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OF CONCERNED SCIENTISTS

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WENTWORTH GROUP SUBMISSION TO THE PORTFOLIO COMMITTEE NO. 7 - PLANNING AND ENVIRONMENT

Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024

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About the Wentworth Group

The Wentworth Group of Concerned Scientists is an independent group of scientists, economists and professionals, working to secure the long-term health of Australia's land, water and biodiversity. We focus on solutions-based, science-driven policy reforms. Achievements since our inception include:

1. Working with former leaders to advance national water reform, leading to the **2004 National Water Initiative**, the ***Commonwealth Water Act 2007***, establishment of the $10 billion Commonwealth Water for the Future program and supporting delivery of the Murray-Darling Basin Plan.
2. Collaborating with the former Premier of NSW, Bob Carr, to develop a new model for landscape conservation in NSW, including the establishment of **Catchment Management Authorities** (now called Local Land Services), and developing science-based regulations to improve the management of native vegetation in NSW.
3. Working with the former Premier of Queensland, Anna Bligh, and CSIRO, to build a strong public policy case for carbon farming, resulting in the Commonwealth ***Carbon Farming Initiative Act 2011***.
4. Developing the landmark ***Accounting for Nature*** model, which contributed to the UN System of Environmental Economic Accounts adopted in 2013 and the *National Strategy for Environmental-Economic Accounting* endorsed by Commonwealth, state and territory Environment Ministers in April 2018.
5. Releasing the **Blueprint to Repair Australia's Landscapes** in 2024, laying out a 30-year strategy to repair Australia's degraded soils, native vegetation, inland waters and coastal ecosystems, and kick-start the recovery of our threatened species.

We appreciate the opportunity to contribute to the Planning and Environment Portfolio Committee's inquiry into the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024.

Background

Biodiversity in NSW is on a steady trajectory of decline: there are almost 1000 threatened species in NSW and only 50% of these are expected to survive the next 100 years; almost one-third of NSW's vegetation has been substantially altered and what remains only has approximately one-third of its original capacity to support native flora and fauna; some species have experienced population declines of nearly 75% and 72 species are already extinct in NSW.[1]

[11] Henry, K, et al. *Independent Review of the Biodiversity Conservation Act 2016 – Final Report.* State of NSW and the Department of Planning and Environment, Aug. 2023. Available at https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf

The NSW Biodiversity Offsets Scheme (BOS) is the primary tool intended to ensure that the biodiversity impacts resulting from clearing or development activities (that exceed scheme thresholds) are appropriately 'offset' with biodiversity gains elsewhere. In other words, the scheme is meant to ensure that biodiversity does not continue to decline in the name of progress in NSW.

The BOS has been subject to numerous independent reviews since its introduction in the NSW *Biodiversity Conservation Act 2016* (BC Act), with multiple reviews consistently finding the scheme to be lacking in key areas, ultimately contributing to the continued decline of biodiversity in NSW:

- The NSW Audit Office raised key concerns around scheme transparency, sustainability and integrity.[2]
- The Independent Review of the *Biodiversity Conservation Act 2016* found that the option to acquit obligations through payments to the Biodiversity Conservation Fund was compromising the integrity of the BOS.[3]
- In its first annual report into the NSW Biodiversity Credit Market, the NSW Independent Pricing and Regulatory Tribunal found the market was not effectively delivering on its key role of connecting buyers and sellers of biodiversity credits and enabling efficient trade.[4]

In summary, the BOS does not align with international best practice for biodiversity offsetting, it provides for significant variation to like-for-like rules which undermines the ability to genuinely offset impacts on affected species and places, the mitigation hierarchy is not consistently or rigorously applied, the scheme allows proponents to make a payment into a fund for impacts that are not offsettable and as a result the Biodiversity Conservation Trust accrues obligations that it simply cannot deliver.

In its 2022 inquiry into the Integrity of the NSW Biodiversity Offsets Scheme, this very committee (Portfolio Committee No.7) found that there were "serious flaws" in the design and operation of the scheme and questioned whether it was capable in its (then) current format of delivering "no net loss" for biodiversity.[5]

The Wentworth Group would support reforms that address these fundamental issues with the BOS, and in this submission, we examine the current reform proposal in that context. As such, in this submission, we focus on four of the committee's 19 recommendations for improving the BOS, as outlined in Portfolio Committee No.7's 2022 report[6] (paraphrased below):

- **Recommendation 1:** That the Department review and reform the design of the Biodiversity Offsets Scheme, to ensure it meets best practice principles for biodiversity offsetting, including strengthening the application of the mitigation (avoid, minimise, and only then

