mechanism within the scheme that allows biodiversity to be assessed upfront on a larger scale, rather than site by site at the development application stage.

3.3 The government explained that biodiversity certification:

- uses the same assessment method and offset rules as for a single development, but on a large scale
- is attractive for proponents who own multiple parcels or a large lot of land as it provides certainty about where development can occur
- is available solely to planning authorities such as local governments, local land services, the Greater Sydney Commission and the Minister for Planning
- is used to achieve strategic planning and biodiversity outcomes on a large scale
- offers more offsetting options such as creating new national parks or using environment zones.<sup>198</sup>

<sup>197</sup> Evidence, Ms Michelle Dumazel, Executive Director - Biodiversity and Conservation, Department of Planning and Environment, 8 April 2022, p 25.

<sup>198</sup> Submission 97, NSW Government, p 11.

- 3.4** Departmental witnesses highlighted biocertification as the scheme's mechanism to enable regional planning, and to plan for strategic environmental outcomes up front. Ms Michelle Dumazel, Executive Director, Biodiversity and Conservation, Department of Planning and Environment, advised there was a team which assessed landscape factors and worked with their regional planning colleagues to consider strategic areas of biodiversity that can be included in the planning stage.<sup>199</sup>
- 3.5** Some stakeholders to the inquiry expressed support for the biodiversity certification process as a way to more strategically plan for biodiversity conservation. The Environment Institute of Australia and New Zealand stated that biodiversity conservation planning works best when considered early and at a landscape scale, and suggested the biodiversity certification process can achieve this.<sup>200</sup>
- 3.6** The Environmental Defenders Office stated that, in principle, strategic environmental assessment can be a useful tool to underpin land use planning, as it provides a mechanism for assessing cumulative impacts and landscape scale processes, as well as provide upfront certainty to businesses and the community about the future development potential of an area. However, it also noted that, to be done properly, it must include important safeguards (such as stringent environmental impact thresholds, accountability mechanisms, and strong provisions for monitoring and enforcement), and must not replace important site-specific assessment.<sup>201</sup>
- 3.7** The Environmental Defenders Office highlighted a number of concerns in its analysis of the biodiversity certification process. In particular, it expressed concern about the broad discretion given to the Minister under the Act, and that biodiversity certification 'compromised environmental standards'.<sup>202</sup> It recommended that offsetting under the NSW biocertification system be reviewed and strengthened in line with best practice offsetting principles.<sup>203</sup>
- 3.8** Several environmental and community group submissions criticised the biodiversity certification process as failing to deliver 'strategic' conservation outcomes such as preservation of important wildlife corridors and habitat.<sup>204</sup> There was particular concern from environment and community groups around Sydney about biodiversity certification being used in urban growth centres in a way that allows developers to impact known koala habitat.<sup>205</sup> Concerns about the biodiversity certification process included that it:
- involves significant ministerial discretion, including in ways that compromise conservation such as allowing activities that have a serious and irreversible impact<sup>206</sup>

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<sup>199</sup> Evidence, Ms Dumazel, 8 April 2022, p 22.

<sup>200</sup> Submission 90, Environment Institute of Australia and New Zealand, p 3.

<sup>201</sup> Submission 92, Environmental Defenders Office, p 31.

<sup>202</sup> Submission 92, Environmental Defenders Office, p 25.

<sup>203</sup> Submission 92, Environmental Defenders Office, p 29.

<sup>204</sup> See, for example: Submission 36, Blacktown and District Environment Group, pp 4-9.

<sup>205</sup> See, for example: Submission 67, Save Sydney's Koalas, pp 2-12, Submission 83, Total Environment Centre, pp 2 and 15-20.

<sup>206</sup> Submission 92, Environmental Defenders Office, p 25; Submission 95, Nature Conservation Council of NSW, p 13.

- removes the need for site-by-site environmental assessment by consenting authorities<sup>207</sup>
- is not designed to accommodate subsequent changes in environmental circumstances, such as bushfires<sup>208</sup>
- exempts developers from complying with policies and regulations that offer threatened species additional protections, such as koalas<sup>209</sup>
- does not require applicants to accommodate the recommendations of independent expert reports on protection of wildlife corridors<sup>210</sup>
- allows proponents to make cash contributions to protecting already reserved areas
- has potential conflicts of interest in the process, due to the specialist expertise required, meaning a limited number of individuals may work for proponents, ecological consulting firms or consent authorities<sup>211</sup>
- there is no overarching body looking at planning and biodiversity certification processes in New South Wales.<sup>212</sup>

**3.9** The NSW Government submission cited the Cumberland Plain Conservation Plan as an example of a 'strategic' biocertification approach, and stated that 'the scheme is facilitating one of the largest strategic conservation plans to be undertaken in Australia', which, 'once finalised ... will mean development applications can be determined across a large area of western Sydney without site by site biodiversity assessment and offsetting.'<sup>213</sup>

**3.10** Multiple environmental advocacy and community environment groups expressed concerns about the use of the biocertification process for the Cumberland Plain Conservation Plan.<sup>214</sup> The Blacktown and District Environment Group asserted that the plan has reduced developers' offset requirements and generated no real conservation gains.<sup>215</sup> The Mulgoa Valley Landcare Group Inc argued that the Cumberland Plain Conservation Plan was designed to facilitate development across the Sydney region at the expense of biodiversity. It concluded that, instead of preserving the best remaining Cumberland Plain woodland, protecting important corridors or improving habitat connectivity, the plan primarily protects cheaper land with less biodiversity value on the floodplain or slopes that is not suitable for development.<sup>216</sup> The Better Planning Network asserted that the biodiversity certification framework for the plan gives upfront

<sup>207</sup> See, for example: Submission 38, Mulgoa Valley Landcare Group Inc, p 2; Submission 51, Better Planning Network, p 3.

<sup>208</sup> Submission 51, Better Planning Network, p 3.

<sup>209</sup> Submission 51, Better Planning Network, p 3; Submission 67, Save Sydney's Koalas, p 3.

<sup>210</sup> Submission 67, Save Sydney's Koalas, p 1.

<sup>211</sup> Submission 83, Total Environment Centre, p 12; Submission 9, Name suppressed, pp 1-2.

<sup>212</sup> Evidence, Mr Saul Deane, Urban Sustainability Campaigner, Total Environment Centre, 22 October 2021, p 20.

<sup>213</sup> Submission 97, NSW Government, p 12; Evidence, Ms Dumazel, 8 April 2022, p 22.

<sup>214</sup> See, for example: Submission 92, Environmental Defenders Office, pp 26-29; Submission 83, Total Environment Centre, p 3; Submission 82, Wilton Action Group, p 8.

<sup>215</sup> Submission 36, Blacktown and District Environment Group, p 6.

<sup>216</sup> Submission 38, Mulgoa Valley Landcare Group Inc, pp 2-4.



approval to impacts on biodiversity but delays certainty about the nature of offsets and when they will be implemented to mitigate the impacts.<sup>217</sup>

### **Role of the Biodiversity Conservation Trust in delivering conservation outcomes**

- 3.11** As noted in Chapter 1, one of the Trust's roles in the scheme is to secure biodiversity credits on behalf of developers who chose to pay into Biodiversity Conservation Fund rather than acquire credits directly. Stakeholders pointed out that, from a strategic conservation view, there could be advantages to having a single organisation such as the Trust playing this role, as it could potentially take a more strategic approach in stimulating and securing the supply of credits in areas with high conservation value.
- 3.12** Mr Alexander Cox, PhD candidate, Australian National University noted that centralising offsetting within one body can offer multiple advantages, particularly where that body has greater conservation expertise than most developers. He observed that the Trust is able to pool funds from multiple developers and, in principle, to acquire and manage a long-term, strategic portfolio of conservation reserves on private land.<sup>218</sup>
- 3.13** The NSW Minerals Council suggested that the Trust, as an independent body, is well placed to work with stakeholders to identify future demand within regions and begin working with landholders to develop required credits ahead of demand.<sup>219</sup> It recommended that the Trust be given a greater remit in strategic conservation, including considering ways that strategic conservation could be done outside the scheme.<sup>220</sup>
- 3.14** The Nature Conservation Council of NSW also expressed support for the Trust's potential, despite having concerns about its current capacity and transparency:

We fully support investment in private land conservation and recognise the importance of ecological management and restoration. The Biodiversity Conservation Trust is an important institution and should be supported to build the capacity needed to deliver strategic private land conservation outcomes over the long term. The Biodiversity Conservation Trust's oversight and quality control role in the Biodiversity Offsets Scheme is positive and should be strengthened and made more transparent.<sup>221</sup>

### **The Biodiversity Conservation Trust's ability to discharge its offset obligations**

- 3.15** While some stakeholders saw advantage in the Trust's ability to pool developer funds to acquire offsets, questions were raised about the capacity of the Trust to deliver on its mandate, particularly whether it was able to acquire sufficient credits to discharge its obligations. As noted in Chapter 2, the ecological integrity of the scheme requires like-for-like credits to be obtained

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<sup>217</sup> Submission 51, Better Planning Network, p 13.

<sup>218</sup> Submission 58, Mr Alexander Cox, p 5; Evidence, Mr Alexander Cox, PhD Candidate, Crawford School of Public Policy - Australian National University, 22 October 2021, pp 10 and 14.

<sup>219</sup> Submission 66, NSW Minerals Council, p 9.

<sup>220</sup> Submission 66, NSW Minerals Council, p 10.

<sup>221</sup> Submission 95, Nature Conservation Council of NSW, p 13.

before development impact occurs. The Environmental Defenders Office expressed the doubt of many stakeholders that the current arrangements are working to ensure offsets are secured:

... we have moved so far away from the principles that we are now in such a flexible system that it is just the norm now for—the cost of a development is that you just also throw in some money for an offset that the Biodiversity Conservation Trust might have to find at a future date. We have really departed from those core principles and the core things that should legally underpin an ecologically credible system.<sup>222</sup>

- 3.16** Many stakeholders to this inquiry were concerned about the possibility the Trust may accept developers' payments into the Biodiversity Conservation Fund, but subsequently be unable to obtain the right type of credits to discharge the associated offset obligations. Where suitable credits are not sourced quickly, development impacts can occur before offsets are secured. Additionally, concerns were raised about the level of flexibility provided to the Trust in the type of credits it can acquire, as the Trust does not have to adhere to the like-for-like principle. Further, there is no statutory timeframe for the Trust to acquit its offset obligations.<sup>223</sup>
- 3.17** Evidence from both Mr Cox and the Ecological Consultants Association of NSW was that the Trust has struggled to acquit its offset obligations in a timely way. Mr Cox submitted that, in the first three years of the scheme, payments to the Biodiversity Conservation Fund exceeded the expenditure of the Trust in acquiring offsets, suggesting that there is a growing 'offset gap' where development-related clearing progresses, but securing of offsets lags behind. He suggested that 'it is unclear that in every case sufficient offsets may be secured at all'.<sup>224</sup>
- 3.18** Mr Steven House, Director, Meridolum, noted that the Trust's 2020 Annual Report showed that only 4 stewardship agreements were signed in that year, and while 18 offset obligations had been met, the Trust had accepted liability for a further 231 offset obligations that had not been met.<sup>225</sup>
- 3.19** The Ecological Consultants Association of NSW suggested that, as of September 2020, the Trust had only been able to acquit 20 per cent of the obligations it had taken on.<sup>226</sup> The association's Treasurer, Mr Andrew Lothian, suggested that this was not because the Trust had insufficient finances but reflected a lack of credits in the market, given that the process of producing a stewardship site is costly and complex.<sup>227</sup>
- 3.20** In response to suggestions that the Trust had acquitted less than 20 per cent of its obligations, and was taking several years to secure relevant credits, Mr Paul Elton, Chief Executive Officer, Biodiversity Conservation Trust, stated: 'That is not the case'. He said:

<sup>222</sup> Evidence, Ms Rachel Walmsley, Head of Policy & Law Reform, Environmental Defenders Office, 22 October 2021, p 46.

<sup>223</sup> Submission 97, NSW Government, Attachment C, p 5.

<sup>224</sup> Submission 58, Mr Alexander Cox, p 6.

<sup>225</sup> Evidence, Mr Steven House, Director, Meridolum, 9 December 2021, p 13.

<sup>226</sup> Submission 2, Ecological Consultants Association of NSW, p 2.

<sup>227</sup> Evidence, Mr Andrew Lothian, Treasurer, Ecological Consultants Association of NSW, 22 October 2021, p 6.

- The Trust board has adopted a policy that the Trust should aim to acquit a median of offset obligations within three years and all offset obligations within a maximum of five years.
- To 30 September 2021, the Trust had received 242 payments for 668 offset obligations from private and public development proponents into the Biodiversity Conservation Fund, totalling \$55.9 million. This includes payments to support large-scale infrastructure projects, schools, hospital redevelopments, wind and solar farms, tourist facilities, mining projects and smaller-scale residential developments.
- By bundling offset obligations, the Trust can acquit them in a manner that optimises environmental outcomes.
- To 30 September 2021, the Trust had acquitted 47 per cent of these offset obligations, where "acquitted" means the credits have either been retired or secured for retirement.
- To 10 December 2021, on average, the Trust is taking about 15 months to acquit offset obligations, as measured by number or dollar value.
- The Trust publishes details of offset obligations that have been fully acquitted. For these fully acquitted offset obligations, as at 30 June 2021, the median offset acquittal timeframe was 10 months.<sup>228</sup>

**3.21** Mr Elton did acknowledge that the median offset acquittal timeframe would increase 'somewhat' because there are still offset obligations yet to be acquitted that have been held longer than ten months, but said: 'we remain very confident that we can operate within the Trust board's policy of acquitting median of offset obligations within three years'.<sup>229</sup>

**3.22** The Audit Office of NSW raised some concern about the Trust's capacity to routinely acquit its credit obligations on a like-for-like basis due to credit supply issues in the market. It noted:

- as of 9 May 2022, 340 developers had made payments worth almost \$90 million into the Biodiversity Conservation Fund to transfer their offset obligations to the Trust
- as of 30 December 2021, the Trust had retired around 20 per cent of its obligations by credit number, all on a like for like basis
- the Trust had purchase agreements with landholders and further credits held but not yet retired which would enable the Trust to acquit 37 per cent of its obligations by credit number, if all biodiversity stewardship agreements are finalised
- the Trust has a board-approved annual plan to acquit a portion of its current obligations, however does not have a costed strategy for acquitting its remaining obligations, including whether the necessary credits will be available for purchase
- the Trust has more options available to it than developers to acquit its obligations, and this can be expected to become increasingly necessary in the context of credit supply issues, particularly for rare species.<sup>230</sup>

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<sup>228</sup> Evidence, Mr Paul Elton, Chief Executive Officer, Biodiversity Conservation Trust, 10 December 2021, pp 32-33.

<sup>229</sup> Evidence, Mr Elton, 10 December 2021, p 33.

<sup>230</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 45.

- 3.23** The Trust's need to use alternative options to acquit its obligations, particularly for rare species, was described by the Audit Office of NSW as 'a risk to biodiversity outcomes'.<sup>231</sup>

### Gaps in strategic oversight

- 3.24** Stakeholder groups pointed out that, as a scheme designed to offset development impacts at a project level, there is no overarching mechanism to monitor the cumulative impacts of development. Further, there are not explicit mechanisms in the scheme to plan for protection of biodiversity at a local level, or to promote protection of the most important areas of biodiversity in terms of quality of habitat and connectivity and resilience in the landscape. These issues are considered below.

#### Cumulative loss

- 3.25** The IUCN noted that implementing biodiversity offsets is a long-term exercise, and schemes should take full account of direct, indirect and cumulative impacts, geographically and over time.<sup>232</sup> Several local government stakeholders expressed concern that there is no mechanism in the scheme to monitor for or prevent cumulative loss from multiple smaller areas, sometimes referred to as 'death by a thousand cuts'.<sup>233</sup>
- 3.26** Miss Karen Love, Strategic Environmental Projects Coordinator, Port Macquarie Hastings Council, questioned who is assessing the long-term and cumulative impacts of biodiversity loss that has been facilitated through the scheme.<sup>234</sup> Mr Peter Maslen, retired Engineer and Ecological Scientist, noted that the scheme does not address 'constant' small habitat losses approved by local and state governments, which 'accumulate to create a significant loss of habitat and hence biodiversity'. He observed that 'the ease of clearing of habitat does not get addressed properly by the scheme'.<sup>235</sup>
- 3.27** Mrs Mary-Anne Crawford, Manager Development and Environmental Services, Singleton Council, noted that cumulative impact of biodiversity offsetting is left to council to monitor and manage, as the assessment process for major projects in particular is constrained to examining the individual project level.<sup>236</sup> She suggested that mapping of offsets within an LGA and providing public access and scrutiny of offset outcomes would improve the concerns around the cumulative effects of multiple projects within a locality.<sup>237</sup>
- 3.28** Singleton Council also stated that the impact assessment for each project does not adequately take into account the cumulative impact from other projects in that area. It noted the assessment

<sup>231</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 45.

<sup>232</sup> International Union for Conservation of Nature, *Issues Brief: Biodiversity Offsets* (2016), p 2.

<sup>233</sup> See, for example: Submission 57, Clarence Valley Council, p 1; Evidence, Mr Peter Maslen, Engineer and Ecological Scientist (retired), 22 October 2021, p 16.

<sup>234</sup> Evidence, Miss Karen Love, Strategic Environmental Projects Coordinator, Port Macquarie Hastings Council, 10 December 2021, p 10.

<sup>235</sup> Evidence, Mr Maslen, 22 October 2021, p 11.

<sup>236</sup> Evidence, Mrs Mary-Anne Crawford, Manager Development and Environmental Services, Singleton Council, 10 December 2021, p 2.

<sup>237</sup> Evidence, Mrs Crawford, 10 December 2021, p 2.

of cumulative impacts is particularly relevant to major project applications, and provided examples in the Upper Hunter of multiple large mines being developed in close proximity.<sup>238</sup>

**3.29** Some of the concerns about cumulative loss related to land clearing outside the scheme (as discussed further in Chapter 5). For example, Goulburn Mulwaree Council stated there have been many instances where landholders have cleared relatively small areas of native vegetation, but not enough to trigger entry into the scheme. In this way, 'while the amount of clearing on each individual property can be argued to be minor, the cumulative impact and loss of biodiversity across the entire LGA is significant'.<sup>239</sup>

**3.30** Asked about mechanisms in the scheme for assessing cumulative loss, representatives from the Department of Planning and Environment (the department) replied:

- The measurement of cumulative impacts on threatened species is built into the assessment method up front, because the Biodiversity Assessment Method considers the condition and status of impacted entities [whether critically endangered or endangered] and this is reviewed regularly.<sup>240</sup>
- Threatened entities at risk of extinction due to cumulative impacts and/or their unique ecology are deemed potentially serious and irreversible impact entities under the Biodiversity Assessment Method. If a development proposal may impact on such an entity, additional assessment is required to address this extinction risk, including consideration of historic and contemporary extent of occurrence.<sup>241</sup>
- The data underpinning the Biodiversity Assessment Method are publicly accessible and regularly updated, such as when the Threatened Species Scientific Committee determines to list or change the threat status of threatened entities. Where there is evidence to suggest an entity is under increased pressure the department adjusts settings in the Biodiversity Assessment Method to manage this increased risk.<sup>242</sup>
- For major projects, cumulative impacts are a component of any environmental impact statement – part of the assessment would be to look at other nearby developments that might have impacts that accumulate.<sup>243</sup>
- On 1 July 2021 the department released a cumulative impact assessment technical guide setting out a methodology for assessing cumulative impacts for major projects. The guidelines set the expectation that when assessing an environmental impact statement there is consideration of future development, so other possible projects that could have a cumulative impact are considered.<sup>244</sup>

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<sup>238</sup> Submission 77, Singleton Council, pp 1-2.

<sup>239</sup> Submission 12, Goulbourn Mulwaree Council, p 11.

<sup>240</sup> Evidence, Ms Dumazel, 10 December 2021, p 53; Answer to questions on notice, Department of Planning and Environment, 10 February 2022, p 14; Evidence, Ms Dumazel, 8 April 2022, pp 23-24.

<sup>241</sup> Answer to questions on notice, Department of Planning and Environment, 10 February 2022, p 14.

<sup>242</sup> Answer to questions on notice, Department of Planning and Environment, 10 February 2022, p 14.

<sup>243</sup> Evidence, Mr David Gainsford, Deputy Secretary, Assessment and System Performance, Department of Planning and Environment, 10 December 2021, p 55.

<sup>244</sup> Evidence, Ms Felicity Greenway, Executive Director, Strategic Services, Department of Planning and Environment, 10 December 2021, p 57; Evidence, Mr Gainsford, 8 April 2022, p 25.

### Local biodiversity protection and planning

- 3.31** There was concern from many local councils that the scheme was not working to conserve biodiversity in their area, leaving some Local Government Areas (LGAs) susceptible to ongoing biodiversity loss.<sup>245</sup> Some also suggested that the scheme does not adequately support local land use planning.
- 3.32** Specific areas of concern put forward by local councils included:
- The scheme does not adequately support consideration of strategic land use issues such as protection of biodiversity corridors, local threatened species population viability, water catchment protection or bushfire planning, or recognise local planning for biodiversity protection.<sup>246</sup>
  - The scheme does not require offsets in the same LGA as the development impact, leaving some LGAs vulnerable to experiencing a net loss of biodiversity as offsets are often not acquired locally.<sup>247</sup>
  - Lack of viability of small stewardship sites (under 10 hectares) in the scheme means some LGAs have few potential stewardship sites in their area, leading to offsets not being sourced locally.<sup>248</sup>
  - The inability of the scheme to protect smaller patches of vegetation that are strategically important.<sup>249</sup>
  - Sourcing of offsets for major projects, where local government is not the consent authority, may be opportunistic, and not based on local biodiversity conservation planning.<sup>250</sup>
- 3.33** Local Government NSW argued that the scheme should ensure offsets are procured locally where possible, to deliver a net biodiversity benefit to the affected LGA. It further called on the Trust to work more closely with the sector to secure offsets local where the development impact occurred, with particular emphasis on coastal areas.<sup>251</sup>

<sup>245</sup> See, for example: Submission 37, Wollondilly Shire Council; Submission 44, Port Stephens Council; Submission 47, Natural Resource Management and Planning staff - Port Macquarie Hastings Council; Submission 50, Penrith City Council; Submission 56, Tamworth Regional Council.

<sup>246</sup> Submission 62, Lake Macquarie City Council, p 62; Evidence, Mrs Crawford, 10 December 2021, pp 3-4.

<sup>247</sup> Submission 12, Goulburn Mulwaree Council, p 1; Submission 37, Wollondilly Shire Council, p 3; Submission 50, Penrith City Council, p 2; Submission 44, Port Stephens Council, p 1; Evidence, Mrs Kimberly Baker, Environmental Planner, Port Stephens Council, 10 December 2021, p 2.

<sup>248</sup> While there is no minimum size requirement in the scheme, several councils raised issues about the viability of establishing a stewardship site on areas smaller than 10 hectares. Submission 75, Shellharbour City Council; Submission 21, Clarence Valley Council, pp 2-3; Submission 78, Local Government NSW, p 7. See also NSW Biodiversity Conservation Trust, *Biodiversity stewardship agreement: Landholder guide*, (May 2021), p 16.

<sup>249</sup> Submission 21, Clarence Valley Council, pp 2-3; Evidence, Ms Heather Mitchell, Natural Resource Management Officer – Biodiversity, Clarence Valley Council, 10 December 2021, p 20.

<sup>250</sup> Evidence, Mrs Mary-Anne Crawford, Manager Development and Environmental Services, Singleton Council, 10 December 2021, p 6.

<sup>251</sup> Submission 78, Local Government NSW, p 8.

### **Wildlife corridors and connectivity**

- 3.34** Several stakeholders raised an issue with the project-by-project, market-based nature of the scheme, meaning there was no strategy to ensure offsets were protecting the most strategically important habitat areas that provided ecosystem resilience, connectivity and movement of wildlife.
- 3.35** The NSW Minerals Council expressed concern that the current approach of sourcing offsets in the market may leave a patchwork of conservation lands that are not well connected and have not been sourced for specific strategic reasons.<sup>252</sup>
- 3.36** The Ecological Consultants Association of NSW noted that there was no mandate to consider whether a development was removing an important vegetative link in the landscape, and that the procedure for offset generation lacked a strategic approach to restoring landscape function. The association suggested that the Trust should strategically acquire land, or have a list of land that forms linkages between blocks of native vegetation, presumably to prioritise for possible biodiversity stewardship sites, thus building ecological resilience into the system.<sup>253</sup>
- 3.37** From the project proponent perspective, Cement Concrete and Aggregates Australia complained that the Biodiversity Assessment Method does not provide an incentive for connectivity between offsets or to other conservation land, meaning there is no incentive within the approval process to identify offsets that had strategic value for connectivity. The organisation called for a more strategic approach to offsetting.<sup>254</sup>
- 3.38** Mr Barry Durman, representing Save Sydney's Koalas, also suggested the Biodiversity Assessment Method does not give enough consideration to the importance of protecting wildlife corridors, and ignores the range of threatened animals and their tendency to disperse, such as koalas.<sup>255</sup>

### **Ecological resilience and climate change**

- 3.39** Linked to the concerns about connectivity in the landscape were concerns that the offsets scheme does not account for climate change risks. One author submitted:

Historically, ecosystems and their biodiversity adapted to change and extreme events by moving through connected systems. Modern day ecosystems are barely connected, with biodiversity effectively locked into ecological fragments. Even the largest remnants such as the Pilliga are internally fragmented and not large enough for biodiversity to migrate and adapt. Extreme climate events such as droughts, floods and fire could easily impact entire populations. The combination of climate change and habitat fragmentation creates a bleak outlook for our unique biodiversity.<sup>256</sup>

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<sup>252</sup> Submission 66, NSW Minerals Council, p 9.

<sup>253</sup> Submission 2, Ecological Consultants Association of Australia, p 5.

<sup>254</sup> Submission 87, Cement Concrete & Aggregates Australia, p 4.

<sup>255</sup> Evidence, Mr Barry Durman, Member, Save Sydney's Koalas, 22 October 2021, p 20.

<sup>256</sup> Submission 89, Mr Andrew Knop, p 2.

- 3.40** Environmental groups highlighted the biodiversity destruction caused by the Black Summer bushfires in 2019-20 and stressed the importance of making species preservation in unburnt areas a top priority.<sup>257</sup> Ms Rachel Walmsley, Head of Policy and Law Reform, the Environmental Defenders Office, noted that the fires had ‘fundamentally changed the landscape in which the scheme operates’, and that climate change is reducing ecosystem resilience and exacerbating threats to threatened species.<sup>258</sup> The Environmental Defenders Office submitted that offset frameworks should build in mechanisms to respond to climate change and stochastic events.<sup>259</sup>
- 3.41** A climate scientist advised that there is a lack of knowledge, and no published literature on the impacts of climate change on the long-term viability of biodiversity offsets.<sup>260</sup>
- 3.42** Asked about how the scheme takes climate change into account, the department provided information on the process for major projects to consider and minimise greenhouse gas emissions. With regard to threatened entities, it noted:
- The Biodiversity Assessment Method explicitly requires assessment of impacts to movement corridors for threatened entities via 'prescribed impacts' (that is, impacts that are not related to vegetation clearing).
  - Retaining existing vegetation in-situ that connects threatened species and communities is key to building resilience to climate change.<sup>261</sup>

### Committee comment

- 3.43** While the committee understands that the scheme is only one part of the *Biodiversity Conservation Act 2016*, we nonetheless consider there needs to be a greater focus on ensuring the scheme is able to support strategic conservation outcomes.
- 3.44** The committee notes the potential of biocertification to provide a more strategic, landscape-wide assessment of biodiversity to inform developments and offsets at scale. However, we are concerned by evidence from stakeholders that this mechanism can result in biodiversity being undervalued, with offsets that are inadequate to compensate for what is lost. We are also concerned that there is no requirement to review biocertification approvals to account for changed environmental circumstances subsequent to the assessment being completed but before development commences. We consider the use of the biodiversity certification mechanism should be reviewed to ensure that it meets offsetting principles, achieves positive environmental outcomes, and there is transparency in its use.

<sup>257</sup> Evidence, Mr Brian Williams, President, Wilton Action Group, 22 October 2021, pp 20-21.

<sup>258</sup> Evidence, Ms Walmsley, 22 October 2021, p 42.

<sup>259</sup> Evidence, Ms Walmsley, 22 October 2021, p 42.

<sup>260</sup> Submission 10, Name suppressed, p 1.

<sup>261</sup> Answers to questions on notice, Department of Planning and Environment, 2 June 2022, p 13.



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**Recommendation 4**

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.

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- 3.45** The committee notes the potential for the Biodiversity Conservation Trust to play a strategic role in promoting conservation on private land in New South Wales. Unfortunately, evidence before us suggests that the Trust has thus far been unable to secure like-for-like credits in line with its obligations in a timely way. This has major implications for the ecological outcomes of the scheme. We are concerned about the time lag this creates between development impact and offsets being secured. Further, if the Trust is unable to secure like-for-like credits, we may be losing precious biodiversity that cannot be replaced. We are concerned about the level of flexibility available to the Trust meaning credits that are (eventually) secured may not compensate for the local impact of the development.
- 3.46** To prevent further loss of critical biodiversity, the pathway that enables developers to clear land before genuine, additional, like-for-like offsets are secured must be reformed. To this end, we recommend that the Biodiversity Conservation Trust urgently implement an application and review process for developer payments into the Biodiversity Conservation Fund to ensure proponents have exhausted all other private market avenues prior to paying into the Fund. In the event that credit supply is unavailable on the market the Trust should have a process to demonstrate that genuine like-for-like credits will be available, and there is a plan to bring those credits online, prior to receiving payments.
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**Recommendation 5**

That the Biodiversity Conservation Trust:

- urgently implement an application and review process for developer payments into the Biodiversity Conservation Fund to ensure proponents have exhausted all other private market avenues prior to paying into the Fund, and
  - in the event credit supply is unavailable on the market, have a process to demonstrate that genuine like-for-like offset credits will be available, and there is a plan to bring those credits online, prior to receiving payments.
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- 3.47** For the potential benefits of the Trust's role in securing offsets on behalf of developers to be realised, we consider there needs to be more proactive work done by the department and the Trust to foster protection of the most strategically important biodiversity under the scheme.
- 3.48** We therefore recommend the department and the Trust develop and implement a resourced plan to foster protection of strategically important biodiversity through the scheme. This may include, for example, reviewing the value placed on connectivity and high-quality habitat in the Biodiversity Assessment Method, monitoring for cumulative loss of habitat at local and regional levels, and promoting the establishment of biodiversity stewardship sites in areas of high conservation value.
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**Recommendation 6**

That the Department of Planning and Environment and Biodiversity Conservation Trust develop and implement a resourced plan to ensure the Biodiversity Offsets Scheme promotes protection of strategically important biodiversity.

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## Chapter 4 Effectiveness of the scheme at conserving biodiversity

This chapter considers evidence on effectiveness of the Biodiversity Offsets Scheme at conserving biodiversity. Noting that there are not defined conservation outcome measures, or an evaluation plan for the scheme, it considers what we can know about the scheme's conservation outcomes, based on data from the department about land protected under the scheme, and observations of stakeholders. It then considers evidence on whether the standard of 'no net loss' of biodiversity is being met at project level. This notes issues raised about the quality of surveys that assess and quantify biodiversity at development and stewardship sites, and the ongoing oversight of stewardship sites to know whether anticipated biodiversity gains are being achieved.

