

Submission on the Statutory Review of the *Biodiversity Conservation Act 2016* (NSW)

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Contact: **Olivia Irvine**
President, NSW Young Lawyers

Brigitte Rheinberger
Chair, NSW Young Lawyers Environment and Planning Sub-Committee

Contributors: Brigitte Rheinberger, Jessica Lighton, Jessica Baldwin, Andrew Mahler, Phoebe Saxon

The NSW Young Lawyers Environment and Planning Sub-Committee (**Sub-Committee**) make the following submission in response to the statutory five-year review of the *Biodiversity Conservation Act 2016* (NSW)

NSW Young Lawyers

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NSW Young Lawyers accepts the science and wide-ranging effects of climate change, including as outlined by the United Nations Intergovernmental Panel on Climate Change in its leading expert reports. NSW Young Lawyers considers that Australia has the ability and a responsibility to rapidly reduce emissions and actively help to keep the world's emissions within its remaining 'carbon budget'.

NSW Young Lawyers recognises that there is a climate emergency, posing an unprecedented challenge for human rights and the rule of law. In order for there to be intergenerational equity and climate justice, as well as interspecies equity and ecological sustainability, the law needs to enable and require Australia to rapidly decrease CO₂ (and other greenhouse gas) emissions and to be legally accountable for their adverse contributions to the impacts of climate change.

The Sub-Committee comprises of a group of approximately 250 members interested in our natural and built environment. The Sub-Committee focuses on environmental and planning law issues, raising awareness in the profession and the community about developments in legislation, case law and policy. The Sub-Committee also concentrates on international environment and climate change laws and their impact within Australia.

Summary of recommendations

1. Amend section 1.3(b) of the *Biodiversity Conservation Act 2016* (NSW) to expressly include restoration and enhancement of biodiversity (in addition to maintenance) as an object of the Act.
2. Amend section 1.3(h) of the *Biodiversity Conservation Act 2016* (NSW) to reflect the need for urgent action to manage and reverse the rate of biodiversity loss in New South Wales.
3. Amend section 1.3(m) of the *Biodiversity Conservation Act 2016* (NSW) to reflect the growing range of alternative marked-based conservation mechanisms.
4. Amend the Biodiversity Offsets Scheme in accordance with Recommendation 1 of the NSW Parliamentary Inquiry to ensure best practice principles for biodiversity offsetting (and conservation) are embedded within the Scheme going forward.
5. Update the Biodiversity Conservation Investment Strategy 2018 as part of the *Biodiversity Conservation Act 2016* (NSW) review process and develop a mechanism to encourage priority investment in undamaged ecological refuge areas in the aftermath of major environmental events.
6. Increase the Biodiversity Conservation Trust's financial assistance program and explicitly include reference to the cost of the initial ecological assessment of the land.
7. Establish a program for landholders to access pre-assessments of land with experienced advisors.
8. Consider alternative incentives for the private conservation of land, for example tax incentives.
9. Amend the *Biodiversity Conservation Act 2016* (NSW) to require decision makers to consider and apply the precautionary principle.
10. Amend the *Biodiversity Conservation Act 2016* (NSW) framework for biodiversity credits and offsets so that it explicitly considers incremental and cumulative impacts on the environment caused by multiple or repeated actions.

Introduction

1. The Sub-Committee welcomes the opportunity to comment on the ‘Statutory Review of the Biodiversity Conservation Act 2016’.
2. In its infancy, the *Biodiversity Conservation Act 2016* (NSW) (**BC Act**) was heralded as a “new era” of environmental law based on best available science, which would slow down and reverse long-term biodiversity decline in New South Wales (**NSW**), in part because it was the first Australian environmental statute with a climate-related object clause (as at 2018), and arguably adopted an outcomes-based approach.¹
3. At the same time, the BC Act was criticised because its definition of native species did not account for the migration of species from other states or territories into NSW as a result of shifting distribution due to climate change. It was also criticised for abolishing NSW’s nation-leading “red flag” system for identifying areas and species that should not be subject to further development impacts and offsetting, and generally because it was feared to mark a return to broad scale clearing and species extinction in NSW.²
4. For the reasons that follow, we submit that the BC Act has failed to achieve its potential and the state of biodiversity conservation in NSW in the five years since it came into effect has deteriorated considerably. This submission makes recommendations for amendments to the BC Act in line with the urgent need to address biodiversity decline and best optimise opportunities to improve biodiversity conservation in NSW.
5. This submission addresses focus questions 1, 5, 10 and 14 in the Consultation Paper.