[2] Audit Office of New South Wales, Effectiveness of the Biodiversity Offsets Scheme, 31 August 2022, available at https://www.audit.nsw.gov.au/our-work/reports/effectiveness-of-the-biodiversity-offsets-scheme
[3] Henry, K, et al. *Independent Review of the Biodiversity Conservation Act 2016 – Final Report*. State of NSW and the Department of Planning and Environment, Aug. 2023. Available at https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf
[4] NSW Independent Pricing And Regulatory Tribunal, Biodiversity Market Monitoring Annual Report 2022–23, December 2023, available at www.ipart.nsw.gov.au/sites/default/files/cm9_documents/Annual-Report-2022-23-Biodiversity-Market-Monitoring-December-2023.PDF
[5] Legislative Council Portfolio Committee No.7, Integrity of the NSW Biodiversity Offsets Scheme, November 2022, available at https://www.parliament.nsw.gov.au/lcdocs/inquiries/2822/Report%20No.%2016%20-%20PC%207%20-%20Integrity%20of%20the%20NSW%20Biodiversity%20Offsets%20Scheme.pdf
[6] Ibid.

offset) hierarchy, setting clear thresholds for the un-offsettable, strengthening like-for-like requirements, and ensuring offsets result in genuinely additional biodiversity gains etc.

- **Recommendation 2:** That the NSW Government define a set of scientifically sound principles that govern the operation of the BOS and ensure these are embedded in the BC Act.
- **Recommendation 5:** That the Biodiversity Conservation Trust (BCT) urgently implement a process to ensure developer payments into the Biodiversity Conservation Fund are only permitted once developers have exhausted all other private market avenues and when genuine like-for-like offset credits will be available.
- **Recommendation 18:** That the Department and BCT increase transparency of the use of offsets to enable public scrutiny of the BOS, including establishing a centralised, publicly accessible database which allows spatial viewing of development and linked offset sites, contains information about biodiversity stewardship agreements and their ecological outcomes, and shows all BCT obligations and any discounting applied to major project obligations.

We have chosen to focus on these four recommendations as they all have the potential to be incorporated into the current Bill, and several elements of these recommendations are already foreshadowed within the current wording of the Bill, albeit in a manner which has considerable room for improvement.

Wentworth Group recommendations

The Wentworth Group is of the position that much more sweeping reforms to the BOS are needed than have been put forward in the Bill currently before Parliament, as detailed in multiple reviews of the scheme to date. However, this submission focusses on recommending a number of key changes to build on the contents of the current Bill.

Embedding best practice principles for biodiversity offsetting in legislation

There are a number of internationally recognised fundamental principles for biodiversity offsetting that should be applied to biodiversity offsetting schemes to ensure their ecological integrity. Portfolio Committee No.7 recognised these principles in their 2022 inquiry into the integrity of the BOS and recommended that scientifically sound principles be embedded in the BC Act (see recommendations 1 and 2 of the Committee's report).[7]

Setting a clear and robust pathway for the transition to net positive outcomes

The Bill introduces provision to the BC Act to transition the BOS to 'net positive' outcomes. However, it fails to define what is meant by net positive outcomes, and relegates the timeframe and mechanisms for transition to a subordinate strategy.

1. **We recommend that 'net positive' outcomes be clearly defined in legislation to set the standard and expectations for the transition.** This definition should include explicit reference to:
    a. the sites/locations to which the definition applies – for example, we would recommend that the net positive outcome should occur across affected sites, meaning the site that is being impacted and any associated offset site(s);
    b. the quantum of the increase required – we recommend requiring an absolute increase. This means that across affected sites, the amount of a given thing (for

[7] Ibid.

example, quality-weighted hectares of an ecosystem, or number of individuals of a threatened species) is greater following the action (e.g. development, clearing) and offset than it was prior to the commencement of the action. This increase should be directly attributable to the offset and unlikely to have occurred otherwise (i.e., it should be a genuinely additional biodiversity gain);

c. the timeframe within which the outcome must be delivered (after which it should be maintained) – we recommend the use of an ecologically meaningful timeframe, meaning that time delays do not add to the risks faced by the impacted entity, based on the ecological needs of the specific affected matter, including consideration of the immediacy of the threat of extinction; and
d. the type of the outcome to be achieved for affected entities – for example, we would recommend requiring an absolute increase in the viability of a species or ecological community, whereby viability means the ability of the species or community to survive and recover in the wild.

Ensuring that the specific entities impacted by development and clearing are those that actually benefit from biodiversity offsets

Currently the BC Act, and subordinate regulations, allow considerable flexibility in and avoidance of the requirement for biodiversity offsets to be like-for-like. The existing like-for-like requirements provide significant flexibility for offsetting impacts to native vegetation, allowing offsets to be delivered for a different plant community type to that impacted as long as it is within the same vegetation class. Further, like-for-like requirements can often be avoided altogether through the use of "variation rules", which allow for offsets to be delivered for a different species to that which was impacted and in a different region to the impact site. This circumvention of the like-for-like requirement simply enables impacts on already-threatened entities to continue to accrue entirely uncompensated, and contributes to their decline. This issue has been repeatedly identified as a major shortcoming of the BOS, yet the current Bill fails to address this key issue.