### Assessing biodiversity conservation outcomes of the scheme

**4.1** The Biodiversity Offsets Scheme was established to enable biodiversity loss to be calculated and offset on a project-by-project basis. As a scheme, it does not have defined conservation objectives or a performance framework against which to assess whether it is delivering on the 'no net loss' standard of biodiversity at a local, regional or state level. The Department of Planning and Environment was able to provide data on the amount of land protected by biodiversity stewardship agreements, and biodiversity indicators at a state level, but there is a data gap in terms of evidence of the scheme's performance at delivering 'no net loss' of biodiversity. This allows the perception of many stakeholders that it is facilitating development at the expense of biodiversity protection.

#### Lack of defined conservation outcome measures

**4.2** One challenge for understanding the conservation outcomes of the scheme is that it lacks stated conservation objectives. The Audit Office of NSW noted:

There are no biodiversity-specific outcome measures for the Scheme, such as measures of its expected contribution to maintaining biodiversity at a State and regional level. DPE has not made a clear statement on what its success would look like in the context of environmental and economic policy priorities, and the progress of major projects.<sup>262</sup>

**4.3** The Audit Office report found that a lack of clarity around what the scheme should be achieving means that it is difficult to determine what an acceptable level of compensation for biodiversity loss due to development should be, or whether gains achieved through the scheme would be sufficient to offset development impacts.<sup>263</sup> It also noted that, while high-level principles and directions for the scheme are set out in the *Biodiversity Conservation Act 2016*, key terms used in the Act such as 'compensate' and 'offset' have not been defined for operational, performance measurement or evaluation purposes.

<sup>262</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 3.

<sup>263</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), pp 27-28.

- 4.4 The Audit Office report recommended that, by July 2023, the department should implement a long-term plan defining biodiversity goals with respect to the Act, including (among other things) an approach to measuring and publicly reporting on biodiversity outcomes from the scheme, including its contribution to state and regional biodiversity goals.<sup>264</sup>
- 4.5 The department stated that the ‘no net loss’ standard for each project should mean that offset obligations, if acquitted in a like for like manner, should ensure that biodiversity loss is not accelerated by development activities.<sup>265</sup>

#### **Area protected by biodiversity stewardship agreements**

- 4.6 To demonstrate the biodiversity conservation outcomes of the scheme, the NSW Government submission highlighted the number of biodiversity stewardship sites that have been established under the scheme and the amount of land area protected.<sup>266</sup> The Biodiversity Conservation Trust advised that 219 stewardship sites had been established, covering 38,000 hectares, but noted that of those only 113 had become active, covering 15,500 hectares.<sup>267</sup> The government emphasised that, as a result of the scheme, ‘many threatened ecosystems and habitats for NSW’s threatened native plant and animal species are being protected by private landholders who can earn an income from managing their land for conservation.’<sup>268</sup>
- 4.7 The government submission stressed that biodiversity stewardship agreements are in-perpetuity and registered on land title, meaning current and future landholders must carry out management actions in line with the agreement. It further explained that, when a biodiversity stewardship agreement is put in place, management actions needed to deliver the expected gain in biodiversity are specified in the agreement and costed. The Trust invests money paid into it for management costs, and makes annual payments to landholders once specified actions are completed. The department stated that the security of this funding helps ensure the integrity of biodiversity outcomes under the scheme.<sup>269</sup>
- 4.8 In response to a question about how much land had been protected under the scheme relative to land that had been cleared, the department outlined that, between 25 August 2017 and 19 January 2022:
- 28,422 hectares of development and clearing sites had been assessed, creating offset obligations totaling 309,723 different ecosystem credits and 946,341 different species credits
  - 59,529 hectares were assessed as part of biodiversity stewardship agreements, generating 296,767 different ecosystem credits and 176,923 different species credits.<sup>270</sup>

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<sup>264</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 10.

<sup>265</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 3.

<sup>266</sup> Submission 97, NSW Government, p 2.

<sup>267</sup> Evidence, Mr Paul Elton, Chief Executive Officer, Biodiversity Conservation Trust, 10 December 2021, p 37.

<sup>268</sup> Submission 97, NSW Government, p 2.

<sup>269</sup> Submission 97, NSW Government, p 9.

<sup>270</sup> Answers to questions on notice, Department of Planning and Environment, 10 February 2022, p 2.

- 4.9 Witnesses from the department said that biodiversity stewardship agreements 'ensure there is a gain in biodiversity' because the scheme is set up to generate three to four hectares of protection to one hectare of impact.<sup>271</sup> Mr Paul Elton, Chief Executive Officer, Biodiversity Conservation Trust, advised that the average offset ratio is somewhere between three to four hectares of offset to one hectare of impact.<sup>272</sup> Mr Dean Knudson, Deputy Secretary, Biodiversity, Conservation and Science, Department of Planning and Environment, advised that, based on scientific understanding, this is the ratio required to yield no net loss.<sup>273</sup>
- 4.10 Several stakeholders questioned whether the offset ratios under the scheme are adequate to meaningfully compensate for impacts at development sites. The Northern Rivers Joint Organisation observed that the scheme generated significantly reduced offset ratios compared to its predecessor.<sup>274</sup> The Blacktown and District Environment Group argued that the scheme's offset ratios are grossly inadequate,<sup>275</sup> whilst other community groups expressed concern that habitat lost to development was being inadequately offset.<sup>276</sup>

### **Biodiversity Indicators Program**

- 4.11 Departmental officials told the committee that information on the overall status of biodiversity in New South Wales was being generated by the Biodiversity Indicator Program. This was established under the *Biodiversity Conservation Act 2016* and associated regulation.<sup>277</sup> The program collects data according to a published method, and will produce a report 'from time to time'.<sup>278</sup> The first *Biodiversity Outlook Report* was published in 2021, and, according to the department, 'provides a baseline for the status of biodiversity in New South Wales after European settlement and up to the commencement of the Act in 2017 ... [which] will be used for assessing future changes in biodiversity'.<sup>279</sup>
- 4.12 Departmental officials advised that the *Biodiversity Outlook Report* does not look specifically at the impact of the scheme, but rather is a high-level report that 'looks at cumulative impacts across the state, not just with development'.<sup>280</sup> They said it was used to 'see what is happening and what the trends overall are in biodiversity'.<sup>281</sup> The committee heard it is designed to present trends in

<sup>271</sup> Evidence, Mr Dean Knudson, Deputy Secretary, Biodiversity, Conservation & Science, Department of Planning and Environment, 10 December 2021, p 33.

<sup>272</sup> Evidence, Mr Elton, 10 December 2021, p 37.

<sup>273</sup> Evidence, Mr Knudson, 10 December 2021, p 34.

<sup>274</sup> Submission 93, Northern Rivers Joint Organisation – Natural Resource Management Managers Group, p 2.

<sup>275</sup> Submission 36, Blacktown and District Environment Group, p 10.

<sup>276</sup> See, for example: Evidence, Mr Saul Deane, Urban Sustainability Campaigner, Total Environment Centre, 22 October 2021, p 24; Evidence, Mr Gary Dunnett, Executive Officer, National Parks Association of NSW, 22 October 2021, p 35.

<sup>277</sup> Evidence, Ms Dumazel, 10 December 2021, p 38.

<sup>278</sup> *Biodiversity Conservation Act 2016*, s 14.3; Biodiversity Conservation Regulation 2017, cl 14.2; Answers to questions on notice, Department of Planning and Environment, 2 June 2022, p 4.

<sup>279</sup> Answers to questions on notice, Department of Planning and Environment, 2 June 2022, p 4.

<sup>280</sup> Evidence, Ms Dumazel, 8 April 2022, p 23.

<sup>281</sup> Evidence, Ms Dumazel, 8 April 2022, p 22.

biodiversity at state and bio-regional scales, although it would draw on more detailed species data.<sup>282</sup>

**4.13** In relation to the Biodiversity Offsets Scheme, the department explained that data on the status of threatened species is fed back into the Biodiversity Assessment Method, so that the assessment of the impact of development on individual species in biodiversity development assessment reports was based on up-to-date information.<sup>283</sup>

**4.14** In evidence, departmental officials acknowledged there is a gap between the overall, state-wide picture of biodiversity provided by the Biodiversity Indicator Program and individual, project-level reports generated through the Biodiversity Offsets Scheme to understand the scheme's performance. The officials stated that the department was looking at a monitoring and evaluation framework for the scheme:

We do need to do some work, and we are ... looking at our overall monitoring and evaluation framework to see whether it is robust based on what is required between the actual reports and the individual projects versus ... the Biodiversity Indicator Program, which ... assesses loss overall in terms of the IBRA regions.<sup>284</sup>

#### **Data versus perception in assessing the scheme's biodiversity outcomes**

**4.15** The absence of defined outcome measures and compelling data on the scheme's impact allows the perception that it is failing to achieve 'no net loss' of biodiversity. A range of stakeholders, including environmental advocates, ecologists and local government representatives expressed the view that the scheme is facilitating net loss of biodiversity.<sup>285</sup>

- '... there is absolutely no data available that would allow anyone to substantiate that harm is not being done, particularly in the case of wildlife' ... 'I just do not think anybody would be able to substantiate any good being done and I think there would be considerable evidence that there is harm being done, in the sense that there is ongoing habitat loss'<sup>286</sup> – *Lock the Gate Alliance*
- 'The Biodiversity Offsets Scheme, although well intended, has not produced any gains for biodiversity in the Clarence, rather has ensured a net loss to biodiversity, often of our most threatened flora and fauna.'<sup>287</sup> – *Clarence Valley Council*

<sup>282</sup> Evidence, Mr Atticus Fleming, Acting Coordinator-General, Environment, Energy and Science Group, Department of Planning and Environment, 8 April 2022, p 23; Answers to questions on notice, Department of Planning and Environment, 2 June 2022, p 6.

<sup>283</sup> Evidence, Ms Dumazel, 8 April 2022, p 23; Answers to questions on notice, Department of Planning and Environment, 2 June 2022, p 7.

<sup>284</sup> Evidence, Ms Dumazel, 10 December 2021, p 53.

<sup>285</sup> See, for example: Evidence, Ms Rachel Walmsley, Head of Policy & Law Reform, Environmental Defenders Office, 22 October 2021, p 48; Evidence, Ms Belinda Pellow, President (Acting), Ecological Consultants Association of NSW, 22 October 2021, p 2.

<sup>286</sup> Evidence, Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, 22 October 2021, pp 39-40.

<sup>287</sup> Submission 21, Clarence Valley Council, p 4.

- 'Goulburn Mulwaree Council's experience is that the scheme is not halting or reversing the loss of biodiversity values. At best, it appears to be slowing down or partially impeding the rate of clearing of native vegetation ... but overall clearing is not being adequately compensated for and there is a continuing overall net loss of biodiversity within our Local Government Area'.<sup>288</sup> – *Goulburn Mulwaree Council*
- 'Councils have expressed a general concern that biodiversity offsets are not leading to net improvements in biodiversity'.<sup>289</sup> – *Local Government NSW*

**4.16** Many stakeholders to the inquiry suggested that efforts to understand the net impact of the scheme are hampered by a lack of monitoring and mapping data, and lack of transparency. Data gaps identified included:

- gaps in vegetation mapping<sup>290</sup>
- insufficient monitoring of threatened species and ecological communities and lack of baselines to assess whether 'no net loss' is occurring across landscapes.<sup>291</sup>
- lack of reporting on biodiversity loss and trends at the local and regional level.<sup>292</sup>
- lack of data that would enable assessment of how the avoid-minimise-offset hierarchy is being observed in the scheme.<sup>293</sup>
- lack of robust data to inform thresholds of what species are so endangered they should not be impacted.<sup>294</sup>

**4.17** Lock the Gate Alliance concluded that the lack of data collection is a fundamental problem with the operation of the scheme:

The problem for New South Wales is that we are not systematically collecting and analysing environmental data, so we are continually falling behind in our understanding of which species and communities are on the brink of extinction and what processes are driving them there. There is an anecdotal understanding because we are watching it occur, but in terms of a robust way of developing where the red lines are we really need the data in the first instance.<sup>295</sup>

**4.18** In its submission, the NSW Government identified a need to improve the scheme's ecological integrity by monitoring biodiversity gains and better capturing data on the 'no net loss' standard the scheme is designed to enable through measures such as promoting avoidance and minimisation at offset sites.<sup>296</sup>

<sup>288</sup> Submission 12, Goulburn Mulwaree Council, p 1

<sup>289</sup> Submission 78, Local Government NSW, p 4.

<sup>290</sup> Submission 49, Lock the Gate Alliance, p 1. See also: Evidence, Ms Woods, 22 October 2021, p 36.

<sup>291</sup> Submission 49, Lock the Gate Alliance, p 1. See also: Evidence, Ms Woods, 22 October 2021, p 36; Submission 85, Humane Society International, p 9.

<sup>292</sup> Submission 49, Lock the Gate Alliance, p 1. See also Evidence, Ms Woods, 22 October 2021, p 36.

<sup>293</sup> See, for example: Answers to questions on notice, Local Government NSW, 25 January 2021; Evidence, Ms Dumazel, 10 December 2021, p 49; Evidence, Ms Primrose, 22 October 2021, p 43.

<sup>294</sup> Evidence, Ms Woods, 22 October 2021, p 41.

<sup>295</sup> Evidence, Ms Woods, 22 October 2021, p 41.

<sup>296</sup> Submission 97, NSW Government, pp 2-3.



- 4.19 The Audit Office report noted that the department is developing a draft Monitoring, Evaluation, Reporting and Improvement Framework that is intended to provide performance indicators for the scheme.<sup>297</sup> It also noted that, while the department has established rules for varying from like-for-like offsetting, it has not developed a method for assessing how application of these variation rules could impact biodiversity outcomes.<sup>298</sup>

### **Independent evaluation of the scheme**

- 4.20 Several inquiry participants raised concerns that a lack of independent evaluation of the effectiveness of the scheme undermines its credibility in the eyes of the public, and limits the ability to learn and adjust the scheme as needed.
- 4.21 In evidence, the Nature Conservation Council of NSW, noted that there is not enough public information about the operation and ecological outcomes of the scheme, and that there should be regular evaluations of ecological outcomes and cumulative impact.<sup>299</sup>
- 4.22 There were calls from stakeholders for independent evaluation of the scheme, with stakeholders suggesting this could:
- help to manage potential conflicts of interest in the scheme<sup>300</sup>
  - improve program design, external policy settings and administrative effectiveness<sup>301</sup>
  - provide feedback so that the restoration and management techniques can be refined to improve the effectiveness of the program over time.<sup>302</sup>
- 4.23 The Independent Review of the Commonwealth EBPC Act, released in 2020, made strong findings about the poor state of environmental monitoring, evaluation and reporting nationally. While noting the challenges of attributing observed outcomes to specific interventions, Professor Samuels stressed that effective monitoring and evaluation of environmental legislation is essential to achieve improved environmental outcomes and maintain trust in environmental management systems.<sup>303</sup>

## **Assessing achievement of 'no net loss' at the project level**

- 4.24 With no framework to assess the outcomes of the scheme as a whole, the scheme's design relies on the standard of 'no net loss' being achieved per project. Ensuring this is achieved requires accurate assessment of the impacts on biodiversity of development, and of offsets required to

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<sup>297</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 28.

<sup>298</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 28.

<sup>299</sup> Evidence, Nature Conservation Council of NSW, 22 October 2021, p 43.

<sup>300</sup> Submission 89, Mr Andrew Knop, p 2.

<sup>301</sup> Submission 11, Noel Corkery, p 3.

<sup>302</sup> Submission 79, Australian Institute of Landscape Architects, pp 5-6; Submission 94, NSW Farmers Association, p 3.

<sup>303</sup> Samuel, G, Department of Agriculture, Water and the Environment, *Independent Review of the EPBC Act – Final Report*, October 2020, pp 23 and 175. (Referenced in Submission 85, Humane Society International).

compensate. It also requires ongoing monitoring and oversight to ensure that offset sites are delivering the conservation gains required to offset the impact. This section examines the scheme's arrangements to ensure 'no net loss' is achieved at project level.

### **Adequacy of ecological assessments**

- 4.25** The quality and completeness of ecological surveys to determine what ecosystems and threatened species may be impacted by a development, and what offsets are required to compensate, are critical to the integrity of the scheme. Ecological surveys inform biodiversity development assessment reports, which are commissioned by developers as part of the development application. Landholders commission surveys to quantify credits that could be generated on their land by a stewardship agreement. Surveys must be carried out by accredited ecologists.
- 4.26** Participants in this inquiry raised several issues with the quality of ecological surveys that underpin the scheme, relating to:
- incomplete guidance or lack of certainty in the Biodiversity Assessment Method, leaving accredited assessors to make potentially inaccurate assumptions
  - issues with incomplete mapping or background data that should inform reports
  - lack of effort on the part of some accredited assessors, possibly due to pressure from developers to reduce offset obligations
  - different levels of capacity of consent authorities to assess the quality of surveys produced.

### ***Incomplete/changing survey guidelines***

- 4.27** Problems associated with lack of guidelines or certainty in the Biodiversity Assessment Method were summarised by Mr Cox, PhD Candidate, the Australian National University, and the Ecological Consultants Association of NSW. They noted:
- frequent changes to the Biodiversity Assessment Method's rules for assessment, described as 'constantly shifting assessment requirements'
  - unfinalised, incomplete or dated field survey methodology guidance, leading to lack of consistency in survey expectations
  - dated PlantNET keys meaning some species cannot be identified, and lack of resourcing for the NSW Herbarium meaning new species could take months to process
  - knowledge gaps regarding the distribution of and vulnerability of threatened species to further development meaning the qualitative assessment of impacts to individual threatened species take place in the absence of reliable scientific data.
  - inconsistent advice or delays in receiving advice from regulatory agencies.

- the removal of credit prices from the Biodiversity Assessment Method Calculator, meaning ecological consultants could not perform cost benefit analysis related to biodiversity loss.<sup>304</sup>

**4.28** In late 2022, the department advised the committee that it is taking a number of steps to increase the rigor of ecological surveys, including:

- publishing a new survey guide for koalas
- updating the operational manual for the Biodiversity Assessment Method
- providing new resources to improve the quality of biodiversity assessments
- introducing a revised classification of plant community types in eastern New South Wales into the Biodiversity Assessment Method.<sup>305</sup>

### *Supporting data and mapping*

**4.29** People working closely with the Biodiversity Assessment Method advised that the quality and consistency of reports is being compromised by inadequate background data, documentation or mapping.

**4.30** The Biodiversity Values Map, which is used to help determine if the scheme is triggered, was criticised for inaccuracies, including out of date data, by several local governments and landholders. Stakeholders noted:

- lack of connection with landholder on the type of vegetation, condition, viability and value in the mapping outcomes<sup>306</sup>
- incomplete mapping of plant community types in some regions<sup>307</sup>
- maps being less current, detailed and accurate than local council maps, and the department being unable to accept council data to update the Biodiversity Values Map.<sup>308</sup>

**4.31** Several stakeholders suggested that improved investment in biodiversity mapping is required, to improve the functioning and provide greater transparency to the scheme.<sup>309</sup>

**4.32** The department advised in October 2022 that it had provided guidelines for local government to nominate land to the Biodiversity Values Map, and provided a step by step guide to using the

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<sup>304</sup> Submission 57, Mr Alexander Cox, pp 13-17; Submission 2, Ecological Consultants Association of NSW, pp 3-6; Evidence, Mr Andrew Lothian, Treasurer, Ecological Consultants Association of NSW, 22 October 2021, p 6; Evidence, Ms Pellow, 22 October 2021, pp 4-5.

<sup>305</sup> Correspondence from The Hon James Griffin MP, Minister for Environment and Heritage, to Chair, 20 October 2022, p 3.

<sup>306</sup> Submission 94, NSW Farmers' Association, p 7.

<sup>307</sup> Submission 93, Northern Rivers Joint Organisation - Natural Resource Management Managers Group, p 2.

<sup>308</sup> Submission 56, Tamworth Regional Council, p 3; Submission 13, Coffs Harbour City Council, p 2.

<sup>309</sup> See, for example: Evidence, Ms Pellow, 22 October 2021, pp 1 and 5; Submission 24, Wando Conservation and Cultural Centre Inc, p 28; Evidence, Mr Brian Williams, President, Wilton Action Group, 22 October 2021, p 23; Ms Woods, 21 October 2021, p 36.

Biodiversity Values Map and Threshold tool to support local government and project proponents determine if the scheme applies.<sup>310</sup>

### ***Quality of surveys by accredited consultants***

- 4.33** Many stakeholders raised issues with the quality of surveys that underpin biodiversity development assessment reports. Some noted that gaps in guidance on applying the Biodiversity Assessment Method mean that accredited consultants must use their judgement to determine impacts on threatened species.<sup>311</sup>
- 4.34** Inadequate surveying and reports were raised as an issue by several local councils exercising their role as consent authorities in the scheme, as well as landholders and community groups. Examples included:
- avoiding requiring an offset because a species was not detected during a survey, even though there were historical records of it being present<sup>312</sup>
  - timing ecological surveys (eg surveying in winter) to minimise calculated biodiversity impacts<sup>313</sup>
  - surveys limited to observations completed in a single day, lacking any night survey, DNA sampling, trapping, call backs or consideration of seasonal variation<sup>314</sup>
  - no community consultation, despite community groups having access to long term data sets.<sup>315</sup>
- 4.35** Mr Cox advised that in his experience assessors differed in their survey effort. One accredited assessor he interviewed was concerned that the survey effort was 'paltry' and that it was 'pretty easy to put in minimal effort and to get a result'.<sup>316</sup> Several other submissions criticised the quality of ecological reports completed for developers as not having sufficient data from site surveys to give a true picture of a site's ecological value, and suggested reporting requirements need to be strengthened.<sup>317</sup>

### **Are biodiversity gains being achieved at stewardship sites?**

- 4.36** As well as accurate estimation of biodiversity impacts up front, understanding whether the scheme is achieving a standard of 'no net loss' of biodiversity requires ongoing monitoring of offset sites to ensure expected biodiversity gains are achieved.<sup>318</sup>

<sup>310</sup> Correspondence from The Hon James Griffin MP to Chair, 20 October 2022, p 3.

<sup>311</sup> See, for example: Submission 58, Mr Cox, pp 15-16.

<sup>312</sup> Submission 62, Lake Macquarie City Council, p 5.

<sup>313</sup> Submission 61, Dubbo Regional Council, pp 5-6.

<sup>314</sup> Evidence, Mr Peter Maslen, Engineer and Ecological Scientist (retired), 22 October 2021, p 16.

<sup>315</sup> Submission 88, Mr Peter Maslen, p 3; Submission 89, Mr Andrew Knop, pp 1-2; Submission 96, Valley Watch Inc, p 3.

<sup>316</sup> Submission 58, Mr Alexander Cox, pp 15-16.

<sup>317</sup> See, for example: Submission 96, Valley Watch, p 3.

<sup>318</sup> International Union for Conservation of Nature, *Issues Brief: Biodiversity Offsets* (2016), p 2, cited in Submission 96, Valley Watch Inc, p 3.

- 4.37** A diverse range of stakeholder submissions to the inquiry called for more effective monitoring of stewardship sites and greater compliance activity to ensure offset obligations are met.<sup>319</sup> Concerns related to a lack of ecological monitoring, and insufficient compliance oversight by the Trust. Further concerns about the transparency of the location and performance of stewardship sites are considered in Chapter 8.

### **Ecological monitoring of biodiversity stewardship sites**

- 4.38** The government submission stated that the department and the Trust monitor and evaluate biodiversity gains achieved at offset sites 'to ensure the validity of scheme and Biodiversity Assessment Method settings'.<sup>320</sup> The department explained the Trust's monitoring program:

The Biodiversity Conservation Trust's Ecological Monitoring Module is the overarching program guiding biodiversity monitoring on all private land conservation agreement sites, including BSAs. Biodiversity outcome monitoring has been a requirement for inclusion in all BSA management plans since 1 March 2021 and is built on requirements established under the previous BioBanking Scheme.<sup>321</sup>

- 4.39** The Audit Office report released in August 2022 found that over 90 per cent of biodiversity stewardship sites do not have ecological monitoring requirements. The report stated that ecological monitoring requirements were only included in biodiversity stewardship agreements established after March 2021, and prior to this the Trust did not have a structured framework guiding its ecological monitoring activities at stewardship sites.<sup>322</sup> The Audit Office commented that information is not yet available on biodiversity improvement on stewardship sites created under the current scheme, given the recent implementation of this ecological monitoring.<sup>323</sup>

- 4.40** Stakeholders to the inquiry raised substantial concerns about a lack of ecological monitoring at stewardship sites, and called for improvements. The Nature Conservation Council of NSW called for 'effective systems ... to monitor, evaluate and publicly report implementation of offsets under the scheme and ecological outcomes over time'. The council further suggested that the evaluation of offsets should rely not just on desktop analysis, but also on on-the-ground monitoring of ecological outcomes.<sup>324</sup> Ms Rachel Walmsley, Head of Policy & Law Reform, Environmental Defenders Office argued that there is a need for far greater scrutiny and transparency over whether environmental outcomes are actually delivered, noting that 'at the moment all the focus is on the market and trading and credits, but the focus should be on environmental outcomes'.<sup>325</sup>

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<sup>319</sup> See, for example, Submission 79, Australian Institute of Landscape Architects, p 5; Submission 11, Mr Noel Corkery, p 3; Submission 29, Dr Judy Lambert, pp 4-7; Submission 36, Blacktown and District Environment Group, p 2; Submission 94, NSW Farmers' Association, p 2; Submission 95, Nature Conservation Council of NSW, pp 5 and 12; Submission 38, Mulgoa Valley Landcare Group Inc, pp 4-8.

<sup>320</sup> Submission 97, NSW Government, p 9.

<sup>321</sup> Answers to questions on notice, Department of Planning and Environment, 2 June 2022, p 17.

<sup>322</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 32.

<sup>323</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 50.

<sup>324</sup> Submission 95, Nature Conservation Council of NSW, p 12.

<sup>325</sup> Evidence, Ms Walmsley, 22 October 2021, p 49.

- 4.41** There were questions about whether the cost of conducting ecological monitoring is built into the establishment of biodiversity stewardship agreements.<sup>326</sup> Dr Judy Lambert noted concerns that credit pricing may not be adequate to support the ongoing monitoring and evaluation required to demonstrate that offsets were actually delivering anticipated gains to the condition of the offset areas.<sup>327</sup> The private landholders, Henribark, expressed a similar concern, highlighting the cost of the particular technical skills required for monitoring and review of some elements of the scheme, in addition to the cost to manage the land.<sup>328</sup> (Concerns about the pricing of credits are considered in Chapter 7.)
- 4.42** The Trust noted in response to the Audit Office of NSW report that it was 'currently refining its ecological monitoring program to address the gap in monitoring for older sites', considering cost and resourcing impacts on both the Trust and landholders.<sup>329</sup> The department further advised that: 'ecological monitoring requirements are now included in biodiversity stewardship agreements, over and above the existing requirement for landholders to report annually on completion of management actions and broader department led ecological monitoring of stewardship sites.'<sup>330</sup>

#### **Compliance monitoring of stewardship sites**

- 4.43** Multiple submissions to this inquiry expressed concern with the level of compliance monitoring and enforcement activity at offset sites by the Trust.<sup>331</sup>
- 4.44** The department explained the Trust's approach to assessing the compliance of stewardship sites:
- The NSW Biodiversity Conservation Trust (BCT) utilises a risk-based approach to compliance for Biodiversity Stewardship Agreement (BSA) sites, including both desktop and annual on-site monitoring. Landholders are required to submit annual reports documenting compliance with the management plan and actions that form part of their BSA. Annual reports are subject to review by the BCT and prioritisation of any compliance action. The BCT has a number of statutory compliance mechanisms available to it to assist in dealing with instances of non-compliance.<sup>332</sup>
- 4.45** However, the Audit Office report found that oversight of management actions at biodiversity stewardship sites is limited by low levels of compliance with annual reporting, low rates of site visits and poor compliance data.<sup>333</sup> It noted that, despite the requirement for landholders to submit an annual report on the condition of the site and progress on specified actions, in reality, only 58 per cent of landholders provided an annual report to the Trust in 2021.<sup>334</sup>

<sup>326</sup> Submission 29, Dr Judy Lambert, p 5.

<sup>327</sup> Submission 29, Dr Judy Lambert, p 7.

<sup>328</sup> Submission 35, Henribark Pty Ltd, p 9.

<sup>329</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 60.

<sup>330</sup> Correspondence from The Hon James Griffin MP to Chair, 20 October 2022, p 4.

<sup>331</sup> See, for example: Submission 85, Humane Society International, pp 6-9; Submission 29, Dr Judy Lambert, p 7; Submission 12, Goulburn Mulwaree Council, p 12; Submission 64, Dr Stan Bolden, p 1.

<sup>332</sup> Answers to questions on notice, Department of Planning and Environment, 2 June 2022, p 17.

<sup>333</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 49.

<sup>334</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 49.

- 4.46** There were reports from some community groups that a lack of compliance monitoring enables landholders to abuse the scheme. The Mulgoa Valley Landcare Group provided evidence of several instances in the region where landholders had undertaken clearing or shooting activities on land under a stewardship agreement, with no compliance activity from the Trust. They asserted that 'Biodiversity Stewardship Agreements have little to no oversight, there is no compliance, just letters issued by the Biodiversity Conservation Trust "reminding owners of their obligations", and ... little to no education of the landowner on how to manage a [stewardship] site'.<sup>335</sup>
- 4.47** Both the Environmental Defenders Office and Lock the Gate Alliance raised concerns about monitoring and/or lack of publicly available information about biodiversity values on sites used for mining offsets. Ms Walmsley suggested that there has been an issue (not limited to the current scheme) with mining companies not meeting conditions regarding offsetting or rehabilitation after mining approvals were given. She asserted that there is a lack of monitoring and reporting about how rehabilitation is progressing, and there have been problems with how the mining approvals were done.<sup>336</sup> Some individual submissions raised similar concerns about lack of compliance monitoring and enforcement, noting there are insufficient penalties for repeated non-compliance.<sup>337</sup>
- 4.48** Some observers raised questions about the capacity of government agencies to ensure compliance with offset obligations. For example, Dr Judy Lambert raised concerns about the legal enforceability of offsets, exacerbated by uncertainties around whether local governments and other government agencies responsible for monitoring compliance are adequately resourced to carry out these activities. She cited research showing a lack of data in New South Wales on the extent to which conditions imposed on developers were undertaken on the ground.<sup>338</sup> She submitted that, 'in the absence of sound and ongoing monitoring, enforcement is impossible and if breaches are not enforced, the whole biodiversity conservation process is undermined'.<sup>339</sup>
- 4.49** In contrast, some scheme participants suggested that monitoring and reporting requirements are stronger in the current scheme than previous ones. The NSW Minerals Council advised that the current scheme's requirements for monitoring and reporting are 'onerous' compared to previous schemes.<sup>340</sup>
- 4.50** The Environment Institute of Australia and New Zealand said that, where stewardship sites are established and active management occurs, then its members have observed maintenance and improvement of biodiversity values over time.<sup>341</sup>
- 4.51** The Audit Office of NSW's report noted that the Trust had limited guidance related to the use of its compliance mechanisms, which created a risk of inconsistent compliance decisions on stewardship sites. It further noted that plans to improve the integration between ecological

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<sup>335</sup> Submission 38, Mulgoa Valley Landcare Group Inc, pp 5-9.