How effective are the objects of the Act to restore, conserve and enhance biodiversity today and into the future (question 1)?

Amend the objects of the BC Act to expressly refer to restoration of biodiversity

6. The overarching purpose of the BC Act is to “maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future, consistent with the principles of ecologically sustainable development”.

¹ Guy Dwyer, ‘A Legislative Pigsty? The New Regime for Assessing and Managing Biodiversity Impacts Associated with State Significant Development in New South Wales’ (2018) 35 *Environmental and Planning Law Journal* 670, 670-1; Phillipa McCormack, ‘The Legislative Challenge of Facilitating Climate Change Adaptation for Biodiversity’ (2018) 92 *Australian Law Journal* 546, 552, 555; Sophie Whitehead, ‘Rethinking threatened species legislation in the context of climate change’ (2017) 34 *Environmental and Planning Law Journal* 94, 106.

² McCormack (n 1) 556; Robert Holbrook and Jan McDonald, ‘Offsetting Cultural Heritage: Lessons from the Theory and Practice of Biodiversity Offsets’ (2018) 35 *Environmental and Planning Law Journal* 247, 262; NSW Rural Team, ‘Questions Raised about Landmark Changes to NSW Land Clearing Laws’, *ABC News* (online, 28 December 2016) <<https://www.abc.net.au/news/rural/2016-12-28/landmark-changes-to-nsw-land-clearing-laws/8123918>>.

7. In order to effectively restore, conserve and enhance biodiversity today and into the future, we submit that some of the existing objects of the BC Act should be amended to better reflect the state of biodiversity in NSW.
8. Section 1.3 of the BC Act lists 15 sub-purposes, including that the BC Act is to “maintain the diversity and quality of ecosystems and enhance their capacity to adapt to change and provide for the needs of future generations”.
9. While the Sub-Committee agrees that it is important to maintain biodiversity, it is also equally important to restore damaged ecosystems.
10. Offsetting is currently a central feature of the BC Act. However, it only works on a project-by-project basis, and only once an impact is determined to have occurred. While it is important to address declines in biodiversity caused by specific development, it is also important to work towards enhancing biodiversity across the State. The BC Act should therefore seek to facilitate the maintenance and restoration of biodiversity.
11. This would bring the objects of the BC Act in line with Target 2 of the Kunming-Montreal Global Biodiversity Framework,³ which requires nations to ensure that at least 30 per cent of areas of degraded terrestrial, inland water, and coastal and marine ecosystems are under effective restoration.
12. For these reasons, we recommend that section 1.3(b) be amended to include a specific reference to maintaining and restoring the diversity and quality of ecosystems.

Recommendation 1: Amend section 1.3(b) of the BC Act to expressly include restoration and enhancement of biodiversity (in addition to maintenance) as an object of the BC Act.

Amend the objects to reflect the urgency of action required to prevent biodiversity loss

13. A number of sources recognise that there is an urgent need to address biodiversity loss.⁴ A recent report published by the Department of Planning, Industry and Environment titled the *NSW Biodiversity Outlook Report* estimates that without appropriate management, only 50% of listed threatened species and 59% of listed threatened ecological communities will still exist in 100 years.⁵
14. The Kunming-Montreal Framework also recognises the need for urgent action to address biodiversity loss. Target 4 expressly contemplates ensuring “urgent management actions to halt human induced extinction of known threatened species”.⁶

³ United Nations Environment Programme, *Kunming-Montreal Global Biodiversity Framework*, 15th mtg, Agenda Item 9A, UN Doc CBD/COP/15/L.25) (18 December 2022).

⁴ Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (Report, 30 August 2022) 1 (*'Auditor General Report'*); Department of Planning, Industry and Environment, *NSW Biodiversity Outlook Report: Results from the Biodiversity Indicator Program* (Report, 21 May 2020) vi (*'Biodiversity Outlook Report'*).

⁵ *Ibid.*

⁶ United Nations Environment Programme, *Kunming-Montreal Global Biodiversity Framework*, 15th mtg, Agenda Item 9A, UN Doc CBD/COP/15/L.25) (18 December 2022).

15. One of the current objects of the BC Act is to “support conservation and threat abatement action to slow the rate of biodiversity loss and conserve threatened species and ecological communities in nature”.⁷
16. To reflect the urgency of action needed We recommend that section 1.3(h) be amended as follows:

“(h) to ~~support~~ facilitate urgent conservation and threat abatement action to ~~slow~~ manage and reverse the rate of biodiversity loss and conserve threatened species and ecological communities in nature, and”

Recommendation 2: Amend section 1.3(h) of the BC Act to reflect the need for urgent action to manage and reverse the rate of biodiversity loss in New South Wales.