2. **We recommend enshrining the like-for-like requirement in legislation and applying it to all parties that may acquire an offset obligation.** This should be accompanied by the complete removal of legislative and regulatory provisions allowing for the use of variation rules to circumvent like-for-like requirements.

Rigorous application of the mitigation hierarchy to ensure that offsets are genuinely used as a last resort for unavoidable impacts

The Bill proposes the introduction of a statutory "avoid and minimise standard" to require biodiversity assessment reports to assess "genuine measures" to avoid and minimise impacts to biodiversity. While the Bill sets out the approach that should be taken to avoid and minimise impacts, and the information to be included in biodiversity development and biodiversity certification assessment reports, it does not appear to include a statutory requirement for a decision maker (consent authority) to ensure that "genuine measures" have been exhausted before allowing progression down an offset pathway. Furthermore, the Bill switches between the terms "reasonable measures" and "genuine measures" but does not go so far as to define what either may look like.

3. **We recommend strengthening section 6.3A in the Bill, and all relevant associated provisions in the BC Act, to ensure that the appropriate application of the mitigation hierarchy is a mandatory requirement that must be fulfilled by all proponents before approval can be given by a decision maker.** This should be supported by consistent use and definition of the terms "reasonable measures" or "genuine measures".

Clearly and comprehensively identifying irreplaceable biodiversity values and setting thresholds to prevent the use of offsets for these values

A fundamental principle of ecologically sound biodiversity offsetting schemes is that not all impacts can be compensated for; in other words, some things are simply not replaceable in a like-for-like manner, in an ecologically meaningful timeframe or in a given geographic region. In these circumstances, and should avoidance and minimisation not be feasible, impacts must not be allowed to occur, unless we wish to accept the continued decline of biodiversity and potential loss of species or ecological communities.

The existing legislative framework in NSW includes the concept of serious and irreversible impacts (SAII). The NSW Government describes SAII as being "about protecting the threatened species and threatened ecological communities (collectively called threatened entities) most at risk of extinction from potential development."[8]

Clause 6.7 in the Biodiversity Conservation Regulation 2017 (which is linked to s.6.5 of the BC Act) sets out the principles for determining whether a development will have a serious and irreversible impact on a threatened entity. Where the decision-maker determines that this is the case for a regular Part 4 development (i.e., Part 4 of the *Environmental Planning & Assessment Act 1979*), they are bound to refuse the development (s.7.16(2) of the BC Act). However, this does not apply to two other categories of Part 4 development, namely State Significant Development and State Significant Infrastructure (s.7.16(3) of the Act). That is, the decision-maker may still approve the development notwithstanding a finding that it will have serious and irreversible impacts on the species or ecosystem in question.

Similarly, continuing to exclude Part 5 activities (except State significant infrastructure) from the BOS means that any protections afforded by the scheme, including for SAII, do not extend to these types of activities (unless a proponent opts in to the scheme).

This disparity runs counter to the principles of ecologically sound biodiversity offsetting, and is arguably very problematic in the context of current Government policy, including the proposed transition to a net positive offsets scheme and the stated intention to set "the direction to halt and reverse biodiversity loss…"[9] in NSW.

Furthermore, we note that SAII is just one of 11 types of land with high biodiversity value described in Part 7 of the Biodiversity Conservation Regulation 2017. It is highly probable that irreplaceable biodiversity values exist in many other types of land identified in Part 7. Protection must also be extended to these biodiversity values if we are to genuinely set the direction to halting and reversing biodiversity loss.

4. **We recommend the comprehensive identification of irreplaceable biodiversity values, development of a register to keep an up-to-date log of these values and implementation of legislative provisions to prevent the use of offsets for any matters on the register**, including updating section 7.16 of the BC Act to:

[8] NSW Government Environment and Heritage. "Serious and Irreversible Impacts | Biodiversity Offsets Scheme." *Environment and Heritage*, 14 Feb. 2024, www2.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/clear-and-develop-land/serious-irreversible-impacts. Accessed 4 Sept. 2024.

[9] NSW Government. "NSW Plan for Nature Puts Biodiversity Protections, and Landholder Support Front and Centre." *NSW Government*, 17 July 2024, www.nsw.gov.au/departments-and-agencies/dpird/local-land-services/news/nsw-plan-for-nature. Accessed 4 Sept. 2024.

a. expand the scope to include impacts to all irreplaceable biodiversity values, not just serious and irreversible impacts (and similarly expand the principles in s.6.7 of the Biodiversity Conservation Regulation, or create a new s.6.7A, to encompass all irreplaceable biodiversity values).
b. bind all decision makers (including consent authorities, determining authorities and Ministers) to refuse ALL developments that will have serious and irreversible impacts on biodiversity values (except in exceptional circumstances of national public interest).