<sup>336</sup> Evidence, Ms Walmsley, 22 October 2021, p 49.

<sup>337</sup> See, for example, Submission 64, Dr Stan Bolden, p 1.

<sup>338</sup> Submission 29, Dr Judy Lambert, p 6.

<sup>339</sup> Submission 29, Dr Judy Lambert, p 6.

<sup>340</sup> Submission 66, NSW Minerals Council, p 9.

<sup>341</sup> Answers to questions on notice, Dr Bryan Jenkins, President, Environment Institute of Australia and New Zealand, 4 November 2021.

monitoring and compliance activities had not yet been finalised, though this is important to ensure that ecological underperformance can be addressed via compliance mechanisms if necessary.<sup>342</sup> It recommended that the department and the Trust establish protocols for supporting stewardship agreements where biodiversity outcomes are not on track due to events that could not be controlled or planned for.<sup>343</sup>

- 4.52** In response, the Trust advised that it is establishing a dedicated compliance team that will work with the department to ensure appropriate procedures are in place to support stewardship sites where biodiversity outcomes are not on track.<sup>344</sup>

### Committee comment

- 4.53** The committee is deeply concerned that, five years into the implementation of the scheme, there are no defined conservation outcome measures against which to assess its performance, nor is there compelling data to demonstrate that the standard of 'no net loss' of biodiversity is being achieved. The lack of performance monitoring leaves the scheme open to the perception, aired by many stakeholders to this inquiry, that it is facilitating rather than preventing the loss of biodiversity.
- 4.54** We consider that monitoring of the scheme's outcomes must be improved. We welcome the department's assurance that it expects to have a monitoring, evaluation, reporting and improvement framework for the scheme in place by June 2023. We observe, however, that six years is a long period to have no framework nor data to assess how the scheme is working and adjust settings if it is not.
- 4.55** The committee recommends that the monitoring, evaluation, reporting and improvement framework for the scheme be developed and implemented in a way that enables assessment of the scheme's impact on biodiversity at the local, regional and state level. The framework should enable assessment of the scheme's performance against agreed principles for biodiversity offsetting, the cumulative impact of development, and support identification of unintended impacts of the scheme. Further, it should enable clear public reporting on the scheme's performance against biodiversity goals, and enable ongoing learning and improvement of the scheme.

<sup>342</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), pp 49-51.

<sup>343</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), pp 58 and 60.

<sup>344</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 60; Correspondence from The Hon James Griffin MP to Chair, 20 October 2022, p 4.



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**Recommendation 7**

That the Department of Planning and Environment develop and implement a monitoring, evaluation, reporting and improvement framework for the Biodiversity Offsets Scheme in a way that enables:

- assessment of the scheme's impact on biodiversity at the local, regional and state level
  - assessment and reporting on the scheme's performance against agreed principles for biodiversity offsetting
  - assessment of cumulative impacts of development
  - identification of unintended impacts of the scheme
  - public reporting on the scheme's performance against biodiversity conservation goals
  - ongoing learning to improve the scheme.
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- 4.56** The quality and rigour of ecological surveys at development and offset sites is fundamental to the integrity of the scheme. To be confident that 'no net loss' is being achieved, we need to be sure that threatened entities on proposed development sites are identified and truthfully reported, and that the credits required to offset are determined in a scientifically rigorous way. We are concerned by reports from participants in the scheme that surveys underpinning biodiversity development assessment reports are inadequate. We are also concerned by reports of missing, outdated or inaccurate data, guidelines and maps that are essential to the scheme's operation.
- 4.57** The committee notes and supports the recommendations of the Audit Office of NSW to evaluate and improve the overall quality of biodiversity assessment reports for development and stewardship sites. We also consider it essential that the department institute measures to improve the quality of biodiversity assessment reports, including the ecological surveys that underpin them.
- 4.58** There are several measures the department could take to improve biodiversity assessment reports (some of which are canvassed in later chapters). Of particular importance is the need to establish a quality assurance process. It is also essential to ensure the guidance on ecological surveys and use of the Biodiversity Assessment Method is complete and up to date, and maps used in the scheme are accurate.
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**Recommendation 8**

That the Department of Planning and Environment institute measures to improve the quality of biodiversity assessment reports, including:

- instituting a quality assurance process
  - ensuring the guidance on surveying and use of the Biodiversity Assessment Method is complete and up to date
  - ensuring the maps essential to the scheme, such as the Biodiversity Values Map, are accurate and up to date.
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- 4.59** The ecological credibility of this scheme requires ongoing oversight of stewardship sites to ensure that stewardship sites are genuinely protected in perpetuity and that biodiversity 'gains' are adequate to compensate for what was lost to development. Inadequate monitoring of offset sites – whether under this or previous offsetting schemes – is concerning. Without assurance that land set aside for offsets is genuinely protected and managed, we cannot know that the scheme is delivering 'no net loss' of biodiversity.
- 4.60** The committee is concerned by evidence from stakeholders to this inquiry, and from the Audit Office of NSW, that ecological and compliance monitoring of stewardship sites is inadequate. This is a major credibility risk for the scheme, which must be addressed. For this reason, we recommend that the department and Trust institute measures to increase compliance monitoring and enforcement, and ensure appropriate ecological monitoring occurs on all biodiversity stewardship sites.

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**Recommendation 9**

That the Department of Planning and Environment and the Biodiversity Conservation Trust institute measures to increase compliance monitoring and enforcement, and ensure appropriate ecological monitoring occurs on all biodiversity stewardship sites.

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## Chapter 5 Land clearing outside the scheme

This chapter considers evidence to the inquiry on the impact of changes to the regulation of rural land clearing under the *Local Land Services Act 2013* that happened parallel to the introduction of the Biodiversity Offsets Scheme.

### The Land Management and Biodiversity Conservation Framework

- 5.1** The scheme was introduced as one part of a new Land Management and Biodiversity Conservation Framework (Framework) established in 2016.<sup>345</sup> As the scheme was introduced 'to facilitate ecologically sustainable development', another objective of the Framework was 'to reduce the regulatory burden on farmers and improve productivity while responding to environmental risks'. This was done through amendments to the *Local Land Services Act 2013* (LLS Act).<sup>346</sup>
- 5.2** According to the NSW Government submission, the reforms were 'extensively consulted on and carefully negotiated to balance the interests of agriculture, development and biodiversity conservation'.<sup>347</sup>
- 5.3** A significant amount of evidence to this inquiry related to land clearing that is not subject to the scheme, and is instead occurring under provisions of the LLS Act, or because the land proposed to be cleared is not on the scheme's Biodiversity Values Map.

#### Reforms in 2016 made clearing on rural land easier

- 5.4** The Nature Conservation Council of NSW put forward the view that the impact of the scheme cannot be assessed in isolation from changes brought about by other reforms to the Framework:

The Biodiversity Offset Scheme (BOS) is a key component of the Land Management and Biodiversity Conservation Framework and should be understood in this context. The BOS sits within the Framework as an enabling mechanism for habitat destruction. For those areas where important native vegetation is afforded some protection, the BOS provides a pathway to clearing, even for the most threatened species and ecological communities. Almost nothing is safe.<sup>348</sup>

- 5.5** The amendments to the LLS Act allowed landholders to undertake 'low impact' native vegetation clearing ('routine' land management activities such as collecting firewood and clearing for rural infrastructure such as fences, dams, sheds and access tracks – referred to as 'allowable activities') without requiring government approval. The amendments also streamlined requirements for some clearing activities through the Land Management (Native Vegetation) Code 2018. For clearing on rural land that exceeded the thresholds of both 'allowable activities'

<sup>345</sup> Submission 97, NSW Government, p 3.

<sup>346</sup> Submission 97, NSW Government, p 3.

<sup>347</sup> Submission 97, NSW Government, p 3.

<sup>348</sup> Submission 95, Nature Conservation Council of NSW, p 6.

and the Code, approval was required from the Native Vegetation Panel, triggering offset requirements under the scheme.<sup>349</sup>

- 5.6 At the time the reforms were introduced, the government acknowledged there could be an increase in rural land clearing, but suggested this risk could be managed. In his second reading speech, the then Minister for Environment, The Hon Mark Speakman stated:

We acknowledge up-front that this new approach to land management may lead to some increased clearing at a property scale, but there are checks and balances to ensure that the impacts of that clearing are managed through a suite of set asides, caps, offsets, investments, market-based instruments, monitoring and regulatory enforcement.<sup>350</sup>

- 5.7 The NSW State of the Environment Report 2021 found that 'permanent clearing of native woody vegetation in NSW has increased about three-fold since 2015', going from an average of 13,000 hectares cleared on average per year from 2009 to 2015, to 35,000 hectares per year from 2017 to 2019. It noted permanent clearing of non-woody vegetation, such as native shrubs and ground covers, occurred at an even higher rate.<sup>351</sup>

- 5.8 Mr Dean Knudson, Deputy Secretary, Biodiversity, Conservation and Science, Department of Planning and Environment, said that clearing of woody vegetation outside of the scope of the scheme had gone up from 40,000 hectares a year up to about 60,000 hectares a year. To balance this, he also pointed to a separate program focused on private land conservation managed by the Biodiversity Conservation Trust (Trust), and that there had been a significant increase in the public estate through national parks amounting to around 380,000 hectares over the past couple of years.<sup>352</sup>

### **Substantial land clearing is not subject to the scheme**

- 5.9 Five years on from the introduction of the reforms, environmental groups assert that the Framework as a whole greatly weakened biodiversity protections and facilitated greater rates of land clearing. The Nature Conservation Council of NSW argued that the Framework 'dramatically deregulated' native vegetation management. The council stated that, 'since these excessively permissive laws were introduced, rates of annual vegetation clearing have approximately doubled in NSW'.<sup>353</sup> It pointed to a 2019 review of native vegetation management by the Audit Office of NSW which found that the clearing of native vegetation on rural land was not effectively regulated or managed, and that rates of land clearing, as well as private conservation, had increased.<sup>354</sup> That audit report concluded:

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<sup>349</sup> Submission 97, NSW Government, p 3; Hon Niall Blair MLC, Second reading speech: Local Land Services Amendment Bill 2016, NSW Legislative Council, 9 November 2016.

<sup>350</sup> Hon Mark Speakman, Second reading speech: Local Land Services Amendment Bill 2016, NSW Legislative Assembly, 16 November 2016.

<sup>351</sup> NSW Environment Protection Authority, *NSW State of the Environment 2021* (April 2022), pp 47 and 53.

<sup>352</sup> Evidence, Mr Dean Knudson, Deputy Secretary, Biodiversity, Conservation & Science, Department of Planning and Environment, 10 December 2021, p 36.

<sup>353</sup> Submission 95, Nature Conservation Council of NSW, p 6.

<sup>354</sup> Submission 95, Nature Conservation Council of NSW, p 6.

The clearing of native vegetation on rural land is not effectively regulated and managed because the processes in place to support the regulatory framework are weak. There is no evidence-based assurance that clearing of native vegetation is being carried out in accordance with approvals. Responses to incidents of unlawful clearing are slow, with few tangible outcomes. Enforcement action is rarely taken against landholders who unlawfully clear native vegetation ... There are processes in place for approving land clearing but there is limited follow-up to ensure approvals are complied with.<sup>355</sup>

**5.10** The Nature Conservation Council of NSW asserted that too much vegetation clearing is not captured by the Biodiversity Offsets Scheme, due to significant amounts of clearing allowed under LLS Act. It noted that:

- the Native Vegetation Panel, responsible for approving and determining offsets for higher impact clearing, has only processed one application for rural clearing in four years
- no other rural clearing under the LLS Act over the last four years (double the pre-reform average) had required biodiversity offsets.<sup>356</sup>

**5.11** Ms Kate Wooll, Business Manager, Strategic Planning, Goulburn Mulwaree Council, highlighted how the alternative pathway for rural clearing was a weakness of biodiversity protections, which allowed 'a lot of clearing' to occur:

I think my main concern is that a lot of our most significant biodiversity is actually in the rural zones. Effectively having the two-tier system of one set of rules for the rural area and another set of rules for all of the environmental circles in the urban area is a clear weak point in terms of trying to work out responsibilities and having some clarity or consistency of rules across environments, which is causing clear, poor outcomes because effectively the way it is at the moment, you have rural areas where the LLS provisions are very light and a lot of clearing can occur. Then almost next door you can have an environmental zone where you have to go through the whole BOS scheme and it is all the more technical [and] difficult to do anything.<sup>357</sup>

**5.12** The Nature Conservation Council of NSW also described how 'key components' of the Framework were 'incomplete or not fully operational', leading to implications around what clearing is and isn't subject to the scheme or the LLS Act:

Key components of the LMBC Framework, which interact with the BOS, are incomplete or not fully operational. This includes the Native Vegetation Regulatory Map, which still does not display all land categories, and the Areas of Outstanding Biodiversity Values mechanism, which hasn't been formally established. Both features have direct implications for what clearing is and is not captured by the BOS and should be finalised as a priority.<sup>358</sup>

**5.13** Ms Belinda Pellow, Acting President, Ecological Consultants' Association of NSW also raised the issue of Native Vegetation Regulatory Maps, which are relevant to the LLS Act clearing

<sup>355</sup> Audit Office of New South Wales, Performance Audit, *Managing native vegetation* (June 2019), p 2.

<sup>356</sup> Submission 95, Nature Conservation Council of NSW, p 7.

<sup>357</sup> Evidence, Ms Kate Wooll, Business Manager Strategic Planning, Goulburn Mulwaree Council, 10 December 2021, p 17.

<sup>358</sup> Submission 95, Nature Conservation Council of NSW, p 9.

provisions, not being made available. Ms Pellow described their absence as 'a serious missing resource' because consultants could therefore not determine if the lands they were assessing were exempt from the LLS Act clearing provisions.<sup>359</sup>

- 5.14** The Nature Conservation Council of NSW also suggested that too much other clearing fell below the scheme's triggers, such as the area thresholds, and the scope of the Biodiversity Values Map. The council believed that the appropriateness of the area thresholds and the accuracy and completeness of the Biodiversity Values Map required further interrogation.<sup>360</sup>
- 5.15** Local Government NSW also advised that not all serious and irreversible impact listed communities, such as critically endangered ecological communities, were shown on the Biodiversity Values Map, meaning that they could inadvertently be cleared without triggering the scheme.<sup>361</sup>

### **Adequacy of 'set asides' to compensate rural land clearing**

- 5.16** Under Part 5A of the LLS Act, any non-'allowable' clearing activities must be compensated by conserving another area on the same property, referred to as a 'set aside'. The ratio of the area that is set aside to the area that is cleared varies from 1:1 to 8:1, with the amount of land that must be set aside usually depending on the amount of land being cleared and its conservation status. Land that is set aside is listed on a public register.<sup>362</sup>
- 5.17** The Environmental Defenders Office suggested that the set-aside mechanism side-steps genuine evidence-based offsets in favour of simple area-based ratios that did not ensure the set aside land was ecologically equivalent, and thus did not adequately compensate for loss of biodiversity. The office asserted that, while set asides were intended to be managed in perpetuity, they were not registered on the land title, and there were inadequate or no monitoring and reporting requirements to determine if they were delivering environmental benefits over time.<sup>363</sup>
- 5.18** Henribark, an ecological consultancy, raised a similar concern about 'set asides' under the LLS Act. It noted that while stewardship sites under the scheme have management requirements and may be visited annually by the Trust's staff trained in ecology, an area designated as a rural set aside is 'probably visited once, if at all, and the landholder's management is relatively unregulated'.<sup>364</sup>

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<sup>359</sup> Evidence, Ms Belinda Pellow, President (Acting), Ecological Consultants Association of NSW, 22 October 2021, pp 1 and 5.

<sup>360</sup> Submission 95, Nature Conservation Council of NSW, pp 7-8.

<sup>361</sup> Submission 78, Local Government NSW, p 8.

<sup>362</sup> Submission 97, NSW Government, p 3; Local Land Services, *Land Management Code – Equity*; Local Land Services, *Land Management Code – Farm Plan*.

<sup>363</sup> Submission 92, Environmental Defenders Office, pp 22-23.

<sup>364</sup> Submission 35a, Henribark Pty Ltd, p 6.

## Use of *Local Land Services Act* rural land clearing provisions to avoid triggering the scheme

- 5.19** Evidence to this inquiry from local governments raised strong concerns about the way the Biodiversity Offsets Scheme interacts with the LLS Act. It was suggested that landholders were able to use the provisions that allowed clearing under the LLS Act to clear land prior to rezoning or lodging a development application, in order to avoid triggering the scheme.
- 5.20** Local Government NSW explained how the LLS Act was used to clear land before a development application was lodged, leading to minimal oversight of the biodiversity impact of this type of clearing:
- ... clearing is often occurring through the allowable activities / self-assessment pathway under the *Local Land Services Act 2013* before development applications are submitted ... 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.<sup>365</sup>
- 5.21** Kempsey Shire Council submitted that the relationship between the scheme and the LLS Act remained unclear, and there was potential for proponents to avoid entry into the scheme by undertaking clearing of native vegetation as permitted under the LLS Act or under Private Native Forestry plans prior to lodging a biodiversity development assessment report. Noting that vegetation removal is not subject to the same level of oversight or offset requirements as the scheme, the council called for further guidance on how past clearing of native vegetation should be considered under the scheme.<sup>366</sup>
- 5.22** Mrs Kimberly Baker, Environmental Planner, Port Stephens Council, said that the council had observed extensive clearing of vegetation on rural zoned land, allowed under provisions of the LLS Act, prior to lodgment of rezoning or development applications. Such clearing, she suggested, was occurring on land where there were no agricultural operations, and was done 'presumably to avoid triggering [the scheme's] clearing thresholds or to reduce the residual offsetting obligations of the project'.<sup>367</sup>
- 5.23** Several other local councils noted concerns that rural land clearing under the LLS Act had increased since the Framework was introduced, and expressed concern that the scheme could inadvertently encourage unlawful site clearing or works to reduce the quality of vegetation prior to lodging a development application, to avoid triggering the scheme or to lower offset requirements.<sup>368</sup>

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<sup>365</sup> Submission 78, Local Government NSW, p 6.

<sup>366</sup> Submission 22, Kempsey Shire Council, p 5.

<sup>367</sup> Evidence, Mrs Kimberly Baker, Environmental Planner, Port Stephens Council, 10 December 2021, p 3.

<sup>368</sup> See, for example: Submission 50, Penrith City Council, p 2; Submission 6, Bathurst Regional Council, p 2.



- 5.24** Asked if the Department of Planning and Environment (the department) was aware of land clearing taking place on rural land before development, to avoid triggering the scheme, the department noted it had received complaints of this type.<sup>369</sup>
- 5.25** The department stated that the use of 'allowable activities' does not permit 'pre-emptive clearing for a purpose that needs development consent'. It advised that: 'Section 60Q(2)(a) of the LLS Act states that allowable activities do not permit clearing or any other activity "without an approval or other authority required by or under another Act or Part of this Act"'.<sup>370</sup>

### **Compliance monitoring under the *Local Land Services Act***

- 5.26** Goulburn Mulwaree Council submitted that, due to the complexity of different conservation and land management legislation, there was confusion over responsibility for compliance monitoring. It stated: 'regardless of which regulatory agency is involved in any particular scenario ... there are insufficient staff available to investigate and follow up on illegal clearing activities in a timely and efficient manner'.<sup>371</sup>
- 5.27** In evidence, Mr Brian Faulkner, Environment and Biodiversity Assessment Officer, Goulburn Mulwaree Council expressed frustration with reported allegations of illegal or unauthorised clearing not being addressed by Local Land Services, the department or its compliance officers, who are 'woefully understaffed, woefully under-resourced' and simply unable to keep up with enforcement.<sup>372</sup> The council suggested this resulted in repeated small-scale clearing leading to an overall loss of biodiversity.<sup>373</sup> Mr Faulkner noted however that many people had illegally cleared land through 'ignorance' of the scheme – they were not 'being bad or misleading or ... deliberately violating the law ... they genuinely do not understand' the scheme.<sup>374</sup>
- 5.28** The committee was interested to understand who monitored compliance with adherence to regulations on rural land clearing, to ensure land is not being cleared under the guise of agricultural purposes, when the real intent was to allow later development without triggering the scheme. Mr Witherdin, Chief Executive Officer, Local Land Services advised that complaints about land clearing compliance would go to the Environment Line, a hotline that is managed by the Environment Protection Authority, which would refer land clearing compliance issues to the department's Environment and Heritage Group (rather than LLS).<sup>375</sup>

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<sup>369</sup> Answers to questions on notice, Department of Planning and Environment, 10 February 2022, p 13.

<sup>370</sup> Answers to questions on notice, Department of Planning and Environment, 10 February 2022, p 13.

<sup>371</sup> Submission 12, Goulburn Mulwaree Council, p 12.

<sup>372</sup> Evidence, Mr Brian Faulkner, Environment and Biodiversity Assessment Officer, Goulburn Mulwaree Council, 10 December 2021, p 17.

<sup>373</sup> Submission 12, Goulburn Mulwaree Council, p 12.

<sup>374</sup> Evidence, Mr Faulkner, 10 December 2021, p 17.

<sup>375</sup> Evidence, Mr David Witherdin, Chief Executive Officer, Local Land Services, 10 December 2021, p 50.

## Committee comment

- 5.29** At the time the Biodiversity Offsets Scheme was introduced, other elements of the Land Management and Biodiversity Conservation Framework made clearing of native vegetation on rural land easier. Even the government noted in 2016 that the changes could result in increased land clearing, and all evidence suggests that is exactly what has occurred. While the broader issue of rural land clearing is outside the scope of this inquiry, the committee observes that having pathways under the *Local Land Services Act 2013* to clear rural land without biodiversity assessment or offsetting undermines the broader conservation intentions of the *Biodiversity Conservation Act 2016* and the scheme.
- 5.30** We note that the recently announced statutory review of the *Biodiversity Conservation Act 2016* is being held in conjunction with a review of Part 5A and Schedules 5A and 5B of the *Local Land Services Act 2013*. In light of evidence that the reform package appears to have enabled accelerated rates of land clearing rather than 'arresting or reversing' the decline of biodiversity across the state, the committee believes that this review should reconsider the appropriateness of land clearing pathways under the *Local Land Services Act 2013*. We recommend, therefore, that the NSW Government work with landholders to review and reconsider the appropriateness of land clearing pathways under the *Local Land Services Act 2013*, with the aim of increasing and incentivising biodiversity protections on rural land.

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### Recommendation 10

That the NSW Government review and reconsider the appropriateness of land clearing pathways under the *Local Land Services Act 2013*, working with landholders, with the aim of increasing and incentivising biodiversity protections on rural land.

- 5.31** The introduction of less stringent rural land clearing laws appears to have enabled some developers to bypass the scheme and its obligations by clearing land under the provisions of the *Local Land Services Act 2013*, prior to development. We are particularly alarmed by reports from local governments that this is taking place without repercussions. This is something that should be monitored and rectified. We recommend that the department and Local Land Services, in consultation with landholders, develop and implement a plan to prevent land clearing on rural land regulated by the *Local Land Services Act 2013* that would have otherwise triggered or increased obligations under the scheme.

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### Recommendation 11

That the Department of Planning and the Environment and Local Land Services, in consultation with landholders, develop and implement a plan to prevent land clearing on rural land regulated by the *Local Land Services Act 2013* that would have otherwise triggered or increased obligations under the Biodiversity Offsets Scheme.

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## Chapter 6 Stakeholder perspectives: cost, risk and complexity

The Biodiversity Offsets Scheme creates new opportunities for private landholders to participate in conservation, but these come with costs, risks and constraints for key stakeholders, such as landholders, developers and local government consent authorities. This chapter outlines the views of stakeholders on whether the scheme is functioning effectively and efficiently to meet its objectives, and delves into stakeholders' experiences in participating in or applying the scheme and navigating its mechanics. It describes users concerns with the scheme's uncertainties, complexities, financial risks and resultant costs and delays, and considers whether support for scheme participants is adequate.

### Key stakeholders

- 6.1 The informed participation of key stakeholders is essential for the scheme to function well. The key stakeholders are:
- private landholders, who establish stewardship sites on their land
  - developers, who need to meet their offset obligations by securing credits
  - consent authorities (particularly local councils), who assess and approve proposed developments.
- 6.2 This chapter discusses the differing perspectives of these three key stakeholders in interacting with and applying the scheme.

### Landholder opportunities, costs and financial risks

- 6.3 One of the objectives of the *Biodiversity Conservation Act 2016* is to encourage and enable landholders to enter into voluntary agreements over land for the conservation of biodiversity.<sup>376</sup> The willingness of landholders to establish biodiversity conservation agreements on their land is integral to the operation of the scheme, as this allows developers (or the Biodiversity Conservation Trust) to secure 'credits' to offset impacts of development. However, landholders face significant costs and financial risks if they choose to participate an establish a stewardship site, as well as regulatory barriers. In its recent review of the scheme, the Audit Office of NSW found that neither the Department of Planning and Environment nor the Biodiversity Conservation Trust had 'sufficiently reduced barriers to landholder participation'.<sup>377</sup>

#### Landholder motivations for participating in the scheme

- 6.4 Several landholders outlined why they were enticed to participate in the scheme:
- the ability to diversify income by administering and 'farming' biodiversity<sup>378</sup>

<sup>376</sup> Submission 97, NSW Government, p 4.

<sup>377</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 6.

<sup>378</sup> Evidence, Mr Greg Steenbeeke, Director, Henribark Pty Ltd, 8 April 2022, p 2.

- giving farmers the opportunity to be more drought resilient by providing a valuable source of income during dry periods<sup>379</sup>
- to convert an unprofitable farm into a profitable one, while also conserving parts of it<sup>380</sup>
- the funds helped to maintain and improve a property's 'natural capital'<sup>381</sup>
- to allow a property to be 'properly' managed for conservation – to fund fencing, weed and pest control, to provide fire breaks and maintain access tracks, and to rehabilitate degraded and cleared areas.<sup>382</sup>

**6.5** However, the committee heard that there is a lack of awareness about the scheme and its potential benefits amongst landholders. Local Government NSW argued that there appeared to be a general lack of awareness of the scheme, what a stewardship site is, and how and where offsets can be utilised, limiting landholder participation in the scheme.<sup>383</sup> Similarly, the Planning Institute of Australia described how landholders who were unfamiliar with the scheme, or were poorly resourced, could not access the scheme.<sup>384</sup>

**6.6** More broadly, Deep River Group's feedback from developers, landholders and 'industry experts' found that understanding and knowledge of the scheme was 'significantly too low', because the scheme was 'over-engineered' or had been changing 'too frequently due to political shifts'.<sup>385</sup>

### **Costs of setting up a stewardship site**

**6.7** One of the barriers to establishing a stewardship site is the upfront cost. Several stakeholders found upfront stewardship site establishment costs to be very high or prohibitive, particularly for smaller landholders.<sup>386</sup> Mr Alexander Cox, PhD Candidate, Australian National University, who interviewed several accredited assessors as part of his research of the scheme, advised that the cost of undertaking ecological assessment typically ranged from \$20,000 to \$50,000 per site, but could be 'easily many times this' at larger sites. The cost depended on the size of the land being surveyed, the diversity of the native vegetation present, and the number of threatened species that were being identified.<sup>387</sup>

**6.8** Ecological assessment costs were high because of the scale of survey requirements. Several environmentally focussed stakeholders emphasised the importance of accurately representing and quantifying detailed biodiversity values, and wanted to ensure that ecological representations built into the scheme were not compromised by any potential simplifications.

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<sup>379</sup> Evidence, Mr Angus Atkinson, Member, NSW Farmers' Association, 9 December 2021, p 26.

<sup>380</sup> Evidence, Mrs Louise Davies, Member, Landholder Biodiversity Interest Group, 8 April 2022, p 2.

<sup>381</sup> Evidence, Mr Atkinson, 9 December 2021, p 26.

<sup>382</sup> Evidence, Mr Peter Dykes, Private individual, 10 December 2021, p 25.

<sup>383</sup> Submission 78, Local Government NSW, p 10.

<sup>384</sup> Submission 52, Planning Institute of Australia, p 4.

<sup>385</sup> Submission 76, Deep River Group, pp 16-17.

<sup>386</sup> See, for example: Submission 20, Yancoal Australia Ltd, p 1; Submission 87, Cement Concrete and Aggregates Australia, p 3; Submission 22, Kempsey Shire Council, p 4.

<sup>387</sup> Submission 58, Mr Alexander Cox, p 13.

- 6.9** The Environment Institute of Australia and New Zealand emphasised that the scheme needed to 'capture the complexity of the natural environment'.<sup>388</sup> Likewise, Coffs Harbour City Council's Team Leader, Biodiversity, Coastal and Flooding, Ms Sally Whitelaw, believed that ecological assessments needed to remain complex to accurately quantify and value biodiversity.<sup>389</sup> Mr Cox explained that the high costs were 'rightly' due to the emphasis on in-field flora and fauna surveys that typically require at least four days of monitoring.<sup>390</sup>
- 6.10** In addition to the costliness of hiring accredited assessors, Yancoal and the NSW Minerals Council outlined several other costly expert advisors that landholders needed to engage to be able to participate in the scheme:
- land conservation managers to determine ongoing land management requirements and costs for fire, weed and pest management
  - lawyers to provide advice, including in relation to land title and land eligibility
  - financial advisors
  - accountants to advise on tax implications.<sup>391</sup>

#### **Uncertainty, risk and opportunity costs of establishing stewardship sites**

- 6.11** Many stakeholders advised that the financial incentives and profits of a stewardship site were difficult to estimate, not guaranteed (as they were dependent on being able to sell credits) and were 'marginal at best'.<sup>392</sup> Some believed that credit prices had not reflected the true cost of establishing stewardship sites.<sup>393</sup> The Ecological Consultants Association of NSW suggested that the cost of developing a stewardship site was much larger than the credit prices that were set over the last five years, partly because of the 'immense number of contingencies' that needed to be costed into 20-year management plans.<sup>394</sup>
- 6.12** Potential revenue from managing a stewardship site was also considered lower than revenue from other possible uses of the land. Commenting on these opportunity costs, the Ecological Consultants Association of NSW suggested that landholders in high value land areas (such as in coastal areas, or on the outskirts of Sydney) were unlikely to find the scheme financially preferable compared to developing a site. The association thought that this might be because the opportunity cost involved in committing land to a stewardship site was not reflected in the

<sup>388</sup> Submission 90, Environment Institute of Australia and New Zealand, p 2.

<sup>389</sup> Evidence, Ms Sally Whitelaw, Team Leader, Biodiversity, Coastal and Flooding, Coffs Harbour City Council, 10 December 2021, p 20.

<sup>390</sup> Submission 58, Mr Alexander Cox, p 15.

<sup>391</sup> Submission 20, Yancoal Australia Ltd, p 2; Submission 66, NSW Minerals Council, p 12.