Amend the objects to consider alternative market-based conservation mechanisms

17. As noted above, biodiversity offsetting is an integral feature of the BC Act.
18. The complexity and challenges presented by biodiversity offsets are well documented.⁸ Ruoso and Plant usefully summarise these issues as follows:

“The idea that ecological loss – especially loss of native vegetation – could be compensated by providing an ecological gain on another site has been widely criticised and challenged in the scientific literature ... and environmental activists’ circles ... Criticism of biodiversity offsetting often centres on its (lack of) ecological soundness, particularly whether offsets can indeed halt biodiversity losses.”⁹

19. Specifically in relation to the NSW offsets scheme, members of the Sub-Committee have noted that, in their experience, it can be difficult to find certain types of offsets. This can be particularly problematic where offsets are required as a condition of development consent and can cause project delays.
20. The Sub-Committee acknowledges that biodiversity offsets may be appropriate in certain circumstances, but only if a risk-based mitigation hierarchy is applied and offsets are used as a “last resort” measure (rather than as a default).
21. Target 19 of the Kunming-Montreal Framework recognises that there are a number of alternative market-based mechanisms for addressing biodiversity loss, including biodiversity credits, benefit-sharing mechanisms, ecosystem services and green bonds.¹⁰

⁷ *Biodiversity Conservation Act 2016* (NSW) s 1.3(h).

⁸ Laure-Elise Ruoso and Roel Plant, ‘Distributive and Contextual Equity in Landholder Participation in Biodiversity Offsets: A Case Study of Biodiversity Offsets in New South Wales, Australia’ (2021) 17(1) *Ecosystems and People* 6; *Auditor General Report* (n 4) 12.

⁹ Ruoso and Plant (n 8) 6 (citations omitted).

¹⁰ United Nations Environment Programme, *Kunming-Montreal Global Biodiversity Framework*, 15th mtg, Agenda Item 9A, UN Doc CBD/COP/15/L.25) (18 December 2022).

22. We also note the alternatives such as “target-based ecological compensation” developed by the Science for Nature and People Partnership, which is designed to not only “offset” impacts from development, but to require an increase at the offset site of the same amount of vegetation impacted.¹¹
23. One of the current objects of the BC Act is to “establish market-based conservation mechanisms through which the biodiversity impacts of development and land use change can be offset at landscape and site scales”.¹²
24. Given the challenges associated with biodiversity offsets, and having regard to the extensive alternative market mechanisms available, we recommend amending section 1.3(m) as follows:

“(m) to establish market-based conservation mechanisms through which the biodiversity impacts of development and land use change can be ~~offset~~ managed at landscape and site scales, and ecosystems can be enhanced.”

Recommendation 3: Amend section 1.3(m) of the BC Act to reflect the growing range of alternative marked-based conservation mechanisms.

How current and comprehensive are the existing elements of the Act for biodiversity conservation (question 5)?

Biodiversity Offsets Scheme

25. The Sub-Committee submits that the existing elements of the BC Act are not sufficiently up-to-date and comprehensive for conserving biodiversity and should be amended in line with the recommendations of the NSW Parliamentary Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme (**Inquiry**).
26. The Inquiry recognised 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.”¹³ However, the Inquiry formed the view that “the design of [the Biodiversity Offsets Scheme (Scheme)] has swung too far in favour of facilitating development, at the expense of irreplaceable biodiversity values”.¹⁴
27. Further, the Inquiry was concerned that the Scheme provides excessive scope for development to occur without “genuine, additional, ecologically equivalent” offsets being in place, and that the Scheme abandons many of the internationally accepted best practice principles for biodiversity offsetting.¹⁵

¹¹ Jeremy Simmonds, ‘Biodiversity Offsetting Is Contentious: Here’s an Alternative’ (Blog Post, 23 December 2019) <<https://www.iucn.org/news/business-and-biodiversity/201912/biodiversity-offsetting-contentious-heres-alternative>>.

¹² *Biodiversity Conservation Act 2016* (NSW) s 1.3(m).

¹³ Legislative Council Portfolio Committee No. 7, Parliament of New South Wales, *Integrity of the NSW Biodiversity Offsets Scheme* (Final Report, November 2022) 2.98.

¹⁴ *Ibid.*

¹⁵ *Ibid* 2.99.