Ensuring the Biodiversity Conservation Trust does not continue to acquire offset obligations that it cannot acquit, by constraining the parameters in which developers can make payments into the Biodiversity Conservation Fund

The Biodiversity Conservation Trust (BCT) has long been acquiring offset obligations that it is unable to acquit in a timely manner, in accordance with the like-for-like requirement or, in some instances, at all. The Bill proposes a number of small changes intended to partially address this issue, including the introduction of statutory timeframe for the Biodiversity Conservation Trust to acquit obligations or seek Ministerial approval for progressing down an alternative pathway. We support the introduction of a statutory timeframe but note these proposed changes fall far short of addressing the key issue. Without further amendments, we believe the BCT will continue to accumulate unfunded obligations for the most vulnerable, challenging and costly to compensate protected matters. An inability to identify a suitable offset for a particular entity is a red flag that ought to alert decision-makers to offset scarcity. At the very least, it ought to trigger a requirement to investigate whether accepting further offset obligations is appropriate for such entities. However, the proposed arrangements provide no mechanism for this to occur, and to the contrary, will obscure offset scarcity while enabling continued declines of threatened entities.

5. **We recommend that:**
    a. **The payment to the BCF and transfer of an offset obligation to the BCT be stringently restricted to the delivery of offsets that deliver a like-for-like gain for the impacted protected matter.** (When such offsets are not available, the development or clearing activity generating the impact should not be approved, unless in exceptional circumstances of national public interest.)
    b. **The BCT be required to confirm the likely availability of like-for-like offsets before accepting a payment.** (A feasibility test should be introduced to ensure that payments are not accepted for impacts that cannot be compensated for with a like-for-like offset.)
    c. **Additional provisions be added to the BC Act whereby, if a like-for-like offset cannot be secured following receipt of a payment, the reason for this failing is investigated and response pathways are set in motion,** as follows:
        i. If the offset could not be secured due to an insufficient payment being made, this would trigger an adjustment to the financial calculator used to determine the payment rate OR
        ii. If the offset could not be secured due to ecological infeasibility or genuine scarcity, this would trigger the inclusion of that protected matter on the register of irreplaceable biodiversity values and prohibit acceptance of any further payments until the situation had demonstrably changed.

Improving the effectiveness of proposed transparency registers

The Bill proposes the development of a number of new registers to improve the transparency of the BOS, including statutory registers to track decisions and record offset obligations. However, the proposed registers could be enhanced through an expansion in scope and a more detailed overview of the information to be captured in the registers (currently proposed for subordinate regulations). Kujala et al., (2022) demonstrate that credible biodiversity offset schemes need to be supported by public registers that provide sufficient information to evaluate scheme effectiveness, particularly whether no net loss has been achieved, and facilitate adaptive management.[10] They identify the types of data and information that need to be captured in registers in order to inform, a) evaluation of proposed offset actions, b) post evaluation of offset effectiveness and, c) adaptive policy improvement.[11]

6. **We recommend that section 9.7 (amendments 60 and 61) of the Bill be strengthened to ensure that there is an explicit statutory requirement for the registers to include the data and information needed to enable robust and independent monitoring and evaluation of the scheme, and inform improvement of the scheme over time,** including:
    a. The data and information identified in recommendation 18 of the Portfolio Committee No.7 2022 report, as follows**:**
        i. spatial data for the development and stewardship sites, including site boundaries;
        ii. information about biodiversity stewardship agreements, such as type and quantity of credits, management actions and restoration uplift;
        iii. information about the ecological outcomes of biodiversity stewardship agreements;
        iv. information linking credits or offset sites to relevant developments;
        v. details of offset obligations transferred to the Biodiversity Conservation Trust; and
        vi. details of offset obligations for all major projects, including any discounting.
    b. A sufficient level of data and information to facilitate understanding of:
        i. The type and amount of loss approved at each development/clearing site;
        ii. The type and amount of gain projected at each associated offset site, including the way in which gains are expected to be generated and the counterfactual assumptions against which projections have been made; and
        iii. The actual gain achieved at each offset site, as tracked through time.

[10] Kujala, H., Maron, M., Kennedy, C. M., Evans, M. C., Bull, J. W., Wintle, B. A., Iftekhar, S. M., Selwood, K. E., Beissner, K., Osborn, D., & Gordon, A. (2022). Credible biodiversity offsetting needs public national registers to confirm no net loss. *One Earth, 5(6)*, 650–662. https://doi.org/10.1016/j.oneear.2022.05.011
[11] Ibid.