<sup>392</sup> Submission 78, Local Government NSW, p 6; Submission 52, Planning Institute of Australia, p 4; Submission 13, Coffs Harbour City Council, p 3; Submission 42, Landholder Biodiversity Interest Group, p 7; Submission 21, Clarence Valley Council, p 2; Submission 58, Mr Alexander Cox, p 13; Submission 87, Cement Concrete and Aggregates Australia, p 4.

<sup>393</sup> See, for example: Submission 78, Local Government NSW, p 9; Submission 2, Ecological Consultants Association of NSW, p 3; Submission 39, Gilgandra Shire Council, p 6; Submission 70, Darkinjung Local Aboriginal Land Council, p 6.

<sup>394</sup> Submission 2, Ecological Consultants Association of NSW, p 3.

prices of credits.<sup>395</sup> The association's Treasurer, Mr Andrew Lothian, outlined the difficult and risky decision-making process for a landholder considering the opportunity costs of participating in the scheme, including the risk of not being able to sell their credits:

Say someone in western Sydney owns a large block of land which has reasonable timber on it. They have two options. They can either put that up for stewardship and all the costs that go along with that. But they could also sell that to a developer. ... the risk of them putting their land up for stewardship and generating credits means that in the future they might have a steady income of \$100,000 worth of management costs over the next 20 years. ... But there is a concern: "What if I put my site up for stewardship but then no-one wants those credits? I spent a lot ... I've got all these credits. But if no-one wants to buy them, I've still got to manage the land. I still can't use the land for other purposes. I can't sell it to a developer."<sup>396</sup>

**6.13** There are substantial financial risks associated with establishing stewardship sites. For example, Yancoal advised that ecological advice could at any point preclude a proposed stewardship site from being suitable for biodiversity offset, rendering any prior expenditure 'fruitless'.<sup>397</sup>

**6.14** Similarly, Mr Angus Atkinson, Member, NSW Farmers' Association, described how he had invested over \$100,000 in developing a biodiversity stewardship site assessment report, with the intent of supplying credits for major projects nearby. However, these projects ended up not requiring his credits, and other credit sales opportunities were in different regions, which also precluded his participation in the scheme. Mr Atkinson described his frustrating experience and blamed the lack of adequate information about the demand for credits for his predicament:

So at that point I was looking at it thinking, "Wow!" I really wondered whether I had been caught up in a Nigerian scam where I just needed to keep spending more and more money to try to get my money back, to be honest. ... there was simply not enough information regarding the demand for credits that were going to be done for me. There was no readily available service to get independent advice on the biodiversity credits ...<sup>398</sup>

**6.15** One anonymous landholder, an early adopter of the scheme, described the various risks they took on after choosing to participate:

As a landholder I regret ever having committed to the scheme. I would never do it again.

Landholders carry most, if not all, of the risks associated with biodiversity stewardship agreements. We provide the land, pay consultants to assess its conservation value, support the administrative costs of the Biodiversity Conservation Trust, raise the funds necessary to underwrite a long term management plan and then implement that plan.<sup>399</sup>

**6.16** The committee also heard that participating in the scheme could also result in enormous financial losses for landholders. Mr Barry Buffier AM, an advisor to FAP Nominees, argued

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<sup>395</sup> Submission 2, Ecological Consultants Association of NSW, p 3.

<sup>396</sup> Evidence, Mr Andrew Lothian, Treasurer, Ecological Consultants Association of NSW, 22 October 2021, p 7.

<sup>397</sup> Submission 20, Yancoal Australia Ltd, pp 2-3

<sup>398</sup> Evidence, Mr Atkinson, pp 26-27.

<sup>399</sup> Submission 16, Name suppressed, pp 4-5.

that there were inadequate warnings of potential multimillion-dollar losses that landholders or stewardship site investors could suffer (further described in Chapter 7):

The scheme is a very complicated financial investment scheme, and in any other environment it would only be available to sophisticated investors and it would require a product disclosure statement attached to it. There is nothing in here that warns the investor about the potential problems with this scheme and the multimillion-dollar losses that are possible ...<sup>400</sup>

**6.17** The NSW Minerals Council highlighted two additional investment barriers experienced by landholders:

- a lack of information about the price of credits, which undermined confidence
- uncertainty over how a stewardship agreement would impact on future sales of the land.<sup>401</sup>

**6.18** Another problematic financial risk relates to capital gains tax, with some inquiry participants describing how this tax could deter landholders from participating in the scheme.<sup>402</sup> There are two occasions when a landholder incurs this tax's liability – when a stewardship agreement is entered, and when the credits are sold.<sup>403</sup> The Environment Institute of Australia and New Zealand explained that a landholder may incur a liability well before they receive any (potential) payment to undertake management actions:

Taxation can have significant implications for private landholders as a capital gains tax event can be realised in the financial year that the credits are granted, but it may be many years before enough credits are sold to cover the capital gains liability, or enough credits may never be sold to cover this liability. This tax liability can deter private landowners from entering into a Stewardship site agreement.<sup>404</sup>

**6.19** Mr Cox described another financial risk associated with land management obligations that are incurred after credits are sold. Land management obligations are funded by annual payments from the Total Fund Deposit, which a landholder must pay upfront to the Trust using the proceeds of credit sales. However, if a landholder had not sold enough credits to reach the Total Fund Deposit amount, those funds are not able to be provided back to the landholder to undertake those management actions. So, the landholder may incur a significant land management obligation, without being compensated.<sup>405</sup>

<sup>400</sup> Evidence, Mr Barry Buffier AM, Advisor to FAP Nominees Pty Ltd, 9 December 2021, pp 5-6.

<sup>401</sup> Submission 66, NSW Minerals Council, p 12.

<sup>402</sup> See, for example: Submission 90, Environment Institute of Australia and New Zealand, pp 4-5; Evidence, Mr Steven House, Director, Meridolum, 9 December 2021, p 16; Submission 42, Landholder Biodiversity Interest Group, pp 7-8; Submission 16, Name suppressed, p 6.

<sup>403</sup> A capital gains tax liability is also incurred, based on an agreed valuation of credits, when a Biodiversity Stewardship Agreement is entered. See Biodiversity Conservation Trust, *Taxation Guide for Landholders* (September 2020), p 6.

<sup>404</sup> Submission 90, Environment Institute of Australia and New Zealand, pp 4-5; Biodiversity Conservation Trust, *Taxation Guide for Landholders* (September 2020), p 6.

<sup>405</sup> Submission 58, Mr Alexander Cox, p 9.



- 6.20 Highlighting the seriousness of this issue, the Audit Office of NSW found that 40 per cent of stewardship sites had not sold enough credits to meet their Total Fund Deposit.<sup>406</sup>

### Complexities for landholders

- 6.21 The complexity of the scheme was another significant barrier to landholder participation. For example, the Planning Institute of Australia believed the scheme was outside the capacity of most landholders, who had 'given up, advising the system is too complex'.<sup>407</sup> Additionally, Deep River Group described the process of generating credits as 'complex, un-user friendly, and fraught with legal terms'.<sup>408</sup>

- 6.22 Mr Lothian suggested that the complexity of the scheme was significantly discouraging landholder participation, unless they were particularly motivated to conserve their land:

Beyond some people who just want to leave their legacy as protecting a block of land, there is not a lot of people out there who are really jumping to engage in this scheme when they start to get more information about it and how complex it is.<sup>409</sup>

- 6.23 The NSW Government acknowledged that establishing a stewardship site was a significant decision for landholders and noted that the scheme did not guarantee landholders a financial return for selling credits. The government was aware that upfront establishment costs could be high and deter some landholders from setting up stewardship sites. A financial assistance scheme had therefore been introduced, effectively an interest-free loan, to cover upfront establishment costs if the Trust believed the landholder was likely to be able to sell credits, to be repaid once the landholder sold those credits. The department was also considering what additional legal, financial and business advice would support landholders.<sup>410</sup>

- 6.24 The department's Deputy Secretary, Biodiversity, Conservation and Science, Mr Dean Knudson acknowledged the complexities experienced by landowners, local councils and businesses, and was eager to simplify the scheme for these users:

... if you are a relatively unsophisticated or a smaller landowner, LGA, business, you are going to have trouble entering the scheme. So we have got to do work to make it simpler. We have got to make it easier for people to figure out what they have got on their lands and what it could be worth in the scheme because that is not as transparent and predictable as it could be.<sup>411</sup>

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<sup>406</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 6.

<sup>407</sup> Submission 52, Planning Institute of Australia, p 4.

<sup>408</sup> Submission 76, Deep River Group, p 23.

<sup>409</sup> Evidence, Mr Lothian, 22 October 2021, p 8.

<sup>410</sup> Submission 97, NSW Government, pp 13-14; Evidence, Mr Paul Elton, Chief Executive Officer, Biodiversity Conservation Trust, 10 December 2021, p 53. The committee acknowledges that, since giving its evidence to this inquiry, the department has assumed responsibility for facilitating establishment of biodiversity stewardship agreements through the Biodiversity Credit Supply Fund, and for approving Biodiversity Stewardship Agreements, previously delivered by the Biodiversity Conservation Trust. See Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 56.

<sup>411</sup> Evidence, Mr Dean Knudson, Deputy Secretary, Biodiversity, Conservation and Science, Department of Planning and Environment, 10 December 2021, pp 39-40.

- 6.25** In October 2022, the Minister for the Environment and Heritage advised the committee that the department had undertaken several initiatives to assist landholders, including:
- providing a monthly scheme 'updates' newsletter to subscribers
  - establishing a Credits Supply Taskforce to 'proactively support landholders' to enter into stewardship agreements
  - increasing the discount rate from 2.6 to 3.2 percent to lower the amount landholders needed to hold in the Total Fund Deposit to manage stewardship sites.<sup>412</sup>

## Costs and constraints for developers

- 6.26** The experiences of large and small-scale developers indicated that significant costs and uncertainty associated with the scheme inhibited development. Many inquiry participants were concerned about stifling, or even in some cases halting, development; in the latter case creating 'sterilised' land. Large-scale developers also complained about the unknown scale of offset costs in the early project planning stages, prior to land rezoning.

### Cost impost of the scheme on large-scale developers

- 6.27** Some developers and local councils believed that significant offsetting costs were stifling development, and in some instances making developments unviable. They provided examples of how offset costs could be very significant, including in comparison to the value of the land.
- Representing the property development industry, Urban Taskforce Australia described how, in many cases, the cost of biodiversity offsets was 'simply prohibitive of developing the land at all'. The taskforce described how a species could be discovered at a site during the development application stage that was not factored into development costs earlier, and subsequently required offsetting. The cost could make zoning irrelevant and the land unable to be feasibly developed, effectively sterilising the land.<sup>413</sup>
  - Gilgandra Shire Council considered the scheme to be an 'absolute handbrake to critical developments' that was 'totally crippling' development in regional New South Wales. The council asserted that the scheme was heavily biased against regional areas with low land costs. Credit liabilities were often greater than the value of the land, with purchasers unable to pay significantly higher prices, making development unviable.<sup>414</sup>
  - Projects in the Bathurst region had either been abandoned or were significantly delayed due to the time, cost or complexity of investigations required to fulfil offset-related obligations, seeming to be 'all too hard'. Bathurst Regional Council provided the example of one state significant development project with offsetting costs of \$18 million, which represented around 10 per cent of the overall development's construction costs. The council suggested that this level of cost impost could result in the development's benefit

<sup>412</sup> Correspondence from The Hon James Griffin MP, Minister for Environment and Heritage, to Chair, 20 October 2022, pp 2-3.

<sup>413</sup> Submission 68, Urban Taskforce, p 2; Evidence, Mr Tom Forrest, Chief Executive Officer, Urban Taskforce Australia, 8 April 2022, p 12.

<sup>414</sup> Submission 39, Gilgandra Shire Council, pp 2-4.

cost ratio reducing to a level that might eliminate the proposal, regardless of its positive social and economic benefits.<sup>415</sup>

- At a proposed South Nowra industrial development, Shoalhaven City Council described how, well before the introduction of the scheme, an area was zoned for industrial development. Subsequently, it was estimated to need approximately \$1.5 million of credits to develop the site. This represented more than the value of the land, and rendered the development unviable, with council's previously agreed planning outcomes not coming to fruition, and the land remaining vacant.<sup>416</sup>

**6.28** Tweed Shire Council argued that more flexible, timely and streamlined offsetting approaches to meet offset obligations were warranted in some circumstances, particularly for the delivery of essential public infrastructure, such as water supply dams.<sup>417</sup>

**6.29** Urban Taskforce Australia considered that the scheme's costs impeded and delayed investment and delivery of new homes, particularly in regional areas and on the urban fringe. The taskforce's Chief Executive Officer, Mr Tom Forrest reminded the committee that people based in developed parts of Sydney benefitted from historic land clearing, and believed it was inequitable for new homebuyers in the fringe of Sydney to bear the cost of land clearance. To make the scheme more equitable, Mr Forrest proposed that this cost be borne by all, rather than just the home purchaser or developer, as 'investment in infrastructure is investment in our future'.<sup>418</sup>

**6.30** Representing the mining sector in New South Wales, the NSW Minerals Council believed that the scheme's increasing sophistication was imposing more obligations, leading to increased costs for developers. In particular, the council believed that a 'much higher' offset to impact ratio, and a requirement for stewardship sites to be held in perpetuity had significantly increased costs for all development. The council also believed that offset management, monitoring and reporting requirements associated with the scheme had become 'very onerous, with limited additional environmental gain' compared with earlier methods of managing offsets.<sup>419</sup>

**6.31** One mining company, Yancoal, elaborated on how onerous the requirements were and explained that for each vegetation community, 'some 30-plus equations' were applied to 'more than 15 different vegetation attributes' to determine the number of credits generated.<sup>420</sup> Yancoal added that significant expertise was required to apply the methodology, evident by the 176-page length of the Biodiversity Assessment Method, three stages of operational manuals (157 pages in length) and over 20 guidelines and policies.<sup>421</sup> Additionally, the ecological surveys that fed into the Biodiversity Assessment Method were described by the Planning Institute of Australia as 'onerous' and difficult to standardise.<sup>422</sup>

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<sup>415</sup> Submission 6, Bathurst Regional Council, p 2.

<sup>416</sup> Submission 15, Shoalhaven City Council, p 2; Evidence, Mr Gordon Clark, Director City Futures, Shoalhaven City Council, 10 December 2021, p 10.

<sup>417</sup> Submission 91, Tweed Shire Council, p 3.

<sup>418</sup> Evidence, Mr Forrest, 8 April 2022, p 11.

<sup>419</sup> Submission 66, NSW Minerals Council, pp 4 and 9.

<sup>420</sup> Submission 20, Yancoal Australia Ltd, p 2.

<sup>421</sup> Submission 20, Yancoal Australia Ltd, p 2.

<sup>422</sup> Submission 52, Planning Institute of Australia, p 3.

***Cost uncertainty during land rezoning***

- 6.32** Several stakeholders explained that developers did not need to consider biodiversity offsets during the early planning proposal (rezoning) stage of a development. This resulted in developers not knowing their offset obligations until their development applications had been lodged for assessment. Tamworth Regional Council recommended that the biodiversity impacts be required to be considered upfront, so that the implications to the viability of the projects was known earlier on. Similarly, Urban Taskforce Australia suggested that biodiversity offset costs be fixed at the rezoning stage of property development.<sup>423</sup>
- 6.33** In response, the department's Executive Director, Biodiversity and Conservation, Ms Michelle Dumazel, suggested that biodiversity impacts could be assessed up-front using the biocertification process.<sup>424</sup>

**Cost impost of the scheme on small-scale developers**

- 6.34** Some councils described the significant cost implications for small-scale 'mum and dad' property developers, who were struggling to afford to undertake ecological assessments, let alone pay for any potential credit liabilities. Some councils described how there was limited environmental gain associated with the financial imposts on these small-scale home developers, compared to large-scale property developments.
- 6.35** Local Government NSW and other councils informed the committee that there were circumstances where people had purchased rural allotments of land (sometimes prior to the introduction of the scheme) but were then facing a significant financial impost because of the scheme, and potentially unable to develop the land.<sup>425</sup>
- 6.36** Occasionally, the scheme had made it financially unviable for a property owner to undertake the necessary assessments to build a home, leading to the land being sterilised.<sup>426</sup> Dubbo Regional Council described how, for example, slashing of native grasses (such as for bushfire fuel load control), despite being temporary, could 'well tip a small scale (house) development over into the scheme ... [as it requires] expensive site surveying, report development and (at times unnecessary) offsetting'.<sup>427</sup>
- 6.37** The scheme unfairly punished 'mum and dad' developers who merely want to 'retire to a bush block, build their dream home and live out their years surrounded by nature', according to Goulburn Mulwaree Council. The council described how a property owner had invested their life savings in a 120-hectare rural property with the intent of building a dwelling. Afterwards, their site was found to have a critically endangered ecological community. The owner first had to engage a qualified ecologist to determine if a significant impact to the ecological community was likely. If the impact was considered significant, further assessment was needed, costing

<sup>423</sup> Submission 78, Local Government NSW, p 6; Submission 56, Tamworth Regional Council, p 2; Evidence, Mr Forrest, 8 April 2022, p 11.

<sup>424</sup> Evidence, Ms Dumazel, 8 April 2022, pp 21-22.

<sup>425</sup> Submission 78, Local Government NSW, p 5; Submission 39, Gilgandra Shire Council, p 5; Submission 6, Bathurst Regional Council, p 2.

<sup>426</sup> Submission 50, Penrith City Council, p 2.

<sup>427</sup> Submission 61, Dubbo Regional Council, p 4.

several thousands of dollars, along with credit costs. The council advised the owner that they could establish a stewardship site on their property to offset any impacts, however the owner did not have the finances to undertake this.<sup>428</sup>

- 6.38** The Goulburn Mulwaree Council argued that these requirements and associated costs caused 'significant financial, emotional and psychological stress' for individual property owners affected by the scheme, without necessarily halting or reversing the loss of biodiversity. It believed that in comparison, large scale investors and property developers were 'hardly impacted as they merely view the scheme as just another hoop to jump through and pass costs on to the end consumer'.<sup>429</sup>
- 6.39** The committee was also told that the scheme undermined land compensation that was granted to local Aboriginal land councils under the *Aboriginal Land Rights Act 1983*. The Darkinjung Local Aboriginal Land Council believed that the costly requirements of the scheme effectively sterilised their land from being developed, arguing that it acted as a tax on the land compensation they were given. This meant that the most economically rational action for them was to sell their land and reinvest the funds in other lands that would be able to provide tangible benefits.<sup>430</sup>

### Capacity of local government as a consent authority

- 6.40** Local government representatives argued that the complexity of the scheme led to substantial difficulties in applying, participating in, and complying with the scheme. Some of the key complexities were associated with the Biodiversity Assessment Method, ecological survey requirements and supporting guidelines, biodiversity development assessment reports, legislation, and overall, having limited information resources for councils to advise participants and undertake assessments.<sup>431</sup>
- 6.41** The committee heard that the scheme's legislation was complex and often difficult to interpret, 'even for professionals in the industry'. Goulburn Mulwaree Council explained that several legislative instruments apply, making the scheme 'unwieldy and impractical on many levels'. Council's assessment staff were also required to spend a 'significant' amount of time explaining and interpreting the scheme and related legislation to developers.<sup>432</sup>
- 6.42** Local councils advised that the complexities of the scheme delayed their assessment of development applications. Some councils believed they did not have adequate support from the department, nor the human resources to adequately interpret and assess the scheme's requirements, particularly so for those councils located in regional areas.

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<sup>428</sup> Submission 12, Goulburn Mulwaree Council, pp 5-6.

<sup>429</sup> Submission 12, Goulburn Mulwaree Council, pp 5-6.

<sup>430</sup> Submission 70, Darkinjung Local Aboriginal Land Council, pp 3 and 9.

<sup>431</sup> Submission 78, Local Government NSW, p 4; Submission 58, Mr Alexander Cox, p 13; Submission 39, Gilgandra Shire Council, p 7; Submission 62, Lake Macquarie City Council, p 6; Evidence, Ms Whitelaw, 10 December 2021, p 20.

<sup>432</sup> Submission 12, Goulburn Mulwaree Council, pp 7-8 and 12; Evidence, Mr Brian Faulkner, Environment and Biodiversity Assessment Officer, Goulburn Mulwaree Council, 10 December 2021, p 17.

- Port Macquarie Hastings Council's Strategic Environmental Projects Coordinator, Miss Karen Love summarised the scheme as 'an elaborate, resource-hungry and complex accounting system that facilitates development at the cost of the environment'. The council's difficulties with the scheme had led to significant delays in assessing development applications.<sup>433</sup>
- Kempsey Shire Council alleged that limited information had been provided to it by the department and the Trust, and that its staff (and developers) were expected to rely on limited resources to provide advice and undertake assessments.<sup>434</sup>
- Tamworth Regional Council advised that NSW Government funding for local government support officers had ceased in 2020, making it difficult to obtain consistent advice on planning issues.<sup>435</sup>
- Goulburn Mulwaree Council advised that the scheme was particularly onerous when applied to small lots in urban zones, and that it created extra work and delays for assessment staff, for what would 'otherwise be relatively simple and straightforward projects'.<sup>436</sup>

**6.43** The Environment Institute of Australia and New Zealand agreed that the scheme's complexity had led to delays in approval – not only of development applications, but also stewardship sites.<sup>437</sup> The Planning Institute of Australia agreed that ecological reports could be complicated to interpret, especially for councils without ready access to ecological advice.<sup>438</sup>

**6.44** When it comes to quality assuring biodiversity assessment reports, Mr Cox noted that consent authorities, in particular councils, have differing levels of capacity to interpret and assess the quality of biodiversity development assessment reports.<sup>439</sup> Mrs Kimberly Baker, Environmental Planner, Port Stephens Council, pointed out that it is difficult for councils to secure staff with the appropriate experience or technical skills to assess the reports. This means some councils are reliant on either assistance from the department or using a consultant to do an independent review for them.<sup>440</sup>

**6.45** The Northern Rivers Joint Organisation noted concerns from member councils about biodiversity development assessment reports continuing to not meet requirements. It reported that at on at least three occasions deficient reports had resulted in development applications

<sup>433</sup> Submission 47, Natural Resource Management and Planning staff - Port Macquarie Hastings Council, pp 3-4; Evidence, Miss Karen Love, Strategic Environmental Projects Coordinator, Port Macquarie Hastings Council, 10 December 2021, p 11; Submission 91, Tweed Shire Council, p 2; Submission 87, Cement Concrete and Aggregates Australia, pp 3-4.

<sup>434</sup> Submission 22, Kempsey Shire Council, p 4.

<sup>435</sup> Submission 56, Tamworth Regional Council, p 3.

<sup>436</sup> Submission 12, Goulburn Mulwaree Council, p 8.

<sup>437</sup> Submission 90, Environment Institute of Australia and New Zealand, p 2.

<sup>438</sup> Submission 52, Planning Institute of Australia, p 3.

<sup>439</sup> Submission 57, Mr Alexander Cox, pp 13-17.

<sup>440</sup> Evidence, Mrs Kimberly Baker, Environmental Planner, Port Stephens Council, 10 December 2021, p 10.

going to the Land and Environment Court of New South Wales, at considerable cost to the council and community.<sup>441</sup>

**6.46** Local government representatives highlighted examples of inadequate government resourcing to support the scheme, including:

- under-resourcing of the scheme's support staff leading to an 'enormous backlog' of work and delayed response times<sup>442</sup>
- a lack of available staff to provide support with the Biodiversity Assessment Method<sup>443</sup>
- long response times when department staff were asked to independently review biodiversity development assessment reports.<sup>444</sup>

**6.47** Local councils wanted the department to better support councils in their role as consent authorities by:

- supporting training of biodiversity development assessment report assessors in councils, to give greater confidence in assessing the quality of reports, and decision making<sup>445</sup>
- providing access to accredited assessors dedicated to supporting councils in their role as consent authorities, if they did not have the expertise in house to review or challenge them.<sup>446</sup>

**6.48** The Audit Office of NSW report identified a number of actions the department has taken to quality assure biodiversity development assessment reports, and further recommended that the department should evaluate the overall quality of assessment reports for development sites (and also stewardship sites) and implement improvement strategies, including a quality assurance process.<sup>447</sup>

**6.49** To address some of the above concerns, in 2022, the department sponsored 300 local government staff to access newly released eLearning training modules. The department has also recently published additional resources to support local government assessment staff, which include:

- a manual designed for staff new to the scheme
- a biodiversity development assessment report template and guidance document for local assessments
- a biodiversity assessment and approval pathways document.<sup>448</sup>

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<sup>441</sup> Submission 93, Northern Rivers Joint Organisation – Natural Resource Management Managers Group, p 5.

<sup>442</sup> Submission 12, Goulburn Mulwaree Council, p 12.

<sup>443</sup> Evidence, Mrs Baker, 10 December 2021, p 9.

<sup>444</sup> Evidence, Mrs Baker, 10 December 2021, p 9.

<sup>445</sup> Submission 78, Local Government NSW, p 8.

<sup>446</sup> Submission 78, Local Government NSW, p 8.

<sup>447</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), pp 37-39 and 56.

<sup>448</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 38.

## Committee comment

- 6.50** The committee is deeply concerned by evidence from virtually all scheme participants that they are finding the scheme burdensome and complex, with multiple barriers to entry.
- 6.51** Landholders form the backbone of a properly functioning offsets scheme. Without their voluntary participation, developers have no way of acquitting their offset obligations. It is clear from the evidence received that there are too many barriers to landholder participation in the scheme, including its cost, complexity and uncertainties associated with it.
- 6.52** We note that the department has recognised the need to do more to facilitate landholder participation in the scheme. To achieve this, we consider there is a compelling need to address the upfront costs associated with establishing a stewardship site, including the risks to landholders of establishing a stewardship agreement but not selling enough credits to receive management action payments.
- 6.53** To this end, we recommend that the department continue to investigate and implement options for reducing the costs, financial risks and complexities associated with establishing stewardship sites without compromising the ecological integrity of the scheme.

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### Recommendation 12

That the Department of Planning and Environment continue to investigate and implement options for reducing the costs, financial risks and complexities associated with establishing stewardship sites, without compromising the ecological integrity of the Biodiversity Offsets Scheme. This should involve consideration of:

- upfront cost and complexity of establishing a stewardship site
- costs and risks incurred by landholders who have established a stewardship site but have not sold sufficient credits to receive management action payments
- the availability of information and support to landholders interested in participating in the scheme.

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- 6.54** The committee acknowledges developers' concerns about uncertainties and risks associated with having insufficient upfront knowledge about offset obligations and likely cost implications. We consider more should be done to improve the transparency of the scheme to lessen the uncertainty associated with it.
- 6.55** For this reason, we recommend that the department provide greater certainty for developers on the likely scale of biodiversity offsetting liabilities in the lead up to land rezoning decisions.

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### Recommendation 13

That the Department of Planning and Environment provide greater certainty for developers on the likely scale of biodiversity offsetting liabilities in the lead up to land rezoning decisions.

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- 6.56** As the consent authorities for local development, it is critical for local councils to be able to navigate and apply the scheme. The committee is grateful to the many local councils who participated in the inquiry, and deeply concerned about the array of issues they raised. A particular point of concern is the capacity of local governments to review biodiversity development assessment reports, and challenge the quality if necessary.
- 6.57** Noting the department's advice that it has since provided some further support to local governments, we nevertheless recommend that the department continue to increase the level of support for local governments in their role as consent authorities in the scheme, with a particular focus on quality assurance of biodiversity development assessment reports.

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**Recommendation 14**

That the Department of Planning and Environment continue to increase the level of support for local governments in their role as consent authorities in the Biodiversity Offsets Scheme.

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## Chapter 7 The offsets credit market

The Biodiversity Offsets Scheme creates a market in which biodiversity values are quantified into units of exchange - 'credits' – that can be created and purchased, and subsequently retired, to acquit offset obligations. This chapter examines the design of the credit market, and its effect on credit supply, pricing and market liquidity. It then outlines several issues that influence the operation of the market, predominantly stemming from the ability for developers to bypass the credit market completely by instead paying directly into the Biodiversity Conservation Fund. This chapter also considers market transparency, the transition of credits created under the former BioBanking Scheme to the Biodiversity Offsets Scheme, and finally, opportunities to facilitate demand for unwanted credits through philanthropic conservation are explored.

### Design of the credit market

- 7.1** One of the principles of appropriate biodiversity offsetting is that biodiversity gains and losses should be quantitatively assessed using justifiable and replicable units of exchange.<sup>449</sup> Within the scheme, the Biodiversity Assessment Method measures and quantifies biodiversity gains and losses and converts these values into particular species or ecosystem 'credits'.
- 7.2** To offset the biodiversity impacts of a development, a developer is required to acquire and retire the equivalent number credits generated at a stewardship site. A key avenue for developers to acquire credits is through the biodiversity offset credit market (if they are available).<sup>450</sup> This credit trading system is a market-based mechanism, with landowners and credit purchasers negotiating on the price of credits. The market therefore determines the price for each credit.<sup>451</sup>
- 7.3** An important feature of the market is that it is not a generic single market for 'biodiversity credits', but rather, to ensure the like-for-like provisions are met, every individual threatened species and ecosystem has its own independent market, known as an 'offset trading group'. Currently there are 1,394 different types of ecosystem credits, many of which are treated as equivalent and therefore consolidated into 364 different tradable 'offset trading groups', and 867 different species credit types.<sup>452</sup>

<sup>449</sup> International Union for Conservation of Nature, *Issues Brief: Biodiversity Offsets* (2016), p 2; NSW Department of Planning and Environment, *Our principles for the use of biodiversity offsets in NSW* (29 June 2021), <https://www.environment.nsw.gov.au/topics/animals-and-plants/conservation-programs/nsw-biodiversity-offsets-policy-for-major-projects/principles-for-use-of-biodiversity-offsets-in-nsw>.

<sup>450</sup> Alternatively, developers can establish their own stewardship sites to generate credits, or acquit their obligations by paying into the Biodiversity Conservation Fund, thus transferring their offset obligations to the Trust.

<sup>451</sup> NSW Department of Planning and Environment, *Offset credits transactions* (28 April 2022), <https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/offset-obligations-and-credit-trading/offset-credits-transactions>.

<sup>452</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 13.

- 7.4 Many stakeholders to the inquiry believed that the credit market was not working as it should, describing it as 'non-functioning',<sup>453</sup> 'extremely immature',<sup>454</sup> 'bordering on market failure' in some regions,<sup>455</sup> and 'highly illiquid'.<sup>456</sup> The NSW Minerals Council noted that a 'thriving and liquid' offsets market had not materialised, and had been unable to deliver the type and quantity of credits required to offset large-scale projects. The council noted that an active market for credits occurred in a few development hotspots in metropolitan areas, but there was minimal trading in many regional and rural areas.<sup>457</sup>
- 7.5 During the inquiry's hearings, the functionality of the credit market was discussed at length. Stakeholders provided an overview of the credit market's key design features and provided feedback on its operation and pricing, including the Biodiversity Conservation Trust's (the Trust's) involvement and influence.