28. Recommendation 1 of the Inquiry identified a number of aspects of the Scheme that should be reformed to ensure it embodies best practice principles for biodiversity offsetting (and, by extension, conservation):

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.*¹⁶

29. On the basis of Recommendation 1 of the Inquiry, we submit as follows:

- a. *'No net loss' standard:* Adopting a “no net loss” standard as the core basis for the Scheme results in a mechanism that inherently does not improve environmental outcomes; at best, only a maintenance of the status quo is achieved. Additionally, this standard does not acknowledge the current downward trajectories of biodiversity loss within NSW and does not recognise that positive action is required to halt and reverse this trajectory. We note that the Inquiry recognised that International Union for the Conservation of Nature principles stipulate that biodiversity offsets must aim to achieve no net less and preferably a net gain of biodiversity.¹⁷ An emphasis on positive improvement to biodiversity offsetting should be considered to address this concern, for instance by amending the standard to 'not net loss or better', 'conserve and improve', or 'net gain'.
- b. *'Like-for-like' requirements:* Currently, although the Scheme adopts a 'like-for-like' approach to offsets, offsets are often not strictly 'like-for-like' and the design of the mechanism allows for too much flexibility and deviation from genuine like-for-like settings such that, in some circumstances, the conservation intention driving the offsetting is rendered redundant. For instance:

¹⁶ Ibid xi.

¹⁷ International Union for Conservation of Nature, 'Issues Brief: Biodiversity Offsets' (Issues Brief, September 2016) <https://www.iucn.org/sites/default/files/2022-04/biodiversity_offset_issues_briefs_final_0.pdf>.

- Offsetting of vegetation within the same vegetation class rather than the same plant family;¹⁸
- The permitted spatial locations of offsets can deviate significantly from the impacted biodiversity area that is being offset.¹⁹ For example, development proponents could destroy/develop Swift Parrot habitat in the Upper Hunter region but offset it with conservation of Swift Parrot habitat and populations on the NSW south coast, which could lead to an increased risk of local extinctions; and
- Offsetting species with different species of the same or higher threat status provided the different species is located in the same or adjoining subregion, or any other subregion within 100 kilometres of the impacted site.²⁰

The Inquiry concluded that 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.²¹ The current 'like-for-like' mechanism does not represent accepted biodiversity conservation best practice and includes broad variations and ancillary rules that can be used by development proponents to avoid the 'like-for-like' offset requirements. This design has led to a significant tension between the competing priorities of sound ecological outcomes and a functioning offset market.

- c. *'Avoid, minimise, offset' hierarchy*: Under the Scheme, offsetting should be the last resort to conserve biodiversity values with development proponents first required to avoid and minimise impacts to biodiversity values. However, in numerous submissions to the Inquiry, it was demonstrated that the reality of the hierarchy is that the 'avoid' and 'minimise' aspects are inadequately emphasised and attempts to avoid and minimise impacts are often perceived as 'tick-box' exercises by development proponents.²² Additionally, there is currently no clear guidance of how the hierarchy should be implemented or what constitutes best practice, including guidance on the necessary steps and evidence required by development proponents to demonstrate that genuine attempts to avoid and minimise impacts have been made prior to resorting of offsetting. The Scheme should be strengthened to ensure offsets are genuinely employed as a last resort and reserved for the truly unavoidable impacts of development.

Recommendation 4: Amend the Biodiversity Offsets Scheme in accordance with Recommendation 1 of the NSW Parliamentary Inquiry to ensure best practice principles for biodiversity offsetting (and conservation) are embedded within the Scheme going forward.

Private Land Conservation

30. Investment in private land conservation in NSW is informed by the Biodiversity Conservation Investment Strategy 2018 (**Investment Strategy**) which was established in accordance with Part 5 Division 1 of the

¹⁸ *Biodiversity Conservation Regulation 2017* (NSW) cl 6.3(2).

¹⁹ *Ibid* cl 6.3(2).

²⁰ *Ibid* cl 6.4(1).

²¹ Legislative Council Portfolio Committee No. 7, Parliament of New South Wales, *Integrity of the NSW Biodiversity Offsets Scheme* (Final Report, November 2022) 2.101.

²² *Ibid*.