### Liquidity of the credit market

- 7.6 As noted above, there are over 1,000 different credit types that can be traded under the scheme. Stakeholders noted that this reflects the complexity of biodiversity, but the result is that the credit market is also complex, and largely illiquid.
- 7.7 The Treasurer of the Ecological Consultants Association of NSW, Mr Andrew Lothian, explained the like-for-like credit design feature and highlighted how this led to insufficient trades, with implications for reliable pricing:
- [With so many credit markets,] to get enough trades in that credit ... market to get reliable data on supply and demand, costing—we are just not seeing those trades. The economists ... are estimating they would need about 40 trades in an 18-month period to get fairly robust data. Honestly, I do not see that ever happening.<sup>458</sup>
- 7.8 In considering the large number of credit types, Urban Taskforce Australia asserted that the list of credits was too long, too specific (including being locationally specific), and as the taskforce's Chief Executive Officer, Mr Tom Forrest, elaborated, 'gets into the minutia to such an extent that it undermines the integrity of the whole system'. The taskforce claimed that the like-for-like requirements were causing market failure, and highlighted situations where a species could not be readily found at another site for a credit transaction to occur.<sup>459</sup>
- 7.9 Several submissions demonstrated the lack of trading in credits by highlighting that 952 (of 983) species offset trading groups and 310 (of 359) ecosystem offset trading groups had never been

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<sup>453</sup> Submission 2, Ecological Consultants Association of NSW, pp 3 and 7.

<sup>454</sup> Submission 66, NSW Minerals Council, p 11.

<sup>455</sup> Submission 39, Gilgandra Shire Council, p 4.

<sup>456</sup> Submission 58, Mr Alexander Cox, p 5.

<sup>457</sup> Submission 66, NSW Minerals Council, pp 4, 7 and 11; Submission 13, Coffs Harbour City Council, pp 2-3.

<sup>458</sup> Evidence, Mr Andrew Lothian, Treasurer, Ecological Consultant Association of NSW, 22 October 2021, p 8.

<sup>459</sup> Submission 68, Urban Taskforce, p 3; Evidence, Mr Tom Forrest, Chief Executive Officer, Urban Taskforce Australia, 8 April 2022, pp 11-12.

traded.<sup>460</sup> The Audit Office of NSW reported that 86 percent of ecosystem credits and 97 percent of species credits had never been traded, and concluded that the market is 'not well developed' and that credit supply had been 'slow'.<sup>461</sup> The Trust's Chief Executive Officer, Mr Paul Elton, advised that the vast majority of offset trading groups had never been traded because there had never been demand for those types of credits.<sup>462</sup>

**7.10** Despite the fact that an overwhelming majority of offset trading groups had never been traded, the Audit Office of NSW also found that there was 'a substantial shortfall in the supply of credits, and significant risks of future credit shortfalls'. As of March 2022, only 9 per cent of ecosystem credit demand and 4 per cent of species credit demand could be met by existing credit availability. Its analysis found that, based on future credit demands, adequate supply of credits was expected for 31 percent of ecosystem credit demand, 1 per cent of flora species demand, and 16 per cent of fauna species demand.<sup>463</sup>

**7.11** The government advised that it was committed to improving and refining the operation of the scheme, and stated that a key focus for it was to ensure the sufficient supply of credits to 'create a more competitive market' and meet demand from major infrastructure projects.<sup>464</sup> Specifically, it was working to facilitate and expand the supply of credits (particularly in regional areas), improve information about future credit supply and demand pipelines, and address barriers to participation. It was also considering creating offsets on government-owned land. Mr Dean Knudson, Deputy Secretary, Biodiversity, Conservation and Science, Department of Planning and Environment, elaborated on the need to increase the supply of credits and forecast credit demand to entice landholders to participate:

... we need to increase the supply of credits. The reason for that is that if we look over the forward estimates there is about \$108 billion worth of major projects scheduled to start in New South Wales. The amount of biodiversity credits that will be required to be associated with that will be in the billions. That is going to require us to take a stepwise change in the scale at which we are identifying credits for those proposals. So I think we have a really significant work program trying to improve the supply of credits but also provide information to the market about where the demand for credits is going to come from so that if you are an individual landowner you know there is a market for what you have on your land.<sup>465</sup>

## Distortion of credit market prices

**7.12** In 2014, the NSW Government reflected on the operation of the then BioBanking credit market and commented that 'under current requirements, project developers must compete with each other in seeking offset sites, unnecessarily bidding up the price of these sites'. The NSW

<sup>460</sup> Submission 22, Kempsey Shire Council, p 3; Submission 47, Natural Resource Management and Planning staff - Port Macquarie Hastings Council, p 3; Submission 58, Mr Alexander Cox, p 11.

<sup>461</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 18.

<sup>462</sup> Evidence, Mr Paul Elton, Chief Executive Officer, Biodiversity Conservation Trust, 10 December 2021, p 41.

<sup>463</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), pp 24-25.

<sup>464</sup> Submission 97, NSW Government, pp 14-15.

<sup>465</sup> Submission 97, NSW Government, pp 14-15.

Government therefore ultimately introduced the Biodiversity Conservation Fund to allow developers to 'deposit money instead of locating and purchasing offset sites themselves' and to 'calculate the biodiversity cost of their project upfront'.<sup>466</sup>

**7.13** According to some inquiry participants, the introduction of this payment mechanism has inappropriately interfered with the offsets credit market. This section reviews some of these arguments.

### **The impact of the Biodiversity Offsets Payment Calculator**

**7.14** The vast majority of developers choose to discharge their offset obligations by payment to the Trust's Biodiversity Conservation Fund, with the amount paid determined by the Biodiversity Offsets Payment Calculator.<sup>467</sup>

**7.15** With the vast majority of biodiversity credit obligations being satisfied by payment to the Fund, it is imperative to the success of the scheme that the Biodiversity Offsets Payment Calculator truly reflects the cost of establishing and maintaining a stewardship site. However, the committee heard evidence that this is not the case.

**7.16** Several landholders complained that the calculator had 'artificially' manipulated credit prices through an 'obscure process' based on 'questionable modelling'.<sup>468</sup> These comments were in reference to the econometric model that drove the calculator's pricing outputs. As the output from the calculator was always a guaranteed maximum price developers would pay to acquit their offset obligations, the calculator had effectively created a ceiling on credit prices. Some stakeholders advocated for moving to a 'free' or 'open' credit market.<sup>469</sup> The Audit Office of NSW concluded that the Biodiversity Offsets Payment Calculator was 'impacting credit price information and market development'.<sup>470</sup>

**7.17** In addition to the price ceiling effect, many stakeholders complained about the downward pressure the calculator put on credit prices, as it:

- gave unreliable price signals, as it had 'no relation' to the supply and demand for individual credit types<sup>471</sup>
- set the price of credits at the 'best average price', rather than the 'premium price' or 'last chance option they were meant to be'.<sup>472</sup>

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<sup>466</sup> Media release, Hon Robyn Parker MP, Minister for Environment, 'New biodiversity fund open for consultation', 20 March 2014.

<sup>467</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 19.

<sup>468</sup> Submission 42, Landholder Biodiversity Interest Group, p 7; Submission 70, Darkinjung Local Aboriginal Land Council, p 6; Submission 100, Mr Steven House, p 2; Submission 35, Henribark Pty Ltd, pp 9-11; Submission 35a, Henribark Pty Ltd, pp 9 and 13-14.

<sup>469</sup> Submission 42, Landholder Biodiversity Interest Group, p 7; Submission 70, Darkinjung Local Aboriginal Land Council, p 6; Submission 100, Mr Steven House, p 2.

<sup>470</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 21.

<sup>471</sup> Submission 58, Mr Alexander Cox, p 11; Evidence, Mr Alexander Cox, PhD Candidate, Crawford School of Public Policy, 22 October 2021, p 13.

<sup>472</sup> Submission 35, Henribark Pty Ltd, pp 9-11; Submission 35a, Henribark Pty Ltd, pp 9 and 13-14.

- advantaged developers because credit costs were based on prices that developers had been willing to pay in the past<sup>473</sup>
- acted in an anti-competitive way by restricting the upper sales price of credits<sup>474</sup>
- relied on average prices, which mathematically led to reduced credit prices over time.<sup>475</sup>

**7.18** One of the ramifications of the calculator reducing the value or price of credits is that creates a risk for the Trust to being unable to afford to pay landowners to establish stewardship sites. The Trust could therefore 'struggle to satisfy' all of its offset obligations, and risked transferring its obligations to the public purse.<sup>476</sup> Similarly, the Audit Office of NSW found that the calculator created a risk that the Biodiversity Conservation Fund would not have sufficient funds for the Trust to meet its obligations on a like-for-like basis, meaning that the Trust would need to consider using alternative options (such as variation rules) to acquit obligations, which could result in 'suboptimal' biodiversity outcomes.<sup>477</sup>

**7.19** Despite the calculator's alleged downward pressure on prices, stakeholders from the resources sector contended that costs generated by the calculator were still 'many times more expensive' than the cost of buying and managing their own stewardship sites.<sup>478</sup>

**7.20** The NSW Government acknowledged that the Biodiversity Offsets Payment Calculator relied on limited trading data and could deviate materially from the actual cost of supplying credits and had a 'perverse impact on the market', creating 'unintended consequences'. The government also acknowledged that the calculator acted as a point of competition for credit sellers.<sup>479</sup>

**7.21** Hence, on 17 October 2022, the NSW Government replaced the Biodiversity Offsets Payment Calculator with a new Biodiversity Conservation Fund Charge System. The new system determines a 'Charge' that seeks to reflect 'a reasonable estimate of the cost to the Trust of acquitting an offset obligation in accordance with the like-for-like biodiversity credit rules'. The aim of the new system is to improve price certainty and reduce 'unnecessary' price volatility, to assure stakeholders that credit prices would be set 'fairly'. Unlike its predecessor, it is not able to be viewed publicly, to remove 'inappropriate' market signals.<sup>480</sup>

**7.22** The Environmental Defenders Office considered the new Biodiversity Conservation Fund Charge System to have the same key problems as the Biodiversity Offsets Payment Calculator, as its purpose has been framed around the creation of a functioning market, rather than delivering positive environmental outcomes.<sup>481</sup>

<sup>473</sup> Submission 35, Henribark Pty Ltd, pp 9-11; Submission 35a, Henribark Pty Ltd, pp 9 and 13-14.

<sup>474</sup> Submission 76, Deep River Group, p 39.

<sup>475</sup> Submission 35a, Henribark Pty Ltd, pp 13-14.

<sup>476</sup> Submission 58, Mr Alexander Cox, pp 6 and 10.

<sup>477</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 33.

<sup>478</sup> Submission 66, NSW Minerals Council, p 11; Submission 87, Cement Concrete and Aggregates Australia, p 2.

<sup>479</sup> Submission 97, NSW Government, p 14; Submission 97, NSW Government, Attachment A, pp 1-2; Evidence, Ms Michelle Dumazel, Executive Director, Biodiversity and Conservation, Department of Planning and Environment, 8 April 2022, p 27.

<sup>480</sup> Submission 97, NSW Government, p 15.

<sup>481</sup> Submission 92, Environmental Defenders Office, p 17.

### **The appropriateness of the Biodiversity Conservation Fund**

- 7.23** The committee heard diverging views on whether developers should be allowed to pay into the Biodiversity Conservation Fund to meet their offset obligations, hence bypassing the credit market completely.
- 7.24** Commenting on the advantages of a Biodiversity Conservation Fund, Mr Alexander Cox, PhD Candidate, Australian National University, who researched the scheme, noted that the illiquidity of the credit market limited the ability for developers to purchase credits from private landowners, and therefore the Trust played an 'essential role' in mediating credit exchanges between landowners and developers.<sup>482</sup>
- 7.25** Mr Jack Bulfin, Director of Operations, Deep River Group provided some added context for one of the reasons why developers often preferred to bypass the credit market by paying into the Biodiversity Conservation Fund. He explained that facilitating credit transactions is 'very complex' for developers, and provided the following example:
- ... if you need 6 different types of credits then you might go to 30 different landowners to be able to fulfil that transaction and each one has its own contracts, its own terms and has to go through its own administrative process.<sup>483</sup>
- 7.26** In contrast, the Environmental Defenders Office argued that the credit pricing process had been 'fundamentally undermined' by flexibility in the like-for-like rules, the existence of variation rules, and the ability for developers to pay into the Biodiversity Conservation Fund to meet their offset obligations.<sup>484</sup>
- 7.27** Several landholders believed that the ability for developers to acquit their offset obligations to the Trust had turned the Trust into a 'monopoly' that they could not compete with.<sup>485</sup> Providing the view of many landholders, a member of the Landholder Biodiversity Interest Group, Mr Andy Davies, complained that the option to pay into the Biodiversity Conservation Fund was preventing stewardship site owners from attracting interest from credit purchasers, with the Trust 'hoovering up' all of the credit sales.<sup>486</sup> The group alleged this was achieved by the Trust setting prices per credits through tender processes, rather than allowing a 'free' market, as had been the case under the previous BioBanking scheme.<sup>487</sup> Mr Davies described how the Trust had become the main market participant and how this had distorted the market:

The developers pay that into the Biodiversity Conservation Fund and then move on; they do not actually need to offset anything before they clear. What that is actually doing is playing around with the demand and supply metrics so demand is only coming from one buyer, being the Biodiversity Conservation Trust, as opposed to multiple buyers

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<sup>482</sup> Submission 58, Mr Alexander Cox, pp 5-6.

<sup>483</sup> Evidence, Mr Jack J Bulfin, Director of Operations, Deep River Group, 22 October 2021, p 30.

<sup>484</sup> Submission 92, Environmental Defenders Office, p 17.

<sup>485</sup> See, for example: Submission 16, Name suppressed, p 2; Submission 76, Deep River Group, pp 22 and 39; Submission 35a, Henribark Pty Ltd, pp 8 and 14.

<sup>486</sup> Evidence, Mr Andy Davies, Member, Landholder Biodiversity Interest Group, 8 April 2022, p 4.

<sup>487</sup> Submission 42, Landholder Biodiversity Interest Group, p 4.

interacting with multiple sellers. You have one buyer cherrypicking which credits they want to buy.<sup>488</sup>

- 7.28** Mr Peter Dykes, a stewardship site owner, added that this had turned the Trust into a 'monopoly' and that landholders were now 'fighting a monolithic group' to try to sell their credits.<sup>489</sup>
- 7.29** Mr Greg Steenbeeke, Director, Henribark (a landholder and ecological consultant) considered that the role of the Trust should be limited to intervening when there was a market failure, that is, when there were no credits available on the market.<sup>490</sup>

### **Conflicting roles of the Biodiversity Conservation Trust**

- 7.30** As the dominant buyer in the market, the Trust has a major influence on credit prices, but it also has other roles that potentially create conflict and market distortion. The Audit Office of NSW noted that the multiple roles of the Trust, as a facilitator of credit supply (including administering and overseeing compliance of stewardship agreements), and as a market intermediary (acquiring offset obligations from developers) as well as market participant (purchasing credits to meet its acquired offset obligations) come into conflict from a structural and market design perspective.<sup>491</sup>
- 7.31** Evidence from stakeholders to this inquiry highlighted the conflicting roles of the Trust both as a major purchaser of credits, and as a regulator responsible for establishment and oversight of biodiversity stewardship agreements.
- 7.32** One landholder noted that, in its conservation management role, the Trust sources income from developers to acquire credits that may never be created. It holds an exclusive position with respect to credit availability and prices, and also has an incentive to seek lower prices, or to execute substandard agreements to meet its credit obligations.<sup>492</sup> This, the landholder suggested, creates conflicts for the Trust. They further asserted that: 'In my observation [the Trust] resolves its conflicting responsibilities in favour of credit seekers.'<sup>493</sup>
- 7.33** Lake Macquarie City Council also highlighted the Trust's conflicted role as both the regulator of market prices and the main purchaser in the market. The council proposed that the effective operation of the scheme requires full transparency and accountability, and should avoid the conflict of interest for the Trust.<sup>494</sup>
- 7.34** The Environment Institute of Australia and New Zealand, while supportive of developer charges going to the Trust, said this support was subject to there being robust governance processes to avoid the potential conflict of interest generated by the Trust's multiple roles as

<sup>488</sup> Evidence, Mr Davies, 10 December 2021, p 30.

<sup>489</sup> Evidence, Mr Peter Dykes, 10 December 2021, p 30.

<sup>490</sup> Evidence, Mr Greg Steenbeeke, Director, Henribark Pty Ltd, 10 December 2021, p 31.

<sup>491</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 30.

<sup>492</sup> Submission 16, Name suppressed, p 2.

<sup>493</sup> Submission 16, Name suppressed, p 2.

<sup>494</sup> Submission 62, Lake Macquarie City Council, p 7.



regulator for approval of stewardship sites, purchasing credits to meet developer charge credit obligations and also setting developer charge prices.<sup>495</sup>

**7.35** Expressing concern about the Trust's role in the credit market as both a market operator and participant, the Darkinjung Local Aboriginal Land Council believed the new Biodiversity Conservation Fund Charge System would likely give the Trust access to the best pricing information of any market participant.<sup>496</sup>

**7.36** The NSW Minerals Council suggested the issue was not necessarily about conflicting roles, but rather whether the Trust was adequately resourced to undertake its role as both an assessing and compliance agency as well as one with a role to play in strategic conservation.<sup>497</sup>

**7.37** In its submission to this inquiry, the NSW Government expressed confidence in the robustness of the Trust's governance framework:

The Biodiversity Conservation Trust has established a comprehensive governance framework that includes public annual reports and quarterly reports to the Biodiversity Conservation Trust Board on: performance; communication, engagement and education activities; finance; conformance; risk management; and work health and safety. The Biodiversity Conservation Trust has also established an internal audit program and appointed a Chief Audit Executive. The Biodiversity Conservation Trust undertakes external financial audits and can be subject to performance audits by the Audit Office NSW.<sup>498</sup>

**7.38** The Audit Office of NSW, on the other hand, found that, while the Trust had separated responsibility for different roles into separate teams in the organisation to manage potential conflicts of interest, its safeguards for assuring the effectiveness of this separation were not adequately defined.<sup>499</sup> The same subcommittee of the Trust's board has oversight of both creating credit supply and offsetting demand. The Audit Office of NSW suggested this creates a number of risks to the scheme, affecting both participants' confidence in the market and broader scheme outcomes.<sup>500</sup>

**7.39** The Audit Office of NSW recommended that the Department of Planning and Environment (the department) establish governance arrangements with separate reporting to better oversee and manage risks related to the Trust.<sup>501</sup> In additional information provided to the committee, the department advised that, among measures to build confidence in the scheme, it had:

- appointed Mr Mike Mrdak AO to oversee the delivery of an Integrated Improvement and Assurance Program
- appointed the NSW Independent Pricing and Regulatory Tribunal to monitor the biodiversity credit market, including government participation in the market

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<sup>495</sup> Submission 90, Environment Institute of Australia and New Zealand, p 3.

<sup>496</sup> Submission 70, Darkinjung Local Aboriginal Land Council, p 7.

<sup>497</sup> Submission 66, NSW Minerals Council, p 9.

<sup>498</sup> Submission 97, NSW Government, p 9.

<sup>499</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 30.

<sup>500</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 30.

<sup>501</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), pp 10 and 30.

- established an external stakeholder reference group chaired by Mr Mike Mrdak AO.<sup>502</sup>

**7.40** The department further advised that a new Credits Supply Taskforce had been established within the department with the objective of increasing the supply of biodiversity credits, as well as taking over the function for approving biodiversity stewardship agreements, which was previously delivered by the Trust.<sup>503</sup>

## Factors that should be reflected in pricing of credits

**7.41** Stakeholders suggested that the current market is not functioning in a way that appropriately values species or ecosystem scarcity, or reflects the costs and risks to landholders of committing their land as a stewardship site. This is partly due to the distortion caused by the dominant position and structural conflict of the Trust. These issues are explored below.

### Pricing to reflect scarcity

**7.42** The Environmental Defenders Office believed that having a market for biodiversity credits could only be justified if, as species and ecosystems became scarcer, they became more expensive to offset, in a non-linear fashion, and therefore limited vegetation clearing.<sup>504</sup> Highlighting how credit prices did not reflect species and ecosystem scarcity, some inquiry participants provided examples of illogical credit pricing anomalies.<sup>505</sup> Ms Rachel Walmsley, Head of Policy and Law Reform, Environmental Defenders Office, argued that these anomalies demonstrated that the scheme was too focussed on creating a functioning market, rather than achieving environmental outcomes by factoring in the scarcity of biodiversity:

The pricing at the moment actually fails to factor in things like scarcity. If you think of this logically, the more scarce the ecosystem—it should be the most expensive credit. That should be sending a message to the market saying, "This is not feasible. This project should not go ahead because those are prohibitively expensive credits, because they are the last stand of that ecosystem." Given that there are no red lights in the offsetting scheme and everything is amenable to offsets, it is really only the market that is going to set those red lights via things being cost prohibitive. But the policymakers have been so focused on trying to get a floating, buoyant market that the pricing has been adjusted and it has resulted in different anomalies.<sup>506</sup>

**7.43** Likewise, the Nature Conservation Council of NSW asserted that best practice offset pricing would reflect scarcity, with prices rising accordingly to disincentivise clearing and incentivise the creation of stewardship sites. It was concerned about any suggestion that high credit prices were problematic:

<sup>502</sup> Correspondence from The Hon James Griffin MP, Minister for Environment and Heritage, to Chair, 20 October 2022, p 3.

<sup>503</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 56. See also: Correspondence from The Hon James Griffin MP to Chair, 20 October 2022, p 2.

<sup>504</sup> Submission 92, Environmental Defenders Office, p 17.

<sup>505</sup> Submission 21, Clarence Valley Council, p 4; Evidence, Ms Jan Primrose, Convenor, Better Planning Network, 22 October 2021, p 44.

<sup>506</sup> Evidence, Ms Rachel Walmsley, Head of Policy and Law Reform, Environmental Defenders Office, 22 October 2021, pp 44-45.

Rhetoric suggesting that high prices for offsets is a reason to abandon or further weaken the scheme is very concerning and misguided.<sup>507</sup>

- 7.44** Henribark, an ecological consultancy, highlighted how the Biodiversity Offsets Payment Calculator failed to recognise biodiversity as a finite resource, postulating that the price of the last available impact credit should hypothetically be infinite.<sup>508</sup>
- 7.45** The Environmental Defenders Office also suggested that if the cost of offsetting a project were prohibitive, then the impacts of a project on ecosystems were so great that the project should not proceed.<sup>509</sup> The large scale of biodiversity impacts at some projects meant that offsetting costs could (appropriately) run into billions of dollars. The National Parks Association of NSW advised that the cost of credits to raise the Warragamba Dam had been estimated at \$2.8 billion dollars.<sup>510</sup>

### **Pricing to reflect stewardship site costs and the need for profitability**

- 7.46** Some stakeholders suggested that credit prices needed to better reflect the costs of maintaining stewardship sites and to also incentivise landholders to establish these sites.
- 7.47** As well as appropriately valuing scarcity, the Environmental Defenders Office believed that, in the short term, the credit price needed to:
- cover site establishment costs
  - provide equivalent or better income than traditional land uses
  - cover any uncertainty and risk aversion associated with establishing a stewardship site.<sup>511</sup>
- 7.48** Mr Lothian explained the importance for landholders to cover their costs of setting up a stewardship site, and making a profit:

That whole fundamental thing of, "If you have native vegetation on your property, here's a financial incentive to protect it"—people do not do that unless they are going to make a profit out of it. You can get money for protecting that vegetation on your property, but if that is going to be a loss because of the management costs associated with that, there is no way that you would do it. It is only if you are going to make a profit off the arrangement. You have got to put in all your time to pay the consultant to do the assessment in the first place. Then you cannot use that land for other purposes in future. So you have got the opportunity costs there. All these need to be taken into account with the cost of the credits that you are going to generate on the land and receive. Then you have got the management obligations for the next 20 years and into perpetuity. You need to make sure you are at least meeting those costs.<sup>512</sup>

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<sup>507</sup> Submission 95, Nature Conservation Council of NSW, p 13.

<sup>508</sup> Submission 35a, Henribark Pty Ltd, p 9.

<sup>509</sup> Submission 92, Environmental Defenders Office, pp 31; Evidence, Ms Walmsley, 22 October 2021, p 44.

<sup>510</sup> Submission 71, National Parks Association of NSW, pp 4-6.

<sup>511</sup> Submission 92, Environmental Defenders Office, p 33.

<sup>512</sup> Evidence, Mr Lothian, 22 October 2021, p 7.

**7.49** Henribark suggested that the price of credits needed to be set by the stewardship site owner. It emphasised that whatever price credits are sold for is all of the economic productivity that land would ever produce. It recommended that the price of credits needed to account for the costs of generating those credits and also provide a 'modest living' for the management of the stewardship site.<sup>513</sup>

## Transparency and market information

**7.50** A properly functioning biodiversity offsets credit market requires adequate information among buyers and sellers to inform decision making around benefits and costs. The Audit Office of NSW found that the information provided by the government to the market did not present 'a reliable and holistic picture of credit supply, demand and price to facilitate market development'.<sup>514</sup>

**7.51** Currently, the Trust publishes the following market-based information on its website:

- the Trust's credit purchase transactions alongside all other market transactions, in a public register
- a 'wanted credits' list which shows the credits the Trust is seeking to purchase via open fixed price offers
- the credits the Trust is seeking to purchase via a credit tender
- from late 2021, publication of a quarterly report that details payments made by developers into the Biodiversity Conservation Fund, and the corresponding credits purchased and retired, or conservation actions funded by the Trust to acquit those obligations
- an annual report.<sup>515</sup>

**7.52** The Audit Office of NSW found that the public register does not provide a holistic picture of the market to inform participants about the risks and opportunities of setting up stewardship sites and/or purchasing credits. It found that this shortcoming can incentivise developers to acquit their offset obligations by paying into the Biodiversity Conservation Fund. It also found that key information required by the Biodiversity Conservation Regulation 2017 was missing, including:

- incomplete location details for many issued credits
- missing contact details for some issued credits
- no indication if credits had been retired, and therefore not available for purchase.<sup>516</sup>

**7.53** Mr Cox believed that the operation of the credit market could be more transparent, such as by:

<sup>513</sup> Submission 35, Henribark Pty Ltd, pp 6-11; Submission 35a, Henribark Pty Ltd, pp 7, 9 and 13-14.

<sup>514</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 4.

<sup>515</sup> Submission 97, NSW Government, Attachment C, p 19.

<sup>516</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 20.

- providing additional detail in each annual report, including the number and type of credits transferred to the Trust from developers each year, and the number and type of outstanding credit obligations held by the Trust
- the Trust reporting the challenges it anticipates with securing offsets for specific credit types
- producing an annual 'state of the market report' to discuss trends in market activity and provide some explanation of price changes to individual biodiversity credit types.<sup>517</sup>

**7.54** Mr Bulfin believed that the Trust's transaction register was inadequate as a useful investment tool, and highlighted particular difficulties when there were very limited transactions for certain credit types:

In the case where there might only be one transaction for a credit, you do not have any insight into the market sentiment for those credits—where the market truly believes the price to be. Our recommendation is about increasing the update frequency so that prices are updated either in real time or near real time and providing more versatile and robust information for people who want to use the scheme. That might include more information about the parties and their previous transactions, the terms of the actual credits and the volatility of the marketplace for those credits—previous highs and lows—in a more robust and useful manner.<sup>518</sup>

**7.55** Mr Bulfin also noted that some non-market transactions, such as an entity moving credits to a related entity for a low amount, distorted accurate market information.<sup>519</sup> Mr Bulfin concluded that improved market information would assist in forecasting credit needs and prices.<sup>520</sup>

**7.56** The NSW Government responded to the above issues by engaging the NSW Independent Pricing and Regulatory Tribunal to monitor and report on competition in the credit market. The government has also developed dashboards which would show credit supply and demand. Details shown on the dashboard include potential developments and the number of credit obligations required, and potential stewardship sites and the number of credits generated. Additionally, it has developed a credit pricing guide.<sup>521</sup>

**7.57** Additionally, in October 2022, the Minister for the Environment and Heritage advised the committee that a new 'lookup tool' to simplify finding like-for-like trading options had been published.<sup>522</sup>

## Degradation of credit value following transition to the scheme

**7.58** The committee heard about significant credit devaluation concerns following the transition of credits from the previous BioBanking scheme to the Biodiversity Offsets Scheme. This included

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<sup>517</sup> Submission 58, Mr Alexander Cox, p 7.

<sup>518</sup> Evidence, Mr Bulfin, 22 October 2021, p 28.

<sup>519</sup> Evidence, Mr Bulfin, 22 October 2021, pp 28-30.

<sup>520</sup> Evidence, Mr Bulfin, 22 October 2021, p 32.

<sup>521</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), pp 20, 57 and 64.

<sup>522</sup> Correspondence from The Hon James Griffin MP to Chair, 20 October 2022, p 3.

an example of a severe perverse financial outcome for one particular landholder. Stakeholders also described how credits had been devalued as a result of more lenient offsetting rules. These concerns are explored below.

**7.59** Mr Steven House, Director, Meridolum, explained how offset costs under the scheme are 'substantially cheaper' than under its predecessor, the BioBanking Scheme. The reasons for this included:

- the replacement of red flags (prohibited clearing areas) with the 'more subjective' and 'less onerous' serious and irreversible impacts test
- easier avenues for avoiding like-for-like offsets
- credit prices being calculated using the Biodiversity Offsets Payment Calculator.

**7.60** Mr House suggested there was a 'rule of thumb' under the former BioBanking Scheme whereby 11 to 14 credits would be generated per hectare at an offset site, but that had reduced to 3 to 5 credits per hectare under the Biodiversity Offsets Scheme (but was increased to an average of 5 to 8 credits in 2020).<sup>523</sup>

**7.61** It was also observed that upon introduction of the scheme, the credits generated for some plants was reduced with the calculator changing from counting the number of individual plants to measuring plant area. Henribark explained how, following the transition, some flora species with high densities experienced a 100-fold reduction in the number of credits generated per hectare.<sup>524</sup> Lake Macquarie City Council described the measurement of some species by area of habitat as 'detrimental to the retention and conservation of these species'.<sup>525</sup> Similarly, Henribark advised that the number of ecosystem credits generated per hectare had halved.<sup>526</sup>

**7.62** FAP Nominees, a stewardship site owner, outlined how it had suffered 'disastrous' financial loss following a credit 'equivalence' conversion process after its BioBanking credits were transitioned to Biodiversity Offsets Scheme credits. The organisation had purchased land to establish a stewardship site under the previous BioBanking Scheme, costing it \$3.4 million – predominantly to protect a threatened plant species, commonly known as Black-Eyed Susan. Using the Trust's Spot Price Index, the credits associated with the species had been valued at \$8.3 million in August 2020. However, the Trust advised that it had made changes to how these credits were calculated and valued, leading to a significant devaluation of those credits to a mere \$9,390.<sup>527</sup>

**7.63** FAP Nominees asserted that the re-evaluation was done 'arbitrarily', and that the government had 'destroyed all investor and particularly participant confidence in a scheme they promoted as a safe ecological investment backed by the Government'. Mr Barry Buffer AM, an advisor to FAP Nominees, asserted that the credit equivalence process was nonsensical:

... the key point here is this issue of equivalence. So, yes, they might have been BioBanking credits, but when you talk about an equivalence in [Biodiversity Offsets Scheme] credits, there is an expectation that equivalence is equivalence and there is no

<sup>523</sup> Evidence, Mr Steven House, Director, Meridolum, 9 December 2021, pp 13 and 15-16.

<sup>524</sup> Submission 35, Henribark Pty Ltd, pp 9-11.

<sup>525</sup> Submission 62, Lake Macquarie City Council, p 4.

<sup>526</sup> Submission 35, Henribark Pty Ltd, pp 9-11.

<sup>527</sup> Submission 41, FAP Nominees Pty Ltd, p 1.

way in the world that the change that occurred from 52,000 BioBanking credits to 66 [Biodiversity Offsets Scheme credits] represents anything like financial equivalence or any other form of equivalence.<sup>528</sup>

**7.64** Mr House suggested that the equivalence conversion from BioBanking to Biodiversity Offsets Scheme credits had effectively cancelled approximately 70 per cent of BioBanking credits.<sup>529</sup> An anonymous landholder provided a similar estimation, suggesting that the equivalence process had 'nearly halved (or more)' the number of credits generated at most of their stewardship sites.<sup>530</sup>

**7.65** The department advised that credit equivalence conversions were based on ecological, not financial, equivalence.<sup>531</sup> However the Audit Office of NSW noted that credit valuation has financial relevance and believed that the department's lack of communication about potential financial impacts created uncertainty about the value of BioBanking credits:

... how credits are valued has financial relevance to market participants who are making investment decisions ... [the department's] lack of communication on this matter, and about its potential financial impacts on credit holders, has created some uncertainty about the value of credits generated under the previous scheme.<sup>532</sup>

## Facilitating philanthropic conservation

**7.66** Participation in the biodiversity offsets market is not limited to developers needing to satisfy their offset credit obligations. Credits can be purchased by anyone, including philanthropic investors who simply want to conserve habitat.<sup>533</sup> Clarence Valley Council's Biodiversity Officer, Ms Heather Mitchell, informed the committee that some landholders may not want their site to be used to offset development, despite having land suitable for conservation.<sup>534</sup>

**7.67** Deep River Group believed that the scheme did not adequately facilitate the introduction of non-development-related credit buyers, such as philanthropists. The group advised there were no available mechanisms to contact environmental philanthropists or large corporations, except through publicly accessible avenues.<sup>535</sup>

**7.68** Stewardship site owners, Mr and Mrs Dykes, described how they were unsuccessful in attracting a philanthropic investor:

We had always from the beginning believed that our target group to sell the BioBanking biodiversity credits was to an environmental philanthropist or a large corporation

<sup>528</sup> Submission 41, FAP Nominees Pty Ltd, p 2; Evidence, Mr Barry Buffier AM, Advisor to FAP Nominees Pty Ltd, 9 December 2021, p 10.

<sup>529</sup> Evidence, Mr House, 9 December 2021, p 13.

<sup>530</sup> Submission 54, Name suppressed, p 1.

<sup>531</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 32.

<sup>532</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 32.

<sup>533</sup> Submission 97, NSW Government, p 13.

<sup>534</sup> Evidence, Ms Heather Mitchell, Biodiversity Officer, Clarence Valley Council, 10 December 2021, p 21.

<sup>535</sup> Submission 76, Deep River Group, pp 12-13.

looking to raise its environment profile by supporting the conservation of both the vegetation communities and the Buttercup Doubletail; however looking back over the last 10+ years nothing could more from the truth. Unfortunately ... we were left to battle on our own trying to ... sell our biodiversity credits.<sup>536</sup>

- 7.69** Deep River Group suggested there was an opportunity to expand the credit market to environmentally conscious corporate institutions, investment institutions and philanthropic organisations to achieve both environmental and financial benefits.<sup>537</sup>

## Committee comment

- 7.70** The committee is deeply concerned about the operation of the biodiversity credit market. It is evidently failing to meet the needs of virtually all stakeholders: developers are unable to acquire the credits they need on the market and landholders are not adequately incentivised to participate in the scheme. Ecological outcomes suffer because the credit market does not appropriately value threatened ecosystems and species. This is partly because developers are able to commence development without first finding 'like-for-like' offsets by paying cash into the Biodiversity Conservation Fund for credits the Trust may be unable to secure.
- 7.71** The market distortion caused by the dominant market position of the Trust, with its conflicting roles as both regulator, facilitator of supply and major buyer is a serious problem. It is evident that the ability of developers to pay into the Biodiversity Conservation Fund based on prices determined by the Biodiversity Offsets Payment Calculator has capped credit prices, stifled the credit market, and eliminated any pricing link to scarcity.
- 7.72** The committee welcomes advice from the department that it has appointed the NSW Independent Pricing and Regulatory Tribunal to monitor the biodiversity credits market, including government participation in the market. If this scheme is to have any chance of working, the structural conflict in the various government roles that is preventing development of a functioning market must be addressed.
- 7.73** While welcoming recent announcements from the department about establishment of a new charge system for developers, we remain concerned that the new system is overly focused on ensuring financial sustainability of the Trust rather than the protection of valuable biodiversity. We are of the view that scarcity (or threat status) should underpin pricing, making it increasingly expensive to offset impacts to scarce ecosystems and species. Further, market prices must be sufficient to attract landholders to enter the scheme.
- 7.74** In addition, a functioning market relies on transparency of market information that, from evidence to this committee, has not been in place. This must be improved.
- 7.75** We recognise the tension in trying to create a functioning market, while also adhering to the 'like-for-like' principle that requires ecologically equivalent offsets. While noting that some stakeholders have suggested like-for-like rules should be made more flexible in order to make the market work, we consider this would be to the detriment of the scheme's integrity as a mechanism for ecological conservation.

<sup>536</sup> Submission 34, Mr Peter Dykes and Mrs Sharon 'Ruby' Dykes, p 2.

<sup>537</sup> Submission 76, Deep River Group, pp 14-15.



- 7.76** To this end, the committee recommends that, as a matter of priority, the NSW Government continue to take action to promote the development of a functioning biodiversity credit market, ensuring that:
- structural issues stemming from the government acting as a regulator, facilitator and buyer in the market are addressed
  - the price distortion caused by the role of the Trust and the way payments to the Biodiversity Conservation Fund are calculated is remedied
  - there is transparency of market information about supply and demand for credits and credit pricing
  - the market is able to set prices in a way that recognises scarcity and incentivises landholder participation in the scheme.
  - the ecological credibility of the scheme is maintained by upholding the 'like-for-like' principle.

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**Recommendation 15**

That the NSW Government continue to, as a matter of priority, take action to promote development of a functioning biodiversity credit market, ensuring that:

- structural issues stemming from the government acting as a regulator, facilitator and buyer in the market are addressed
  - the price distortion caused by the role of the Biodiversity Conservation Trust and the way payments to the Biodiversity Conservation Fund are calculated is remedied
  - there is transparency of market information about supply and demand for credits and credit pricing
  - the market is able to set prices in a way that recognises scarcity and incentivises landholder participation in the scheme.
  - the ecological credibility of the Biodiversity Offsets Scheme is maintained by upholding the 'like-for-like' principle.
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- 7.77** We note with some concern the issues aired by owners of credits under the previous BioBanking Scheme about the cost and stress caused to them by the significant devaluation of credits that occurred in the transition to the new Biodiversity Offsets Scheme. This has evidently had a seriously detrimental impact on some individuals, and has also undermined confidence in the new scheme.

- 7.78** We are appalled that the NSW Government introduced a new offsets scheme without adequately considering the impact on individuals' financial interests, or the need to build confidence in the new biodiversity credits market. Hence we recommend that the government review its handling of this transition with a view to building confidence in the long term operation of the current scheme.

**Recommendation 16**

That the NSW Government review its handling of the transition from the BioBanking Scheme to the Biodiversity Offset Scheme with a view to building confidence in the long term operation of the biodiversity credit market.

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- 7.79** There was some stakeholder evidence suggesting there is an unrealised opportunity to attract philanthropic and conservation-minded buyers who could use the scheme as a vehicle to contribute to biodiversity conservation. The committee notes that this could be one way to attract landholders to participate in the scheme and create a more viable credit market. For this reason, we recommend that the Department of Planning and Environment investigate feasible options for making the Biodiversity Offsets Scheme more accessible and attractive for potential philanthropic and conservation-minded investors.
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**Recommendation 17**

That the Department of Planning and Environment investigate and implement feasible options for making the Biodiversity Offsets Scheme more accessible and attractive for potential philanthropic and conservation-minded investors.

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## Chapter 8 Governance of the scheme

This chapter focuses on a number of governance issues with the Biodiversity Offsets Scheme that have received significant attention through the inquiry. These include: transparency around the use and delivery of offsets, including for major projects; management of potential conflicts of interest; and management of the accreditation and performance of ecological assessors.

### Transparency of the scheme's operations

- 8.1** As previous chapters have noted, inquiry participants have raised many aspects of the Biodiversity Offset Scheme's administration that they considered needed improvement if the scheme is to have integrity both as a functioning market and as a mechanism to conserve biodiversity. Many of these concerns related to transparency, both in relation to the scheme's performance and outcomes, and the function of the market. The Audit Office of NSW has similarly identified a range of concerns to do with the lack of transparency of market information and lack of transparency and oversight of credit transactions, all of which create integrity risks for the scheme.<sup>538</sup>
- 8.2** Further issues of transparency arise in relation to the location and performance of stewardship sites, and transparency around the use of offsets for major projects, which are also considered in the following sections.

#### Public information and reporting on use of offsets

- 8.3** Several community groups expressed mistrust in the scheme's integrity because of a lack of published information on the delivery of offsets, which restricts public scrutiny.<sup>539</sup> Several groups noted that there is no consolidated state-wide register of biodiversity offsets, despite one having been promised in 2012.<sup>540</sup> Without transparency, there is a strong perception among community stakeholders that the scheme is open to manipulation and malpractice:
- ‘The Biodiversity Offsets Scheme removes all useful information from public view ... and provides literally nothing more than an LGA and item number. This constitutes a massive reduction in public accountability and reporting within the offset scheme, undertaken during the same period from which we now see allegations of serious misconduct arising. This has not been a coincidental process – it has been a long-running effort by the Department of Planning and Environment and Biodiversity Conservation Trust to reduce public transparency.’<sup>541</sup>
  - ‘As a key offset integrity measure we say the proposed biodiversity investment spatial viewer should be urgently introduced now, because restoring the greatest possible degree

<sup>538</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), pp 20-22 and 39-40.

<sup>539</sup> See, for example: Submission 96, Valley Watch Inc, p 4; Submission 18, Hunter Bird Observers Club, p 4; Evidence, Mr Brian Williams, President, Wilton Action Group, 22 October 2021, pp 22-23.

<sup>540</sup> Evidence, Ms Rachel Walmsley, Head of Policy & Law Reform, Environmental Defenders Office, 22 October 2021, p 47; Submission 49, Lock the Gate Alliance, p 2.

<sup>541</sup> Submission 36, Blacktown and District Environment Group, p 2.

of public visibility on all operations of the scheme is the only way that any misconduct, malpractice, or indeed corruption, will be effectively contained. A scheme of this very nature is intrinsically vulnerable to interference from higher levels.<sup>542</sup>

**8.4** Ms Rachel Walmsley, Head of Policy & Law Reform, Environmental Defenders Office, argued that a consolidated statewide register of offsets that showed what areas are actually offset and where funds have been directed to them, was a critical first step to improving the scheme.<sup>543</sup>

**8.5** Local governments called for better collation of information so that councils and communities could track biodiversity impacts in their area. Coffs Harbour City Council stated that, while information regarding offsetting is available on a project by project basis, a collated yearly report would inform the community on the outcomes for offsetting in relation to major projects and biocertification.<sup>544</sup> The council called for annual reports which outline credits generated and retired per Local Government Area (LGA), which would enable local councils to identify biodiversity values in need of increased protection within their local environmental planning instruments and plans, and to understand the cumulative impacts and efficacy of the scheme.<sup>545</sup>

**8.6** The Blacktown and District Environment Group considered that a range of much more stringent public information and reporting requirements is needed to address the accountability gap, including:

- the ability to trace trades and link individual developments with their associated offsets
- clear maps of stewardship sites with tables of all credit allocations and additionality discounts
- clear maps of offset-generating developments (e.g. biodiversity development assessment reports) with tables of all credit allocations and additionality discounts
- searchable register of all trades, with traders identified by Unique Identifying Number or name
- public data on expenditure of the Biodiversity Conservation Trust's Biodiversity Conservation Fund, including tables identifying the specific spatial boundaries and prices for each individual sale.<sup>546</sup>

**8.7** Mr Alexander Cox, PhD Candidate, Australian National University, who researched the scheme, suggested that greater transparency is required for the activities of the Trust in particular. He noted that, while the Trust currently maintains an online register of biodiversity stewardship agreements, greater transparency could be provided by:

- expanding the public register to show all offset obligations transferred to the Trust

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<sup>542</sup> Evidence, Mr Williams, 22 October 2021, p 24.

<sup>543</sup> Evidence, Ms Walmsley, 22 October 2021, p 47.

<sup>544</sup> Submission 13, Coffs Harbour City Council, p 3.

<sup>545</sup> Submission 13, Coffs Harbour City Council, p 2.

<sup>546</sup> Submission 36, Blacktown and District Environment Group, pp 3-4.

- providing additional information on the register about biodiversity stewardship agreements, including the type and quantity of credits involved, and information on the ongoing management actions required and compliance status over time.<sup>547</sup>

### Location of stewardship sites – spatial mapping

- 8.8** A particular concern voiced in the inquiry was about the lack of spatial mapping of sites that have been used for offsets under this and previous schemes. It was noted that a spatial register did exist under the previous BioBanking Scheme, but the register now available contains much more limited information.<sup>548</sup>
- 8.9** As well as undermining confidence in the scheme, inquiry participants argued that the lack of transparency of stewardship site locations:
- inhibits more strategic planning around use of offsets for conservation outcomes<sup>549</sup>
  - limits the ability of local government 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<sup>550</sup>
  - leads to the possibility of 'double-dipping' (using the same land as a stewardship site for more than one project)<sup>551</sup>
  - leads to the possibility of land previously set aside for an offset subsequently being cleared for development<sup>552</sup>
  - limits the ability for community groups to monitor the use of offsets, and whether conditions of approval for developments are met.<sup>553</sup>
- 8.10** Many witnesses called for a publicly accessible, spatial viewer of stewardship sites, arguing this is a basic measure to build confidence in the scheme's integrity.<sup>554</sup>

<sup>547</sup> Submission 58, Mr Alexander Cox, p 7.

<sup>548</sup> See, for example: Evidence, Mr Williams, 22 October 2021, pp 23-24; Submission 36, Blacktown and District Environment Group, pp 3-4.

<sup>549</sup> See, for example: Evidence, Nature Conservation Council of NSW, 22 October 2021, p 43; Submission 78, Local Government NSW, p 6; Submission 88, Mr Peter Maslen, p 3.

<sup>550</sup> Submission 78, Local Government NSW, p 6.

<sup>551</sup> Evidence, Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance, 22 October 2021, p 36.

<sup>552</sup> Evidence, Ms Woods, 22 October 2021, p 36.

<sup>553</sup> Evidence, Ms Anna Christie, Research Officer, Wando Conservation and Cultural Centre Inc, 22 October 2021, pp 37-38.

<sup>554</sup> See, for example: Evidence, Mr Williams, 22 October 2021, pp 23-24; Submission 78, Local Government NSW, p 6; Submission 39, Gilgandra Shire Council, p 6; Submission 52, Planning Institute of Australia, p 3; Submission 36, Blacktown and District Environment Group, p 3; Submission 49, Lock the Gate Alliance, p 2.

- 8.11** As noted in Chapter 7, the Department of Planning and Environment advised that it is 'working to improve the public registers to increase the accessibility and quality of information available'.<sup>555</sup> The issue of spatial mapping of offset and development sites was not addressed.

### **Transparency of offsets for major projects**

- 8.12** The largest use of the scheme is for major projects (state significant development and state significant infrastructure). The way offsets are used for major projects therefore has a major impact on the scheme's environmental outcomes.

#### **Ministerial discretion in determining offset obligations for major projects**

- 8.13** A number of environmental stakeholders and local governments expressed concern about the level of ministerial discretion allowed in determining offset obligations for major projects, and the lack of transparency in the exercise of that discretion.<sup>556</sup> Their concerns included the ability to approve major projects that are likely to have serious and irreversible impacts, and the ability to 'discount' credits required to offset the development (i.e. require a lower number of credits, or credits of a different class, to those required under the Biodiversity Assessment Method).<sup>557</sup>
- 8.14** According to the Environmental Defenders Office, in determining major projects, the Minister for Planning has discretion over whether or not to require the proponent to retire biodiversity credits to offset impacts and is not required to explain or justify their reasons for their decision.<sup>558</sup>
- 8.15** The Audit Office of NSW noted that the department does not maintain consolidated data on offset obligations in consent conditions for major projects. This means that there is no readily available information on the extent of discounting for major projects, or on the ministerial reasons given for discounting. The Audit Office of NSW found that 'this is a notable gap in [the department's] visibility of the scheme's operations because it affects [the department's] ability to effectively oversee and monitor the scheme's operations, quality assure its implementation and understand outcomes'.<sup>559</sup>

#### **Transparency of stewardship sites for major developments**

- 8.16** As with other offsets under the scheme, several local governments expressed concern about the lack of transparency – in the form of readily collated information – about offsets for major projects in their local area. For example, Kempsey Shire Council reported that, without being able to access spatial data of current stewardship agreements in its LGA, 'it is uncertain when

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<sup>555</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 57.

<sup>556</sup> See, for example: Submission 2, Ecological Consultants Association of NSW, p 7; Submission 92, Environmental Defenders Office, pp 16-17.

<sup>557</sup> Submission 92, Environmental Defenders Office, p 1; Evidence, Ms Walmsley, 22 October 2021, pp 46 and 48; Submission 65, Georges River Environmental Alliance, p 5; Submission 85, Humane Society International, p 2.

<sup>558</sup> Submission 92, Environmental Defenders Office, p 16.

<sup>559</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), pp 7 and 24.

(or if) offset credits from major projects have been secured under [the scheme] for the same biodiversity values that have been lost to an approved development. It is also uncertain where (or if) offset credits will occur, i.e., within our LGA, our region, or elsewhere'.<sup>560</sup>

- 8.17** A number of local government representatives raised concerns about offsets for major projects in their local areas. Wollondilly Shire Council noted that the provisions in the scheme for assessing state significant developments are less rigorous than for other developments, and suggested they should be assessed with the same rigour.<sup>561</sup>
- 8.18** A further concern from local councils was that the sourcing of offsets for major projects, where local government is not the consent authority, may be opportunistic, and not based on local biodiversity conservation planning.<sup>562</sup>
- 8.19** Local Government NSW suggested that a collated yearly report of stewardship sites that had been created would help keep the community informed on the overall biodiversity outcomes from offsetting from major projects.<sup>563</sup>

## Managing conflicts of interest

- 8.20** Another area where the inquiry heard there is room to improve the transparency and public perception of the scheme is the management of conflicts of interest. Inquiry participants identified three key sources of potential conflicts of interest that could compromise the integrity of the scheme, which are explored below:
- ecological consultants with a pecuniary interest in the scheme as landholders, leading to 'windfall gains'
  - accredited assessors employed by developers or landholders tailoring their findings to reflect the pecuniary interest of their client
  - government staff with pecuniary interests in stewardship sites.

### 'Windfall gains' and allegations of consultants partaking in 'insider trading'

- 8.21** One stimulus for this inquiry was a series of articles published in *The Guardian* in 2021. The articles alleged that two ecological consultants (current and former employees of an ecological consultancy called Eco Logical Australia) may have benefitted from access to information about upcoming major infrastructure developments in Sydney to make 'windfall gains' after selling offset credits to the NSW and Australian governments.
- 8.22** According to *The Guardian* articles:

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<sup>560</sup> Submission 22, Kempsey Shire Council, pp 4-5.

<sup>561</sup> Submission 37, Wollondilly Shire Council, p 6.

<sup>562</sup> Evidence, Mrs Mary-Anne Crawford, Manager Development and Environmental Services, Singleton Council, 10 December 2021, p 6.

<sup>563</sup> Submission 78, Local Government NSW, p 9.



- between 2007 and 2018, Eco Logical Australia provided various biodiversity and environmental advice to the NSW Government in relation to proposed developments in western Sydney
- in 2015 and 2016, Eco Logical Australia provided advice to the NSW Roads and Maritime Service (RMS) on offsetting requirements for the Western Sydney Infrastructure Plan – a joint NSW and Australian government roads development program to support the new airport in Western Sydney
- in 2017, RMS contracted Eco Logical Australia to identify offset credits for those roads
- two consultants working for Eco Logical Australia were also part owners of a company called Meridolum
- in 2017 and 2018, Meridolum purchased two parcels of land for \$9.3 million, which were converted into stewardship sites to generate credits
- shortly afterwards, RMS purchased \$38 million in credits from Meridolum to offset impacts from upgrades to roads related to the Western Sydney Infrastructure Plan
- in March 2019, the Australian Government purchased \$5.2 million in credits from Meridolum in relation to the new airport in Western Sydney.

**8.23** In response to allegations being made around 'insider trading', one of the two consultants who had worked for Eco Logical Australia appeared at a public hearing and defended their actions as being lawful and transparent, and outlined that:

- their employment at Eco Logical Australia was fully disclosed before Meridolum's credits were sold to the NSW and Australian government agencies
- Eco Logical Australia had set up internal 'Chinese walls' (information barrier protocols) to prevent them from speaking with anyone within the company about their properties (apart from a nominated officer that acted as an intermediary with the then chief executive officer)
- they were located geographically in a different office to where the work was undertaken
- they assumed that Eco Logical Australia had set up password restrictions for the RMS projects, as had been undertaken for another unrelated RMS project they had worked on
- inquiries they made with the department about their properties were in relation to ensuring they did not fall foul of the cartel provisions of the *Corporations Act 2011* (Cth)
- for any communications about potential credit sales with the department, their employment at Eco Logical Australia was 'fully disclosed'
- all of their properties and credits were placed on the expression of interest register, which was public
- they had never been an accredited assessor.<sup>564</sup>

**8.24** Similarly, the law firm acting for the other consultant advised that they had disclosed potential or actual conflicts of interest, and was therefore excluded from participating in Eco Logical

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<sup>564</sup> Evidence, Mr Steven House, Director, Meridolum, 9 December 2021, pp 13, 14, 19 and 20.

Australia's offsetting projects in western Sydney. Several examples of publicly available documents and government announcements that were available at the time of their investment decisions were referenced. These documents identified developments in western Sydney that had (or would likely have) substantial offsetting obligations.<sup>565</sup>

- 8.25** In response to questions about their 'windfall gains', one of the consultants explained that their profits were simply a function of 'supply squeezing the market' and that changes made to the scheme had reduced credit availability and increased credit prices.<sup>566</sup>

### *Ecologists as stewardship site owners*

- 8.26** While there have been some calls for greater management of conflicts of interest for ecologists who also participate in the scheme as landowners, there are reasons not to exclude ecologists as managers of stewardship sites.

- 8.27** Commenting on the issues raised in *The Guardian*, Henribark, an ecological consultancy and stewardship site owner, believed that ecologists should not be victimised for participating in the scheme if they used their expertise and publicly available knowledge:

There should be no 'victimisation' of an ecologist for participating in the scheme ... If an ecologist uses their expertise to know where to acquire sites through processes publicly advertised ... then that is not something that should be considered 'insider knowledge', but the utilisation of their expertise to their own betterment, and realistically, to the biodiversity conservation outcomes sought ...<sup>567</sup>

- 8.28** Henribark outlined why it considered the involvement of accredited assessors was appropriate, and indeed beneficial to the scheme and biodiversity outcomes:

Those with expertise are the ones you *need* to be involved in the scheme. They have the expertise to know when things are not going right. They can see problems as they emerge, and have the knowledge, training and understanding to find a solution before it becomes too much of an issue.<sup>568</sup>

- 8.29** Similarly, Mr House, Director, Meridolum, believed that ecologists should be encouraged to participate in the scheme, due to their commitment to conservation outcomes:

I think that environmental professionals are the most passionate and some of the most experienced people in this sort of area. They are exactly the sort of people that you want in the scheme. If you are committed to getting conservation outcomes, experienced restoration ecologists should be encouraged to be in the scheme.<sup>569</sup>

- 8.30** A key issue where landholders have other involvement in the scheme (as consultants) is that there are transparent processes in place to declare and manage potential conflicts of interest. Mr Tom Forrest, Chief Executive Officer, Urban Taskforce Australia, stipulated that conflicts of interest needed to be publicly expressed, and recommended that landowners that are

<sup>565</sup> Answers to questions on notice, Mr Mark Adams, 9 May 2022, pp 1, 6 and 7.

<sup>566</sup> Evidence, Mr House, 9 December 2021, p 17.

<sup>567</sup> Submission 35a, Henribark Pty Ltd, pp 16-17.

<sup>568</sup> Submission 35a, Henribark Pty Ltd, pp 16-17.

<sup>569</sup> Evidence, Mr House, 9 December 2021, p 15.

accredited assessors be prohibited from undertaking ecological assessments of their own lands.<sup>570</sup>

### **Potential conflicts for ecologists undertaking site assessments**

- 8.31** As noted in Chapter 4, site assessments that quantify the amount of credits needed to offset development or that may be produced at a stewardship site are undertaken by accredited assessors, who, while following the Biodiversity Assessment Method, must also apply their judgment. There was a perception among several inquiry participants that ecologists may not be objective due to pressure arising from their client's pecuniary interest to achieve a particular outcome (such as underreporting the presence of threatened species), or ongoing relationships with regulators or developers, and that arrangements to disclose conflicts of interest are inadequate.<sup>571</sup>
- 8.32** The Environment Institute of Australia and New Zealand found that many of its environmental practitioner members needed greater clarity and guidance to manage real and perceived conflicts of interest.<sup>572</sup> Some inquiry participants<sup>573</sup> outlined their concerns with accredited assessors' conflicted roles in undertaking assessments for developers, for example:
- An anonymous accredited assessor complained that the department had not provided clear rules or guidelines for what conflict entails and considered it to be 'wrong' that conflicts of interest could be absolved simply by declaring them. They highlighted for example a common conflict where an accredited assessor or company prepared both the biodiversity development assessment report and the biodiversity stewardship site assessment report for the same project, and wanted clear rules to prevent this from occurring, or otherwise a clear direction from the department that this was allowed.<sup>574</sup>
  - Goulburn Mulwaree Council used the same hypothetical example to highlight how an accredited assessor would be under 'immense pressure' to minimise the credit requirements generated at a development site and simultaneously maximise the credits generated at a stewardship site.<sup>575</sup>
  - Mr Andrew Knop, an owner and manager of conservation properties, suggested that 'failures' in ecological surveys were the result of consultants facilitating the pecuniary interests of developers by minimising reported impacts.<sup>576</sup>
- 8.33** Questioning whether assessment reports were being prepared truthfully, the Nature Conservation Council of NSW highlighted its concern that accredited assessors were directly employed by proponents, risking the integrity of the assessment results:

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<sup>570</sup> Evidence, Mr Tom Forrest, Chief Executive Officer, Urban Taskforce Australia, 8 April 2022, p 16.

<sup>571</sup> See, for example: Submission 83, Total Environment Centre, p 12.

<sup>572</sup> Submission 70a, Environment Institute of Australia and New Zealand, p 1.

<sup>573</sup> See, for example: Evidence, Dr Bryan Jenkins, President, Environment Institute of Australia and New Zealand, 22 October 2021, p 31; Submission 16, Name suppressed, p 5.

<sup>574</sup> Submission 9, Name suppressed, pp 1-2.

<sup>575</sup> Submission 12, Goulburn Mulwaree Council, p 7.

<sup>576</sup> Submission 89, Mr Andrew Knop, pp 1-2.

[Accredited assessors] are employed directly by proponents, with the obvious risk that some consultants will tell proponents what they want to hear. If a developer gets an assessment they don't like, they can shop around, and potentially get a less rigorous and more favourable assessment, from another consultant.<sup>577</sup>

- 8.34** Oversight of the quality of biodiversity development assessment reports largely rests with consent authorities. Mr Steenbeeke, Director, Henribark, an ecological consultancy, did not believe there was any problem with undertaking varied work for developers because the consent authority or Trust was responsible for reviewing and verifying assessments.<sup>578</sup>
- 8.35** However, as noted in Chapter 6, there have been concerns from some councils that they lack the capacity to interrogate the quality of biodiversity development assessment reports. Goulburn Mulwaree Council noted that many local councils did not have suitably experienced staff that had sufficient ecological knowledge to be able to challenge 'suspect' biodiversity development assessment reports. Those councils therefore had to rely on ecologists' reports being prepared correctly and 'in good faith'.<sup>579</sup>
- 8.36** The Audit Office of NSW found that there was no specific requirement for accredited assessors to disclose conflicts of interest to either their clients or to the consent authorities, meaning that the department did not have oversight of accredited assessors' conflict of interest declarations.<sup>580</sup>

#### **Conflicts of interest for staff employed at the department, Trust and consent authorities**

- 8.37** Historically, four staff employed within the department had participated in the scheme by establishing stewardship sites.<sup>581</sup> In 2021, the department introduced a scheme-specific conflict of interest protocol to prohibit staff with scheme-related responsibilities from participating in the scheme if they have a 'significant' interest, such as holding interests in stewardships sites, or credits.<sup>582</sup>
- 8.38** The Trust explained that it had an internal policy for staff participating in the Trust's programs, which requires its staff to complete annual conflict of interest declarations.<sup>583</sup> The Audit Office of NSW found that the Trust has largely aligned its existing conflict of interest policy with the department's protocol, but that this could be strengthened, as its policy was narrower in scope and because certain breaches only applied to new employees.<sup>584</sup>

<sup>577</sup> Submission 95, Nature Conservation Council of NSW, p 11.

<sup>578</sup> Submission 35a, Henribark Pty Ltd, p 16; Evidence, Mr Greg Steenbeeke, Director, Henribark, 8 April 2022, p 10.

<sup>579</sup> Submission 12, Goulburn Mulwaree Council, p 7.

<sup>580</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 39.

<sup>581</sup> Answers to questions on notice, Department of Planning and Environment, 10 February 2022, p 9.

<sup>582</sup> Evidence, Dr Louisa Mamouney, Director, Biodiversity Offsets Scheme Branch, Department of Planning, 10 December 2021, p 40; Evidence, Ms Michelle Dumazel, Executive Director, Biodiversity and Conservation Division, Department of Planning and Environment, 10 December 2021, p 40.

<sup>583</sup> Submission 97, NSW Government, Attachment C, pp 18-19.

<sup>584</sup> Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (30 August 2022), p 31.

## Accreditation and performance of ecological assessors

- 8.39** As noted above, the role of accredited assessors in the scheme is critical, therefore there must be mechanisms to ensure they are both appropriately skilled and qualified, and able to deliver objective assessments. The department is responsible for accreditation of assessors in the scheme.
- 8.40** To be eligible for accreditation, a person must pass a 'fit and proper person' test, successfully complete a Biodiversity Assessment Method Assessor training program, and have appropriate knowledge, skills and experience. Accredited assessors are subject to a code of conduct, which includes the management of conflicts of interest. The department audits accredited assessors to assess compliance and to identify opportunities to improve training and guidance documents.<sup>585</sup>
- 8.41** Mr Cox indicated that the accreditation process was 'quite rigorous' and 'realistically' required at least 5 to 10 years of experience as an ecologist in the field to reach accreditation. Mr Cox found that accredited assessors were generally competent and able to 'accurately assess the presence or likely presence of diverse threatened species in different environments'.<sup>586</sup>
- 8.42** Nevertheless, a few examples of the shortcomings of accredited assessors were provided.
- Local Government NSW cited examples of consultants copying other reports, and credit reports being inconsistent with assessment reports.<sup>587</sup>
  - The Northern Rivers Joint Organisation found that several biodiversity development assessment reports did not comply with the requirements of the Biodiversity Assessment Method. It alleged that legal loopholes were 'regularly exploited' by accredited assessors.<sup>588</sup>
  - Lake Macquarie City Council found that offset obligations depended 'heavily on the expertise and integrity' of accredited assessors.<sup>589</sup>
  - Goulburn Mulwaree Council found that accredited assessors who were not familiar with its LGA 'frequently' misidentified local plants and local plant communities.<sup>590</sup>
  - An anonymous accredited assessor advised that accreditation did not guarantee knowledge and skills across all types of biodiversity.<sup>591</sup>
- 8.43** Some councils believed there were inadequate consequences for accredited assessors who performed poorly:
- Both Local Government NSW and Gilgandra Shire Council believed there was a 'lack of recourse' if the work of accredited assessors was not 'up to standard', with Gilgandra Shire

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<sup>585</sup> Submission 97, NSW Government, p 6.

<sup>586</sup> Evidence, Mr Alexander Cox, PhD Candidate, Crawford School of Public Policy - Australian National University, 22 October 2021, p 16; Submission 58, Mr Alexander Cox, p 16.

<sup>587</sup> Submission 78, Local Government NSW, p 7.

<sup>588</sup> Submission 93, Northern Rivers Joint Organisation - Natural Resource Management Managers Group, pp 4-5.

<sup>589</sup> Submission 62, Lake Macquarie City Council, p 5.

<sup>590</sup> Submission 12, Goulburn Mulwaree Council, p 7.

<sup>591</sup> Submission 16, Name suppressed, p 5.

Council finding that it can be difficult to identify issues of concern given local governments were not experts in ecology.<sup>592</sup>

- Penrith City Council was concerned that the accreditation scheme had no 'robust way' to check if reports were compliant with the Biodiversity Assessment Method, with 'no apparent consequence for non-compliant reports'.<sup>593</sup>

**8.44** The department's Deputy Secretary, Biodiversity, Conservation and Science, Mr Dean Knudson had found that the performance of accredited assessors was 'variable' and was intending to investigate what the consequences of ongoing poor performance should be, such as losing accreditation status.<sup>594</sup> The department's Ms Michelle Dumazel, Executive Director, Biodiversity and Conservation, noted that accredited assessor requirements had become 'more robust' in 2021, including the introduction of new training modules. Additionally, a re-accreditation process had been put in place in July 2021 to provide 'some certainty' that accredited assessors knew how to undertake assessments.<sup>595</sup>

### Committee comment

**8.45** It is evident from many of the submissions to this inquiry that the lack of transparency in many aspects of the scheme diminishes confidence in the integrity of biodiversity offsets, and allows the perception of malpractice and abuse of the scheme to gain traction.

**8.46** The committee believes that increased transparency is imperative around the location and performance of offset sites, and the use of offsets for major projects. The committee is concerned that no spatial database of offset sites exists, despite being previously promised, and that interested members of the community, not to mention local planners, have no readily accessible way to see how development impacts are being offset in their local area. This has important implications for the ability of local councils to plan and monitor biodiversity in their local area, and precludes potential benefits that would come from community groups being able to monitor the use of offsets.

**8.47** For this reason, we recommend that the department and Biodiversity Conservation Trust increase transparency around the use of offsets to enable public scrutiny and confidence in the scheme. This should include a centralised, publicly accessible database that:

- enables spatial viewing of development and stewardship sites, including site boundaries
- contains information about biodiversity stewardship agreements, such as type and quantity of credits, management actions and restoration uplift
- contains information about the ecological outcomes of biodiversity stewardship agreements
- contains information about which credits or offset sites have been used to offset which developments

<sup>592</sup> Submission 39, Gilgandra Shire Council, p 6; Submission 78, Local Government NSW, p 7.

<sup>593</sup> Submission 50, Penrith City Council, p 2.

<sup>594</sup> Evidence, Mr Dean Knudson, Deputy Secretary, Biodiversity, Conservation and Science Directorate, Department of Planning and Environment, 10 December 2021, p 36.

<sup>595</sup> Evidence, Ms Dumazel, 10 December 2021, p 35.

- shows all offset obligations transferred to the Trust
- shows offset obligations for all major projects, including any discounting.

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**Recommendation 18**

That the Department of Planning and Environment and Biodiversity Conservation Trust increase transparency of the use of offsets to enable public scrutiny of the Biodiversity Offsets Scheme. This should include a centralised, publicly accessible database that:

- enables spatial viewing of development and stewardship sites, including site boundaries
  - contains information about biodiversity stewardship agreements, such as type and quantity of credits, management actions and restoration uplift
  - contains information about the ecological outcomes of biodiversity stewardship agreements
  - contains information about which credits or offset sites have been used to offset which developments
  - shows all offset obligations transferred to the Biodiversity Conservation Trust
  - shows offset obligations for all major projects, including any discounting.
- 

- 8.48** Recognition and management of conflict of interest – real and perceived – is another area where the operation and transparency of the scheme can be improved.
- 8.49** Part of the stimulus for this inquiry was media attention given to allegations of 'insider trading' on the part of consultants who apparently made 'windfall gains' as a result of opportunities arising from the need to offset development in Western Sydney. The committee has no evidence of actual wrongdoing on the part of those consultants. What this case seems to demonstrate is that, when there is insufficient transparency in the scheme, including about how potential conflicts of interest are managed, it is open to the perception of collusion or insider trading between consultants, their clients and/or the authorities managing it.
- 8.50** There are multiple areas of the scheme where conflicts of interest can arise. One area of concern is the possible conflicts for ecological assessors who may face pressure or have an interest in the outcome of the ecological assessment of a development or stewardship site, and the difficulty for non-specialists to review the quality of ecological assessments. Given the scheme's reliance on the quality of ecological assessments, it is imperative that steps to improve the guidance and quality assurance of the reports are taken as outlined in previous chapters of this report. Further, there must be appropriate monitoring of performance of accredited assessors, and arrangements to declare and manage conflicts of interest.
- 8.51** This is not to suggest that ecologists should be excluded from participating in the scheme as landholders: on the contrary – they are the very people whose skill and expertise is needed to ensure habitat is effectively managed to achieve biodiversity gains. It is essential, though, to increase the transparency around what potential conflicts exist and how they are managed.
- 8.52** The committee therefore recommends that the department continue to review arrangements for managing conflict of interest in the scheme, with a view to providing transparent processes for declaring and managing conflicts of interest among scheme stakeholders. We further recommend that the department review arrangements for the accreditation and performance

monitoring of accredited assessors, with a view to ensuring the quality of ecological assessments in the scheme and appropriate management of possible conflicts of interest.

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**Recommendation 19**

That the Department of Planning and Environment:

- continue to review arrangements for managing conflict of interest in the Biodiversity Offsets Scheme, with a view to providing transparent processes for declaring and managing conflicts of interest among scheme stakeholders
  - review arrangements for the accreditation and monitoring performance of accredited assessors, with a view to ensuring the quality of ecological assessments in the scheme, and appropriate management of conflicts of interest.
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## Appendix 1 Submissions

No.	Author
1	Confidential
2	Ecological Consultants Association of NSW Inc.
3	Name suppressed
4	Confidential
5	Ms Nina Matheis
6	Bathurst Regional Council
7	Ms Paula Morrow
8	Hilary Denholm
9	Name suppressed
10	Name suppressed
11	Mr Noel Corkery
12	Goulburn Mulwaree Council
13	Coffs Harbour City Council
14	Friends of Grasslands
15	Shoalhaven City Council
16	Name suppressed
17	Mr Peter Olive
18	Hunter Bird Observers Club Inc
19	Mr Robert Michie
20	Yancoal Australia Ltd
21	Clarence Valley Council
22	Kempsey Shire Council
23	Lane Cove Council
24	Wando Conservation and Cultural Centre Inc
25	Mrs Elizabeth Michie
26	National Parks Association of NSW Macarthur Branch
27	Name suppressed
28	Ms Kym Kilpatrick
29	Dr Judy Lambert
30	Mrs Leanne George
31	Ms Cath Ireland
32	Ryde Hunters Hill Flora and Fauna Preservation Society Inc

<b>No.</b>	<b>Author</b>
33	Mrs Patricia Durman
34	Sharon 'Ruby' & Peter Dykes
35	Henribark Pty Ltd
36	Blacktown & District Environment Group Inc
37	Wollondilly Shire Council
38	Mulgoa Valley Landcare Group Inc
39	Gilgandra Shire Council
40	Youth for Conservation
41	FAP Nominees Pty Ltd
42	Landholder Biodiversity Interest Group
43	Name suppressed
44	Port Stephens Council
45	Name suppressed
46	Ryde Gladesville Climate Change Action Group
47	Natural Resource Management and Planning staff - Port Macquarie Hastings Council
48	Name suppressed
49	Lock the Gate Alliance
50	Penrith City Council
51	Better Planning Network Inc
51a	Better Planning Network Inc
52	Planning Institute of Australia
53	Ms Fiona Bullivant
54	Name suppressed
55	Name suppressed
56	Tamworth Regional Council
57	Clarence Valley Conservation Coalition Inc
58	Mr Alexander Cox
59	Birding NSW inc.
60	Name suppressed
61	Dubbo Regional Council
62	Lake Macquarie City Council
63	Mr Martin Mansfield
64	Dr Stan Bolden
65	Georges River Environmental Alliance
66	NSW Minerals Council

<b>No.</b>	<b>Author</b>
66a	NSW Minerals Council
67	Save Sydney's Koalas
68	Urban Taskforce
69	Ms Margaret Fisher
70	Darkinjung Local Aboriginal Land Council
71	National Parks Association of NSW
72	Confidential
73	Mrs Sue Gay
74	Mrs Joy Hafey
75	Shellharbour City Council
76	Deep River Group
77	Singleton Council
78	Local Government NSW
79	AILA - Australian Institute of Landscape Architects
80	Koala Koalition EcoNetwork Port Stephens (KKEPS)
81	Eira Battaglia
82	Wilton Action Group
83	Total Environment Centre
84	Animal Liberation
85	Humane Society International
86	Australian Conservation Foundation
87	Cement Concrete and Aggregates Australia
88	Mr Peter Maslen
89	Mr Andrew Knop
90	Environment Institute of Australia and New Zealand Inc.
91	Tweed Shire Council
92	Environmental Defenders Office
92a	Environmental Defenders Office
93	Northern Rivers Joint Organisation - Natural Resource Management Managers Group
94	NSW Farmers' Association
95	Nature Conservation Council of NSW
96	Valley Watch Inc
97	NSW Government
98	National Trust of Australia (New South Wales)

<b>No.</b>	<b>Author</b>
99	Confidential
100	Mr Steven House
101	Community Environment Network Inc.
102	Name suppressed
103	Name suppressed
104	Lynda Newnam

## Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
Friday 22 October 2021 via videoconference, Parliament House, Sydney	Ms Belinda Pellow	President (Acting), Ecological Consultants Association of NSW ( <i>via videoconference</i> )
	Mr Andrew Lothian	Treasurer, Ecological Consultants Association of NSW ( <i>via videoconference</i> )
	Mr Peter Maslen	Engineer and Ecological Scientist (retired) ( <i>via videoconference</i> )
	Mr Alexander Cox	PhD Candidate, Crawford School of Public Policy - Australian National University ( <i>via videoconference</i> )
	Mr Brian Williams	President, Wilton Action Group ( <i>via videoconference</i> )
	Mr Saul Deane	Urban Sustainability Campaigner, Total Environment Centre ( <i>via videoconference</i> )
	Mr Barry Durman	Member, Save Sydney's Koalas ( <i>via videoconference</i> )
	Mr Jeffrey Bulfin	Managing Director, Deep River Group ( <i>via videoconference</i> )
	Mr Jack J Bulfin	Director of Operations, Deep River Group ( <i>via videoconference</i> )
	Dr Bryan Jenkins	President, Environment Institute of Australia and New Zealand ( <i>via videoconference</i> )
Ms Georgina Woods	NSW Coordinator, Lock the Gate Alliance ( <i>via videoconference</i> )	
Ms Anna Christie	Research Officer, Wando Conservation and Cultural Centre Inc ( <i>via videoconference</i> )	

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
	Mr Gary Dunnett	Executive Officer, National Parks Association of NSW ( <i>via videoconference</i> )
	Ms Rachel Walmsley	Head of Policy & Law Reform, Environmental Defenders Office ( <i>via videoconference</i> )
	Ms Ishbel Cullen	Policy and Outreach Coordinator, Nature Conservation Council of NSW ( <i>via videoconference</i> )
	Ms Jan Primrose	Convenor, Better Planning Network ( <i>via videoconference</i> )
<b>Thursday 9 December 2021 Jubilee Room, Parliament House, Sydney</b>	Mr Jerry Lees	Director, FAP Nominees Pty Ltd
	Mr Barry Buffier AM	Advisor to FAP Nominees Pty Ltd
	Mr Steven House	Director, Meridolum ( <i>via videoconference</i> )
	Mr Angus Atkinson	Member and beef producer, NSW Farmers' Association ( <i>via videoconference</i> )
	Ms Claire Doherty	Policy Director, NSW Minerals Council ( <i>via videoconference</i> )
<b>Friday 10 December 2021 Jubilee Room, Parliament House, Sydney</b>	Mr Scott Phillips	Chief Executive, Local Government NSW ( <i>via videoconference</i> )
	Ms Susy Cenedese	Strategy Manager Environment, Local Government NSW ( <i>via videoconference</i> )
	Mr Steven Peart	Group Manager Development Services, Port Stephens Council ( <i>via videoconference</i> )
	Mrs Kimberly Baker	Environmental Planner, Port Stephens Council ( <i>via videoconference</i> )

Mrs Mary-Anne Crawford	Manager Development and Environmental Services, Singleton Council ( <i>via videoconference</i> )
Mr Ziggy Andersons	Coordinator Environmental Services, Singleton Council ( <i>via videoconference</i> )
Ms Bianca Klein	Environmental Services Team Leader, Wollondilly Shire Council ( <i>via videoconference</i> )
Mr Gordon Clark	Director City Futures, Shoalhaven City Council ( <i>via videoconference</i> )
Miss Karen Love	Strategic Environmental Projects Coordinator, Port Macquarie Hastings Council ( <i>via videoconference</i> )
Ms Kate Wooll	Business Manager Strategic Planning, Goulburn Mulwaree Council ( <i>via videoconference</i> )
Mr Brian Faulkner	Environment and Biodiversity Assessment Officer, Goulburn Mulwaree Council ( <i>via videoconference</i> )
Ms Sally Whitelaw	Team Leader Biodiversity, Coastal & Flooding - Coffs Harbour City Council ( <i>via videoconference</i> )
Mr Scott Lenton	Manager Environment & Regulatory Services, Clarence Valley Council ( <i>via videoconference</i> )
Ms Heather Mitchell	Natural Resource Management Officer – Biodiversity, Clarence Valley Council ( <i>via videoconference</i> )
Mr Greg Steenbeeke	Director / Public Officer / Ecologist, Henribark Pty Ltd ( <i>via videoconference</i> )
Ms Judy Steenbeeke	Director / Company Secretary / Financial Manager, Henribark Pty Ltd ( <i>via videoconference</i> )



Mr Peter Dykes	Private individual	
Ms Ruby Dykes	Private individual	
Mr Andy Davies	Member, Landholder Biodiversity Interest Group ( <i>via videoconference</i> )	
Mrs Louise Davies	Member, Landholder Biodiversity Interest Group ( <i>via videoconference</i> )	
Mr Paul Elton	Chief Executive Officer, Biodiversity Conservation Trust	
Mr Dean Knudson	Deputy Secretary, Biodiversity, Conservation & Science – Department of Planning and Environment (DPE)	
Ms Michelle Dumazel	Executive Director, Biodiversity and Conservation, DPE	
Dr Louisa Mamouney	Director, Biodiversity Offsets Scheme Branch, DPE	
Mr David Gainsford	Deputy Secretary, Assessment and System Performance, DPE	
Ms Felicity Greenway	Executive Director, Strategic Services, DPE	
Mr David Witherdin	Chief Executive Officer, Local Land Services ( <i>via videoconference</i> )	
Mr Brendan Cook	Executive Director, Strategy and Policy, Department of Regional NSW ( <i>via videoconference</i> )	
<b>Friday 8 April 2022 Macquarie Room, Parliament House, Sydney</b>	Mr Greg Steenbeeke	Director/Public Officer/Ecologist, Henribark
	Mr Andy Davies	Member, Landholder Biodiversity Interest Group
	Mrs Louise Davies	Member, Landholder Biodiversity Interest Group

Mr Tom Forrest	Chief Executive Officer, Urban Taskforce Australia
Ms Julie Morgan	Executive Director - Environment & Sustainability, Safety Environment & Regulation, Transport for NSW
Mr Atticus Fleming	Acting Coordinator-General, Environment, Energy and Science Group, DPE ( <i>via videoconference</i> )
Ms Ingrid Emery	Executive Director - Project Interfaces and Program Management, Water Infrastructure NSW
Mr David Gainsford	Deputy Secretary, Development Assessment, DPE
Ms Michelle Dumazel	Executive Director - Biodiversity and Conservation, DPE

## Appendix 3 Minutes

### Minutes no. 55

Thursday 24 June 2021

Portfolio Committee No. 7 – Planning and Environment

Via Webex, 2.45 pm

#### 1. Members present

Mr Pearson, *Deputy Chair*

Mr Franklin

Ms Jackson

Mr Mallard

Ms Sharpe

#### 2. Apologies

Ms Faehrmann

#### 3. Correspondence

##### ***Received:***

23 June 2021 – Email from Cate Faehrmann MLC, Hon Mark Pearson MLC and Hon Penny Sharpe MLC to the secretariat requesting a committee meeting to consider a self reference.

#### 4. Consideration of terms of reference

The Chair tabled a letter proposing the following self-reference:

##### **Inquiry into the Integrity of the NSW Biodiversity Conservation Scheme**

1. That Portfolio Committee No. 7 Environment and Planning inquire into and report the integrity of the NSW Biodiversity Conservation 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 adequacy of 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.
2. That the committee report by 1 March 2022.

Resolved, on the motion of Mr Franklin: That paragraph 1b. be amended by omitting the words 'the adequacy of'.

Resolved, on the motion of Ms Sharpe: That the terms of reference, as amended, be adopted by the committee.

#### 5. Inquiry into the Integrity of the NSW Biodiversity Conservation Scheme

Resolved, on the motion of Mr Franklin:

- That the closing date for submissions be 31 August 2021,
- That the secretariat circulate to members the Chairs' proposed list of stakeholders to provide them with the opportunity to amend the list or nominate additional stakeholders, and that the committee agree to the stakeholder list by email, unless a meeting of the committee is required to resolve any disagreement, and

- That hearing dates be determined by the Chair after consultation with members regarding their availability.

## 6. Adjournment

The committee adjourned at 2.55 pm, sine die.

Stewart Smith  
Committee Clerk

## Minutes no. 56

Wednesday 7 July 2021

Portfolio Committee No. 7 – Planning and Environment

Via videoconference at 11.33 am

### 1. Members present

Ms Faehrmann, *Chair*  
Mr Pearson, *Deputy Chair*  
Ms Cusack  
Mr Franklin  
Ms Jackson  
Mr Mallard  
Ms Sharpe

### 2. Apologies

Mr Pearson, *Deputy Chair*  
Ms Cusack

### 3. Inquiry into Budget Estimates 2021-2022 – procedural resolutions

The committee noted the Budget Estimates timetable for 2021-2022 agreed to by the House, with hearings commencing at 9.30 am and concluding by 6.00 pm, for Portfolio Committee No. 7:

Date	Portfolio
Monday 16 August 2021	Planning and Public Spaces (Stokes)
Thursday 19 August 2021	Local Government (Hancock)
Monday 23 August 2021	Energy and Environment (Kean)

#### 3.1 Allocation of question time and witness appearance time

The committee noted that under the Budget Estimates 2021-2022 resolution each portfolio, except The Legislature, will be examined concurrently by Opposition and Crossbench members only, from 9.30 am to 12.30 pm, and from 2.00 pm to 5.45 pm, with an additional 15 minutes reserved for government questions for each of the morning and afternoon sessions.

#### 3.2 Witness requests

Resolved, on the motion of Ms Sharpe: That:

- the committee provide witness requests to the secretariat by 12.00 pm, Thursday 8 July 2021

- the secretariat circulate via email a final witness list for each portfolio for the committee's agreement.

Resolved, on the motion of Mr Franklin: That the committee not invite parliamentary secretaries to appear as a witness at the hearings.

### 3.3 Witness appearance time

Resolved, on the motion of Ms Sharpe: That:

- the Minister appear from 9.30 am until 12.45 pm
- departmental staff appear from 9.30 am until 6.00 pm.

## 4. Inquiry into the health and wellbeing of kangaroos and other macropods in NSW

### 4.1 Draft correspondence to Minister Kean

Resolved, on the motion of Ms Sharpe: That:

- the secretariat contact the Department of Planning, Industry and Environment to ascertain any likely impacts, were the new five year NSW kangaroo management plan to be delayed until after the committee reports in October 2021
- the committee consider draft correspondence to Minister Kean, in light of this information, via email.

## 5. Inquiry into the NSW Biodiversity Conservation Scheme

Resolved, on the motion of Ms Sharpe: That the inquiry title and terms of reference be amended by omitting any reference to 'NSW Biodiversity Conservation Scheme' and inserting instead 'NSW Biodiversity Offsets Scheme'.

## 6. Adjournment

The committee adjourned at 11.47 am, until Friday 16 July 2021, Macquarie Room, Parliament House, (Environmental Planning Assessment Bill – Hearing).

Emma Rogerson  
**Committee Clerk**

## Minutes no. 65

Friday 22 October 2021

Portfolio Committee No. 7 – Planning and Environment

Via videoconference, 9.16 am

### 1. Members present

Ms Faehrmann, *Chair*

Mr Pearson, *Deputy Chair (from 9.15 am until 12.22 pm, and from 1.29 pm onwards)*

Ms Cusack

Mr Franklin

Ms Jackson

Mr Mallard (*from 12.05 pm*)

Ms Sharpe (*from 9.16 am until 2.37 pm, and from 3.23 pm onwards*)

Mr Field (*participating member*) (*from 9.25 am*)

### 2. Previous minutes

Resolved, on the motion of Mr Franklin: That draft minutes no. 64 be confirmed.

### 3. Correspondence

The committee noted the following items of correspondence:

#### *Received*

- 5 October 2021 - Email from Mr Greg Steenbeeke, Director, Henribark Pty Ltd, to secretariat, seeking to discuss matters raised in its submission (no. 35) at an upcoming hearing.
- 13 October 2021 – Email from Ms Jane Alexander, Advocacy Manager, National Trust of Australia (NSW), providing a late submission (no. 98).
- 18 October 2021 – Email from Mr Mike Mrdak AO, to chair, advising their appointment by the Minister for Energy and the Environment as an adviser and external monitor of an integrated improvement and assurance program for the NSW Biodiversity Offsets Scheme.

*Sent*

- 2 August 2021 – Email from Chair to identified stakeholders for the biodiversity offsets inquiry, providing clarifications to the terms of reference for the inquiry.

**4. Inquiry into the Companion Animals Amendment (Puppy Farms) Bill 2021**

Resolved, on the motion of Mr Pearson: That due to capacity constraints and the number of inquiries the committee is currently managing, the committee is unable to undertake an inquiry into the Companion Animals Amendment (Puppy Farms) Bill 2021 and table a report advising the House as such.

**5. Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme**

**5.1 Public submissions**

The committee noted the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 5-8, 11-15, 17-20, 22, 23, 25, 26, 28-33, 35, 37-40, 44, 46, 47, 49-53, 56-59, 61-71, 73-79 and 81-98.

**5.2 Partially confidential submissions (name suppressed)**

Resolved, on the motion of Ms Sharpe: That the committee keep the following information confidential, as per the requests of the authors: names and/or identifying and sensitive information in submissions nos. 2, 9, 10, 21, 27, 36, 42, 43, 45, 48, 54, 55, 60 and 80.

**5.3 Partially confidential submissions (identifying and/or sensitive information)**

Resolved, on the motion of Ms Sharpe: That the committee:

- keep the following information confidential, as per the recommendation of the secretariat: identifying and sensitive information in submissions nos. 3, 24 and 34; and
- keep the following information confidential, as per the request of the author: names and identifying information in submission no 16.

**5.4 Confidential submissions**

Resolved, on the motion of Mr Pearson: That the committee keep submission nos. 1, 4, 41 and 72 confidential, as per the requests of the authors.

**5.5 Virtual hearing proceedings**

The committee noted the virtual hearing arrangements.

**5.6 Live streaming and recording of hearing**

Resolved, on the motion of Ms Sharpe: That the hearing on 22 October 2021 be recorded and the recording be uploaded on the NSW Parliament's YouTube page and a link be published on the inquiry webpage as soon as practicable after the hearing subject to any comments or concerns from the secretariat or the committee after the hearing.

**5.7 Photo of committee for social media**

A screenshot of the committee during its deliberative was taken before the hearing on 22 October 2021 for the purposes of publishing on social media.

**5.8 Allocation of questioning**

Resolved, on the motion of Mr Franklin: That the sequence of questions be left in the hands of the chair.

**5.9 Virtual public hearing**

The committee proceeded to take evidence in public at 9.30 am.

Witnesses were admitted via video link.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Ms Belinda Pellow, President (Acting), Ecological Consultants Association of NSW
- Mr Andrew Lothian, Treasurer, Ecological Consultants Association of NSW

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Peter Maslen, Engineer and Ecological Scientist (retired)
- Mr Alexander Cox, PhD Candidate, Crawford School of Public Policy - Australian National University

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Brian Williams, President, Wilton Action Group
- Mr Saul Deane, Urban Sustainability Campaigner, Total Environment Centre
- Mr Barry Durman, Member, Save Sydney's Koalas

Mr Deane tendered the following document:

- 'Biodiversity Certification of Land - Mt Gilead Stage 1 – Recommendation Report' (Office of Environment and Heritage), 28 June 2019.

Mr Williams tendered the following documents:

- Article dated 17 February 2021, titled 'Rescue plan for nature: How to fix the biodiversity crisis', New Scientist.
- Wilton Action Group timeline, dated July 2021.
- Agenda - Wilton Site Visit (10 March 2017), Department of Planning and Environment.
- 'Wilton and Greater Macarthur Priority Growth Areas: Biodiversity Study' (EcoLogical Australia) - prepared for NSW Department of Planning and Environment, 2017.
- 'Greater Macarthur Investigation Area: Biodiversity Assessment Report' (EcoLogical Australia) - prepared for NSW Department of Planning and Environment, September 2015.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Jeffrey Bulfin, Managing Director, Deep River Group
- Mr Jack J Bulfin, Director of Operations, Deep River Group
- Dr Bryan Jenkins, President, Environment Institute of Australia and New Zealand

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Georgina Woods, NSW Coordinator, Lock the Gate Alliance
- Ms Anna Christie, Research Officer, Wando Conservation and Cultural Centre Inc
- Mr Gary Dunnett, Executive Officer, National Parks Association of NSW

Ms Christie tendered the following documents:

- Photograph – 'Lawler's Well – formerly the only permanent water source in the Leard State Forest – 2011'
- Photograph – 'Birds drinking from Lawler's Well – 2011'
- Map 1 showing 'Leard State Forest – Exclusive Use Areas', Forestry Corporation.
- Map 2 showing 'Leard State Forest – Exclusive Use Areas', Forestry Corporation.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Rachel Walmsley, Head of Policy & Law Reform, Environmental Defenders Office
- Ms Ishbel Cullen, Policy and Outreach Coordinator, Nature Conservation Council of NSW
- Ms Jan Primrose, Convenor, Better Planning Network

Ms Primrose tendered the following document:

- Supplementary submission, including attachments A-D, titled 'Submission to the Legislative Council's Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme: Additional Tabled Document October 2021'.

The evidence concluded and the witnesses withdrew.

The hearing concluded at 3.43 pm.

#### 6. Other business

Resolved, on the motion of Ms Jackson: That the committee provide any supplementary questions for the witnesses at the hearing held on 22 October 2021 for the inquiry into the Integrity of the Biodiversity Offsets Scheme by 5.00 pm on Tuesday 26 October 2021.

#### 7. Next meeting

Tuesday 26 October 2021, 9.15 am, Jubilee Room (Budget Estimates – Energy and Environment).

Andrew Rode  
Committee Clerk

#### Minutes no. 71

Thursday 9 December 2021

Portfolio Committee No. 7 – Planning and Environment

Jubilee Room, NSW Parliament, 1.33 pm

#### 1. Members present

Ms Faehrmann, *Chair*  
Mr Pearson, *Deputy Chair (from 1:50 pm)*  
Ms Cusack  
Ms Jackson  
Mr Mallard  
Ms Sharpe  
Mr Field (*participating member, via videoconference*)  
Mr Martin (*substituting for Mr Franklin*)

#### 2. Previous minutes

Resolved, on the motion of Ms Sharpe: That draft minutes no. 70 be confirmed.

#### 3. Correspondence

The committee noted the following items of correspondence:

##### *Received*

- 15 November 2021 - Email from Mr Greg Steenbeeke (Director - Henribark Pty Ltd), to the committee, seeking to appear at an upcoming public hearing.
- 17 November 2021 - Email from Mr Robert Humphries (Senior Principal Consultant Biodiversity Offset Programs - Eco Logical Australia), to the Secretariat, declining the invitation to appear at the hearing on 9 December 2021.



- 17 November 2021 - Email from Dr Megan Jones (Environmental Planning Officer - Kempsey Shire Council), to the Secretariat, declining the invitation to appear at the hearing on 10 December 2021.
- 18 November 2021 - Email from Mr Mark Adams (Meridolum), to the Secretariat, declining the invitation to appear at the hearing on 9 December 2021.
- 18 November 2021 - Email from Mr Mark Adams (Chief Executive Officer - Eco Logical Australia), to the Secretariat, declining the invitation to appear at the hearing on 9 December 2021.
- 18 November 2021 - Email from Mr Scott Hetherington (Senior Program Leader – Biodiversity, Tweed Shire Council), to the Secretariat, declining the invitation to appear at the hearing on 10 December 2021.
- 19 November 2021 - Email from Ms Louise Davies, Landholder Biodiversity Interest Group, to the Secretariat, advising that their name suppressed submission (No. 42) could have their names published.
- 23 November 2021- Email from Mr Blake Cansdale (Chief Operating Officer - Darkinjung Local Aboriginal Land Council), to the secretariat, declining the invitation to appear at the hearing on 9 December 2021.
- 24 November 2021 - Email from witness to the committee, requesting to appear *in camera* at the upcoming hearing.
- 26 November 2021 – letter from Mr Bryan Belling (Principal - Belling Legal), to the committee.
- 26 November 2021 – copy of correspondence from Mr Steven House to the chair, accepting invitation to appear on 9 December 2021 hearing and requesting that a legal representative accompany him at the hearing (Mr Steven Lewis – Mark O'Brien Legal).
- 2 December 2021 - Email from Ms Sylvia Fernandez (Partner - Thomson Geer) on behalf of Eco Logical Australia, to the secretariat, advising it is not in a position to have a representative from Eco Logical Australia appearing at the hearing on 9 December 2021.

#### ***Sent***

- 24 November 2021 - Email from the Chair, Ms Cate Faehrmann, to Mr Mark Adams, Chief Executive Officer, Eco Logical Australia, reissuing an invitation to appear at the hearing on 9 December 2021 and noting the committees power to subpoena witnesses to appear before a committee.
- 24 November 2021 - Email from the Chair, Ms Cate Faehrmann, to Mr Steven House, reissuing an invitation to appear at the hearing on 9 December 2021 and noting the committees power to subpoena witnesses to appear before a committee.
- 1 December 2021 – Email from the Secretariat to Mr Bryan Belling, Principal, Belling Legal, the legal representative of Mr Mark Adams, requesting that an alternative representative from Eco Logical Australia appear at the hearing on 9 December 2021.

Resolved, on the motion of Ms Cusack: That the letter and attachments from Mr Bryan Belling received on 26 November 2021 be kept confidential.

## **4. Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme**

### **4.1 Hearing on 22 October 2021 – Tendered documents**

Resolved on the motion of Ms Sharpe: That the committee accept and publish the following documents tendered during the public hearing on 22 October 2021 for the inquiry into the Integrity of the NSW Biodiversity Offsets Scheme:

- Mr Brian Williams, President, Wilton Action Group:
  - Article dated 17 February 2021, titled 'Rescue plan for nature: How to fix the biodiversity crisis', NewScientist.
  - Agenda - Wilton Site Visit (10 March 2017), Department of Planning and Environment.
  - 'Wilton and Greater Macarthur Priority Growth Areas: Biodiversity Study' (Eco Logical Australia) - prepared for NSW Department of Planning and Environment, 2017.
  - 'Greater Macarthur Investigation Area: Biodiversity Assessment Report' (Eco Logical Australia) - prepared for NSW Department of Planning and Environment, September 2015.
- Ms Anna Christie, Research Officer, Wando Conservation and Cultural Centre Inc:

- Photograph – 'Lawler's Well – formerly the only permanent water source in the Leard State Forest – 2011'.
- Photograph – 'Birds drinking from Lawler's Well – 2011'.
- Map 1 showing 'Leard State Forest – Exclusive Use Areas', Forestry Corporation.
- Map 2 showing 'Leard State Forest – Exclusive Use Areas', Forestry Corporation.
- Ms Jan Primrose, Convenor, Better Planning Network – supplementary submission, including attachments A-D, titled 'Submission to the Legislative Council's Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme: Additional Tabled Document October 2021'.

That the committee keep confidential the following document tendered during the public hearing on 22 October 2021 for the inquiry into the Integrity of the NSW Biodiversity Offsets Scheme:

- Mr Brian Williams, President, Wilton Action Group:
  - Wilton Action Group timeline, dated July 2021.

#### **4.2 Public submission**

The committee noted that submission no. 100 had been published.

#### **4.3 Confidential submissions**

Resolved, on the motion of Ms Cusack: That the committee keep submission no. 99 confidential, as per the request of the author.

#### **4.4 Change to publication status of submission no. 42**

Resolved, on the motion of Ms Sharpe: That certain names and identifying information in submission no. 42 be kept confidential, at the request of the submission authors, and the status of the submission be changed from name suppressed, to partially confidential.

#### **4.5 Change to publication status of submission no. 41**

The committee noted that submission no. 41 had been published.

#### **4.6 Live streaming and recording of hearing**

Resolved, on the motion of Ms Jackson: That the hearing on 9 December 2021 be recorded and the recording be uploaded on the NSW Parliament's YouTube page and a link be published on the inquiry webpage as soon as practicable after the hearing subject to any comments or concerns from the secretariat or the committee after the hearing.

#### **4.7 Legal representative with Mr Steven House**

Resolved, on the motion of Ms Sharpe: That Mr Steven House be permitted to be accompanied by his legal representative whilst giving evidence, but the legal representative not be sworn in or speak on behalf of Mr House.

#### **4.8 Allocation of questioning**

Resolved, on the motion of Ms Sharpe: That the sequence of questions be left in the hands of the chair.

#### **4.9 Public hearing**

Witnesses were admitted via video link.

The committee proceeded to take evidence in public at 1.45 pm.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Jerry Lees, Director, FAP Nominees Pty Ltd
- Mr Barry Buffier AM, Advisor to FAP Nominees Pty Ltd

Mr Lees tendered the following documents:

- 'A Proposed Compensation Claim by FAP Nominees Pty Ltd for Investment Losses Incurred in the NSW Biodiversity Offsets Scheme against the NSW Dept of Planning, Industry and Environment and the Biodiversity Conservation Trust' - Independent Opinion on the Proposed Claim by Charles O'Neil FCI Arb, dated 30 November 2021.

- Email correspondence with Department of Planning, Industry and Environment regarding updated biodiversity credits in transition to the Biodiversity Assessment Method, dated 30 July 2020

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Steven House, Director, Meridolum (*via videoconference*)

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Angus Atkinson, Member and beef producer, NSW Farmers' Association (*via videoconference*)
- Ms Claire Doherty, Policy Director, NSW Minerals Council (*via videoconference*)

The evidence concluded and the witnesses withdrew.

The hearing concluded at 5.00 pm.

#### **4.10 Tendered documents**

Resolved on the motion of Ms Sharpe: That the committee accept and publish the following documents tendered during the public hearing:

- 'A Proposed Compensation Claim by FAP Nominees Pty Ltd for Investment Losses Incurred in the NSW Biodiversity Offsets Scheme against the NSW Dept of Planning, Industry and Environment and the Biodiversity Conservation Trust' - Independent Opinion on the Proposed Claim by Charles O'Neil FCI Arb, dated 30 November 2021, tendered by Mr Lees
- Email correspondence with Department of Planning, Industry and Environment regarding updated biodiversity credits in transition to the Biodiversity Assessment Method, tendered by Mr Lees, dated 30 July 2020.

### **5. Adjournment**

The committee adjourned at 5.01 pm until Friday 10 December 2021, 9.00 am, Jubilee Room Parliament House, Integrity of the NSW Biodiversity Offsets Scheme public hearing.

Andrew Rode  
**Committee Clerk**

### **Minutes no. 72**

Friday 10 December 2021

Portfolio Committee No. 7 – Planning and Environment

Jubilee Room, NSW Parliament, 8.58 am

#### **1. Members present**

Ms Faehrmann, *Chair*  
Mr Pearson, *Deputy Chair (via videoconference)*  
Ms Cusack (until 11.40 am)  
Ms Jackson (from 1.15 pm)  
Ms Sharpe  
Mr Field (*participating, via videoconference* from 9.34 am)  
Mr Amato (*substituting for Mr Mallard, via videoconference*)  
Mr Poulos (*substituting for Mr Franklin*)

#### **2. Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme**

##### **2.1 Allocation of questioning**

Resolved, on the motion of Ms Sharpe: That the sequence of questions be left in the hands of the chair.

## 2.2 Public hearing

The committee proceeded to take evidence in public at 9.00 am.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Scott Phillips, Chief Executive, Local Government NSW (*via videoconference*)
- Ms Susy Cenedese, Strategy Manager Environment, Local Government NSW (*via videoconference*)
- Mr Steven Peart, Group Manager Development Services, Port Stephens Council (*via videoconference*)
- Mrs Kimberly Baker, Environmental Planner, Port Stephens Council (*via videoconference*)
- Mrs Mary-Anne Crawford, Manager Development and Environmental Services, Singleton Council (*via videoconference*)
- Mr Ziggy Andersons, Coordinator Environmental Services, Singleton Council (*via videoconference*)

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Bianca Klein, Environmental Services Team Leader, Wollondilly Shire Council (*via videoconference*)
- Mr Gordon Clark, Director City Futures, Shoalhaven City Council (*via videoconference*)
- Miss Karen Love, Strategic Environmental Projects Coordinator, Port Macquarie Hastings Council (*via videoconference*)

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Kate Wooll, Business Manager Strategic Planning, Goulburn Mulwaree Council (*via videoconference*)
- Mr Brian Faulkner, Environment and Biodiversity Assessment Officer, Goulburn Mulwaree Council (*via videoconference*)
- Ms Sally Whitelaw, Team Leader Biodiversity, Coastal & Flooding - Coffs Harbour City Council (*via videoconference*)
- Mr Scott Lenton, Manager Environment & Regulatory Services, Clarence Valley Council (*via videoconference*)
- Ms Heather Mitchell, Natural Resource Management Officer – Biodiversity, Clarence Valley Council (*via videoconference*)

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Greg Steenbeeke, Director / Public Officer / Ecologist, Henribark Pty Ltd (*via videoconference*)
- Ms Judy Steenbeeke, Director / Company Secretary / Financial Manager, Henribark Pty Ltd (*via videoconference*)
- Mr Peter Dykes
- Ms Ruby Dykes
- Mr Andy Davies, Member, Landholder Biodiversity Interest Group (*via videoconference*)
- Mrs Louise Davies, Member, Landholder Biodiversity Interest Group (*via videoconference*)

Mr Dykes tendered the following documents:

- Data from Tricketts Arch Statement of Reasonable Equivalence to BAM Credits under the Biodiversity Offsets Scheme
- Email from Mr and Mrs Dykes to the NSW Government, undated, 'Our comments on the Biodiversity Offset Market'.
- 'Inquiry outcomes and/or changes we would recommend'.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Paul Elton, Chief Executive Officer, Biodiversity Conservation Trust
- Mr Dean Knudson, Deputy Secretary, Biodiversity, Conservation & Science – Department of Planning, Industry and Environment (DPIE)
- Ms Michelle Dumazel, Executive Director, Biodiversity and Conservation Division, DPIE
- Ms Louisa Mamouney, Director, Biodiversity Offsets Scheme Branch, DPIE

Mr Knudson and Ms Mamouney withdrew at 2.30 pm.

The following witnesses were sworn and examined:

- Mr David Gainsford, Deputy Secretary, Assessment and System Performance, DPIE
- Ms Felicity Greenway, Executive Director, Strategic Services, DPIE
- Mr David Witherdin, Chief Executive Officer, Local Land Services (via videoconference)
- Mr Brendan Cook, Executive Director, Strategy and Policy, Department of Regional NSW (via videoconference)

The evidence concluded and the witnesses withdrew.

The hearing concluded at 4.00 pm.

### **2.3 Tendered documents**

Resolved on the motion of Ms Sharpe: That the committee accept and publish the following documents tendered during the public hearing:

- Data from Tricketts Arch Statement of Reasonable Equivalence to BAM Credits under the Biodiversity Offsets Scheme, tendered by Mr Dykes
- Email from Mr and Mrs Dykes to the NSW Government, undated, 'Our comments on the Biodiversity Offset Market', tendered by Mr Dykes
- 'Inquiry outcomes and/or changes we would recommend', tendered by Mr Dykes

### **3. Other business**

Resolved on the motion of Ms Sharpe: That, in relation to the inquiry into the Integrity of the NSW Biodiversity Offsets Scheme:

- The committee hold another hearing in 2022, on a date to be determined by the Chair after checking members' availability.
- The reporting date be extended beyond 1 March 2022 until a date to be resolved by the committee in 2022.

### **4. Adjournment**

The committee adjourned at 4.05 pm, *sine die*.

Andrew Rode

**Committee Clerk**

### **Minutes no. 77**

Monday 4 April 2022

Portfolio Committee No. 7 – Planning and Environment

Virtual attendance via Webex, 4.05 pm

#### **1. Members present**

Ms Faehrmann, Chair  
Mr Pearson, Deputy Chair  
Ms Cusack (from 4.07 pm)  
Ms Jackson  
Ms Sharpe

**2. Apologies**

Mr Barrett  
Mr Field  
Mr Mallard

**3. Correspondence**

The committee noted the following items of correspondence:

***Received***

- 23 March 2022 – email from Mr Harry Best, Associate, Thomson Geer, to the secretariat, providing Eco Logical Australia's response to the invitation to appear at the biodiversity offsets inquiry hearing on 8 April 2022.
- 31 March 2022 - email from Mr Harry Best, Associate, Thomson Geer, to the Chair, providing Eco Logical Australia's response to the second invitation to appear at the biodiversity offsets inquiry hearing on 8 April 2022.
- 1 April 2022 – Letter from Mr Bryan Belling, Belling Legal (including attachments), to the Chair, advising that their client is declining the invitation to appear at the biodiversity offsets inquiry hearing on 8 April 2022, including attachments.

***Sent***

- 30 March 2022 - email from the Chair, Ms Cate Faehrmann, to Mr Mark Adams, Chief Executive Officer, Eco Logical Australia, reissuing an invitation to appear at the biodiversity offsets inquiry hearing on 8 April 2022 and noting the committees power to subpoena witnesses to appear before a committee.
- 30 March 2022 - email from the Chair, Ms Cate Faehrmann, to Mr Warren McGrath and Mr Robert Humphries (Eco Logical Australia), reissuing an invitation to appear at the biodiversity offsets inquiry hearing on 8 April 2022 and noting the committees power to subpoena witnesses to appear before a committee.
- 4 April 2022 – email from the secretariat, to Belling Legal and their client, accepting the explanation for declining the invitation to appear at the hearing and requesting an alternative representative appear.

Resolved, on the motion of Ms Sharpe: That the committee keep the correspondence from Mr Bryan Belling (including attachments) on behalf of their client, declining the invitation to appear at the biodiversity offsets inquiry hearing on 8 April 2022, dated 1 April 2022, confidential, as per the request of the author.

**4. Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme****4.1 Summoning of witnesses from Eco Logical Australia**

Resolved, on the motion of Ms Sharpe: That the committee prepare written questions to Eco Logical Australia by 5.00 pm Tuesday 12 April 2022.

**5. Other business****6. Adjournment**

The committee adjourned at 4.25 pm until Friday 8 April 2022, 10.30 am, Macquarie Room Parliament House, public hearing for the inquiry into the Integrity of the NSW Biodiversity Offsets Scheme.

Stewart Smith  
Committee Clerk

**Draft minutes no. 78**

Friday 8 April

Portfolio Committee No. 7 - Planning and Environment

Macquarie Room, Parliament House, Sydney, at 10.32 am

**1. Members present**Ms Faehrmann, *Chair*Mr Pearson, *Deputy Chair*

Mr Barrett

Ms Cusack (*from 10.35 am*)

Ms Jackson

Mr Mallard

Ms Sharpe

**2. Apologies**Mr Field (*participating*)**3. Previous minutes**

Resolved, on the motion of Ms Jackson: That draft minutes no. 71, 72 and 77 be confirmed.

**4. Correspondence**

The committee noted the following items of correspondence:

***Received***

- 21 March 2022 – letter from Dr Anne Kerle, Chairperson, NSW Threatened Species Scientific Committee, to the secretariat, declining the invitation to appear at the biodiversity offsets inquiry hearing on 8 April 2022.
- 4 April 2022 – email from Mr Mark Adams, Chief Executive, Eco Logical Australia, to the secretariat, advising that the request for an alternative representative needs to be directed to Thomson Geer, who is representing Eco Logical Australia.
- 4 April 2022 – email from Mr Harry Best, Associate, Thomson Geer, to the secretariat, reiterating that Eco Logical Australia is not in a position to assist the inquiry.

***Sent***

- 4 April 2022 – email from the secretariat, to Thomson Geer, seeking a suitable nomination from Eco Logical Australia to appear at the hearing on Friday 8 April 2022.

**5. Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme****5.1 Partially confidential submissions (name suppressed)**

Resolved, on the motion of Mr Pearson: That the committee keep the following information confidential, as per the requests of the authors: names and/or identifying and sensitive information in submission nos. 102 and 103.

**5.2 Partially confidential submissions (identifying and/or sensitive information)**

Resolved, on the motion of Mr Pearson: That the committee keep the following information confidential, as per the recommendation of the secretariat: identifying and sensitive information in submission no. 101.

**5.3 Recording of hearing**

Resolved, on the motion of Ms Sharpe: That the hearing on 8 April 2022 be recorded and the recording be uploaded on the NSW Parliament's YouTube page and a link be published on the inquiry webpage as soon as practicable after the hearing subject to any comments or concerns from the secretariat or the committee after the hearing.

**5.4 Answers to questions on notice**

The committee noted that the following answers to questions on notice had been published:

- answers to questions on notice from Dr Bryan Jenkins, President, Environment Institute of Australia and New Zealand, received 4 November 2021
- answers to questions on notice from Ms Rachel Walmsley, Head of Policy & Law Reform, Environmental Defenders Office, received 23 November 2021
- answers to questions on notice from Mr Scott Phillips, Chief Executive, Local Government NSW, received 25 January 2022
- answers to questions on notice from Mr Steven House, Director, Meridolum, received 31 January 2022
- answers to questions on notice from the Department of Planning, Industry and Environment and Biodiversity Conservation Trust, received 10 February 2022

### 5.5 Allocation of questioning

The committee agreed to leave the allocation of questions to the Chair.

### 5.6 Public hearing

The committee proceeded to take evidence in public at 10.46 am.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The Chair reminded the following witnesses that they did not need to be sworn, as they had been sworn at another Biodiversity Offsets hearing for the same committee:

- Mr Greg Steenbeeke, Director/Public Officer/Ecologist, Henribark
- Mrs Louise Davies, Member, Landholder Biodiversity Interest Group
- Mr Andy Davies, Member, Landholder Biodiversity Interest Group

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Tom Forrest, Chief Executive Officer, Urban Taskforce Australia

The evidence concluded and the witness withdrew.

The Chair reminded the following witnesses that they did not need to be sworn, as they had been sworn at another Biodiversity Offsets hearing for the same committee:

- Mr David Gainsford, Deputy Secretary Development Assessment, Department of Planning and Environment
- Ms Michelle Dumazel, Executive Director - Biodiversity and Conservation, Department of Planning and Environment

The following witnesses were sworn and examined:

- Ms Julie Morgan, Executive Director - Environment & Sustainability, Safety Environment & Regulation, Transport for NSW
- Mr Atticus Fleming, Acting Coordinator-General, Environment, Energy and Science Group, Department of Planning and Environment
- Ms Ingrid Emery, Executive Director - Project Interfaces and Program Management, Water Infrastructure NSW

The evidence concluded and the witnesses withdrew.

The hearing concluded at 3.02 pm.

## 6. Adjournment

The committee adjourned at 3.02 pm, *sine die*.

Andrew Rode  
Committee Clerk



**Draft minutes no. 89**

Friday 18 November 2022

Portfolio Committee No. 7 – Planning and Environment

Room 1136, Parliament House, Sydney, 10.00 am

**1. Members present**Ms Higginson, *Chair*Mr Pearson, *Deputy Chair*

Ms Jackson

Mrs MacDonald

Mr Mallard

Ms Sharpe

**2. Apologies**

Mr Barrett

Mr Field (*participating*)**3. Previous minutes**

Resolved, on the motion of Mr Pearson: That draft minutes Nos. 65, 78 and 88 be confirmed.

**4. Correspondence**

The committee noted the following items of correspondence:

***Received***

- 20 October 2022 – Letter from the Hon James Griffin MP, Minister for Environment and Heritage, to the Chair, providing an update on improvements to the Biodiversity Offsets Scheme.

***Sent***

- 19 April 2022 – Email from the secretariat to Mr Mark Adams (Chief Executive, Eco Logical Australia), providing written questions to answer.
- 21 October 2022 – Letter from the Chair to Minister for Environment and Heritage, the Hon James Griffin MP, regarding updates to Biodiversity Offsets Scheme.

Resolved, on the motion of Mr Mallard: That the committee authorise the publication of correspondence from the Hon James Griffin MP, providing an update on improvements to the Biodiversity Offsets Scheme, dated 20 October 2022.

**5. Inquiry into the integrity of the NSW Biodiversity Offsets Scheme****5.1 Public submissions**

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission no. 104.

**5.2 Attachments to submissions**

Resolved, on the motion of Mr Pearson: That the committee authorise the publication of the attachment to submission No. 95.

**5.3 Answers to questions on notice and supplementary questions**

The committee noted that the following answers to questions on notice were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice from Mr Mark Adams, Director, Meridolum, received 10 May 2022
- answers to questions on notice from the Department of Planning and Environment, received 2 June 2022
- answers to questions on notice from Urban Taskforce Australia, received 6 June 2022.

#### 5.4 Consideration of Chair's draft report

The Chair submitted their draft report entitled *Integrity of the NSW Biodiversity Offsets Scheme*, which, having been previously circulated, was taken as being read.

Resolved, on the motion of Mrs MacDonald: That paragraph 1.39 be amended by inserting ', which, in October 2022, was replaced with the Biodiversity Conservation Fund Charge System' after 'the cost of their obligation is calculated using the Biodiversity Offsets Payment Calculator'.

Resolved, on the motion of Mrs MacDonald: That paragraph 1.43 be amended by inserting '[FOOTNOTE: This responsibility has recently been transferred to the Credit Supply Taskforce, within the Department of Planning and Environment. (Source: Correspondence from The Hon James Griffin MP, Minister for Environment and Heritage, to Chair, 20 October 2022, p 2.)]' after 'facilitating the supply of credits by entering into biodiversity stewardship agreements with landholders'.

Resolved, on the motion of Mrs MacDonald: That paragraph 1.52 be amended by:

- a) omitting 'Biodiversity Credits Supply Fund, which is expected to be operating "later in 2022"' and inserting instead 'Biodiversity Credits Supply Fund, which is now operational'
- b) omitting 'The fund would be managed by a Credits Supply Taskforce' and inserting instead 'The fund is managed by the Credit Supply Taskforce'

[FOOTNOTE: Correspondence from The Hon James Griffin MP, Minister for Environment and Heritage, to Chair, 20 October 2022, p 2.]

Mrs MacDonald moved: That paragraph 2.2 be amended by omitting 'not all stakeholders were convinced that biodiversity offsetting is the best approach to conserve biodiversity' and inserting instead 'some stakeholders raised concerns about the effectiveness of biodiversity offsetting'.

Question put and negatived.

Resolved, on the motion of Mrs MacDonald: That paragraph 2.44 be amended by omitting the name and position title of the witness and inserting instead 'In evidence, the council stated'.

Resolved, on the motion of Ms Sharpe: That the witness representing the Nature Conservation Council of NSW be deidentified throughout the report and referred to instead as 'the representative of the Nature Conservation Council of NSW'.

Mrs MacDonald moved: That paragraph 2.44 be amended by omitting the quotation: 'The current system only stops destruction if it is likely to issue the final blow and push a species or ecosystem to extinction. Even then, there are avenues that can legally permit activity likely to cause extinction. We must identify what areas, species and ecological communities are too important to lose and designate absolute protection.'

Question put and negatived.

Mrs MacDonald moved: That paragraph 2.91 be omitted:

'A submission from an ecologist similarly described use of mine rehabilitation as offsets as 'ecological nonsense' on the grounds that mine rehabilitation is, or should be, a standard condition of consent, thus is not creating any additional, or certain, ecological gains:

Mine rehabilitation is not an additional obligation of a mining company, it should be a standard condition of consent as it was in the past. Even so it is highly unlikely the biodiversity values of any former mine site can be restored to a sufficient quality that would merit the use of these sites as an offset for extant vegetation.'

Question put.

The committee divided.

Ayes: Mrs MacDonald, Mr Mallard.

Noes: Ms Higginson, Ms Jackson, Mr Pearson, Ms Sharpe

Question resolved in the negative.

Resolved, on the motion of Mrs MacDonald: 'That paragraph 2.94 be amended by omitting 'minister' and inserting instead 'Minister for Planning'.

Mrs MacDonald moved: That recommendation 1 be omitted and the following recommendation be inserted instead:

**'Recommendation 1**

That the Department of Planning and Environment continue to improve the design of the Biodiversity Offsets Scheme, to ensure it meets best practice principles, by:

1. Ensuring adherence to the avoid, minimise and offset hierarchy in the Scheme, by enhancing support for proponents to avoid and minimise impacts at the project design phase.
2. Outlining where offsets should not be used, should alternative offsets not be feasible – such as where critically endangered species are impacted.
3. Encouraging offsets which add net gains to biodiversity.
4. Indirect offsets available are minimised.
5. The option to use mine rehabilitation be limited
6. The discretion to discount offsets for non-ecological reasons is reduced and decision-making transparency is increased.'

Question put.

The committee divided.

Ayes: Mrs MacDonald, Mr Mallard

Noes: Ms Higginson, Ms Jackson, Ms Sharpe, Mr Pearson.

Question resolved in the negative.

Resolved, on the motion of Mrs MacDonald: That paragraph 3.32 be clarified to reflect whether there is a minimum size for a stewardship site under the scheme, based on references to be provided by the government members.

Mrs MacDonald moved: That recommendation 5 be omitted:

**'Recommendation 5**

That the NSW Government:

- immediately remove the option for developers to transfer their offset obligations to the Biodiversity Conservation Trust until it can be demonstrated that genuine like-for-like offset credits are available; and
- restrict the flexibility available to the Trust to ensure the offsets it secures are genuinely' additional, like-for-like and local to the development impact.'

and the following new recommendation 5 be inserted instead:

**'Recommendation 5**

That the Biodiversity Conservation Trust:

- urgently implement an application and review process for developer payments into the Biodiversity Conservation Fund to ensure proponents have exhausted all other private market avenues prior to paying into the Fund, and
- in the event credit supply is unavailable on the market, have a process to demonstrate that genuine like-for-like offset credits will be available, and there is a plan to bring those credits online, prior to receiving payments.

The committee divided.

Ayes: Ms Jackson, Mrs MacDonald, Mr Mallard, Ms Sharpe

Noes: Ms Higginson, Mr Pearson.

Question resolved in the affirmative.

Resolved, on the motion of Ms Sharpe: That recommendation 9 be amended by inserting 'appropriate' before 'ecological monitoring requirements'.

Resolved, on the motion of Ms Sharpe: That recommendation 10 be amended by:

- a) inserting 'working with landholders,' after '*Local Land Services Act 2013*'
- b) omitting 'significantly' before 'increasing biodiversity protections', and
- c) inserting 'and incentivising' after 'with the aim of increasing'.

Resolved, on the motion of Ms Sharpe: That recommendation 11 be amended by inserting 'in consultation with land holders' before 'develop and implement a plan'.

Resolved, on the motion of Mrs MacDonald that a footnote be inserted in paragraph 6.23 to note that responsibility for supporting establishment of Biodiversity Stewardship Agreements has now transferred from the Biodiversity Conservation Trust to the Department of Planning and the Environment.

Resolved, on the motion of Mrs MacDonald, that recommendation 12 be amended by inserting 'continue to' before 'investigate and implement options'.

Resolved, on the motion of Mrs MacDonald, that recommendation 14 be amended by inserting 'continue to' before 'increase the level of support'.

Resolved, on the motion of Mrs MacDonald, that recommendation 15 be amended by inserting 'continue to' before 'as a matter of priority'.

Mrs MacDonald moved: That recommendation 18 be omitted and the following recommendation be inserted instead:

**'Recommendation 18**

That DPE and BCT increase the transparency of the use of offsets to enable increased confidence in the outcomes of offsetting. This should include information on a website or database, subject to privacy law compliance, by:

- a. Visual representation of offsets sites, using spatial datasets where possible;
- b. Information about biodiversity stewardship agreements, such as type and quantity of credits, management actions and restoration uplift.
- c. Which credits or offset sites have been used to offset which developments.
- d. Which offset obligations have been transferred to the BCT.'

Question put.

The committee divided.

Ayes: Mrs MacDonald, Mr Mallard

Noes: Ms Higginson, Ms Jackson, Mr Pearson, Ms Sharpe.

Question resolved in the negative.

Resolved, on the motion of Ms Sharpe: That recommendation 18 be amended by:

- a) inserting 'and Biodiversity Conservation Trust' after 'That the Department of Planning and Environment'
- b) omitting the second dot point 'contains information about biodiversity stewardship agreements, including the type and quantity of credits involved, management actions required, and compliance status over time' and inserting instead 'contains information about biodiversity stewardship agreements, such as type and quantity of credits, management actions and restoration uplift.'

- c) omitting the fourth dot point 'contains information about the status of credit obligations at development sites' and inserting instead 'contains information about which credits or offset sites have been used to offset which developments'.

Resolved, on the motion of Mr Pearson, that recommendation 19 be amended by inserting 'continue to' in the first dot point before 'review arrangements for managing conflict of interest in the Biodiversity Offsets Scheme'.

Resolved, on the motion of Mr Pearson, that:

- The draft report, as amended, be the report of the committee and that the committee present the report to the House;
- The transcripts of evidence, submissions, tabled documents, answers to questions on notice, and correspondence relating to the inquiry be tabled in the House with the report;
- Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;
- Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, answers to questions on notice, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- The report to be tabled on Thursday 24 November 2022;
- The Chair to advise the secretariat and members if they intend to hold a press conference, and if so, the date and time.

## 6. Adjournment

The committee adjourned at 11.19 am, *sine die*.

Peta Leemen  
**Committee Clerk**

## Appendix 4 Dissenting statement

**The Hon Aileen MacDonald OAM MLC, Liberal Party**

**The Hon Scott Barrett MLC, The Nationals**

**The Hon Shayne Mallard MLC, Liberal Party**

The Inquiry by Portfolio Committee 7 – Planning and Environment into the Biodiversity Offset Scheme and the report entitled – ‘Integrity of the NSW Biodiversity Offsets Scheme’ makes a useful contribution to the ongoing improvement of the Scheme. In particular, recommendations which aim to address data gaps and provide assurance of Scheme performance.

However, the Report does not adequately acknowledge that there have now been three (3) reviews into the Biodiversity Offset Scheme in the last three (3) years and a significant reform program has been underway since mid-2021. For example, Recommendation 1 suggests that in addition to these 3 reviews, the recommendations of which are largely already being implemented, that the Department of Planning and Environment initiate another review.

Not adequately recognising the significant effort underway to improve the Scheme does a disservice to the countless hours input by government staff and Scheme participants who have been contributing to the Scheme improvements over recent years, as outlined on the environment.nsw website and overseen by Mike Mrdak AO, the former Secretary of Infrastructure Australia. A fourth review, of the Biodiversity Conservation Act, of which the BOS is governed, has also recently commenced.

These efforts have resulted in over 280 council staff trained, the delivery of improved market information to bolster the private market, a new charge system for payments into the BCT, simplified participation processes and fee waivers for establishing biodiversity stewardship agreements, as just some examples.

Further, we are concerned that the report does not present a balanced view of stakeholders’ evidence. For example, government officers’ evidence is minimally presented and added largely after the fact as addendums to each chapter, rather than integrated – rendering the bulk of views presented as negative and one-sided. A second example is that limited, if any, of the over 2000 current biodiversity stewardship holders’ views are presented.

Millions of dollars are returned each year to these landholders, largely in regional communities, enabling them to receive a stable revenue stream in a time of natural disasters and income uncertainty, yet their views are not adequately expressed.

Finally, there are numerous factual errors, especially relating to the role of the Biodiversity Conservation Trust. Some of the errors are rectified later in the report or via footnotes. The report should have included accurate and up to date information in the body of the report.

As previously stated, the report is useful, but captures a moment in time and does not adequately take into consideration changes that have already occurred.