BC Act. The Investment Strategy informs a range of mechanisms adopted by the Biodiversity Conservation Trust (**BCT**) to encourage private land conservation, including co-investment partnerships, fixed price offers and conservation tenders.²³

31. The Investment Strategy has not been updated since 2018. The Minister is able to amend the Investment Strategy at any time²⁴ and subsections 5.3(4) and 5.3(5) of the BC Act outline criteria the Minister must consider in preparing the Investment Strategy and what the Investment Strategy must include.
32. The Investment Strategy identifies 'priority investment areas' where higher rated priority investment areas are the primary focus of government investment in private land conservation.²⁵ However, the Investment Strategy does not provide a mechanism by which new (or newly important) biodiversity areas may be promptly assessed by the BCT and identified as priority investment areas. As such, this may limit the available funding for private land conservation for new biodiversity areas, especially in the aftermath of major environmental events where such biodiversity areas may take on new significance as ecological refuges due to the destruction of surrounding areas.
33. For example, the Investment Strategy was prepared prior to the 2019-2020 bushfires that burnt over 5.52 million hectares across NSW.²⁶ The current investment priorities under the Investment Strategy do not directly encourage priority investment in unburnt areas to protect and conserve unburnt, established biodiversity areas, particularly where those areas do not align with the existing priority investment area maps.
34. Updating the Investment Strategy to expressly include a mechanism by which the BCT can rapidly identify new areas of biodiversity, such as unburnt areas in the wake of major bushfires, as priority investment areas, would empower the BCT to prioritise government investment for those new areas which, in turn, would likely facilitate an uptake in private land conservation for the relevant areas. We note that this issue also goes towards Focus Question 6 of the Consultation Paper.²⁷

Recommendation 5: Update the *Biodiversity Conservation Investment Strategy 2018* as part of the *Biodiversity Conservation Act 2016* (NSW) review process and develop a mechanism to encourage priority investment in undamaged ecological refuge areas in the aftermath of major environmental events.

²³ See New South Wales Biodiversity Conservation Trust, 'Conservation Management Program, *Biodiversity Conservation Trust* (Web Page) <<https://www.bct.nsw.gov.au/conservation-management-program>>.

²⁴ *Biodiversity Conservation Act 2016* (NSW) s 5.4.

²⁵ State of New South Wales and Office of Environment and Heritage, *Biodiversity Conservation Investment Strategy 2018* (Web Page, February 2018), 10 <<https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/about-the-biodiversity-offsets-scheme/biodiversity-conservation-trust/biodiversity-conservation-investment-strategy>>.

²⁶ New South Wales Independent Bushfire Inquiry, *Final Report of the NSW Bushfire Inquiry* (Report, 31 July 2020), 2 <<https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/NSW-Bushfire-Inquiry-1630/Final-Report-of-the-NSW-Bushfire-Inquiry.pdf>>.

²⁷ New South Wales Department of Planning and Environment, *Statutory Review of the Biodiversity Conservation Act 2016* (Consultation Paper, March 2023) 9.

How could the Act best support partnerships with private landholders to conserve, restore and enhance biodiversity across NSW (question 10)?

35. Noting that more than 270,000 hectares of NSW land tenure have some form of private land conservation, and that the BCT have entered into 1,665 agreements as at 2020,²⁸ the Sub-Committee acknowledges the crucial role of private landholders in the administration of the BC Act in order to conserve biodiversity in NSW.
36. Landholders can become involved in private land conservation by voluntarily entering private land conservation agreements with the Minister or the BCT over some or all of their land under Part 5 of the BC Act. The types of private land conservation agreements under that part include: Biodiversity Stewardship Agreements; Conservation Agreements; and Wildlife Refuge Agreements. Landholders can also become involved via schemes run by non-government organisations.
37. The Sub-Committee understands that some of the key issues private landholders face in accessing the scheme are a lack of economic or information resources in relation to participation, as well as perceived risks in relation to the value of land and potential competing land management obligations.

Barriers to accessing the scheme

38. As noted above, whilst the BC Act provides a funding commitment to support private land conservation under the Biodiversity Conservation Investment Strategy, this relates largely to funding the location priority areas.
39. Whilst landholders will receive yearly payments from the government to manage their land once established (broadly funded by those who purchase land for offsets), significant resources are required to be expended prior to entering into the agreement, in particular for an initial ecological assessment of the land (which can cost approximately \$20,000-\$30,000).²⁹ Access to financial and staff resources enables landholders to commence the process and undertake that initial assessment, as well as to negotiate the terms of their participation.³⁰
40. This financial barrier will only intensify noting that in 2022 the BCT sought approval from the Minister of Environment and Heritage to increase the fee for establishing a Biodiversity Stewardship Agreement (BSA) ten-fold, from \$2,650 to \$26,500.³¹
41. Whilst the BCT currently offers financial assistance to landholders who intend to participate in the BCT's fixed price offers and credit tenders to assist with the costs of entering into an agreement, the Sub-Committee recommends that this funding be increased and expanded in order to reach a more diverse group of potential landholders and include the costs involved in the initial ecological assessment.

Recommendation 6: Increase BCT's financial assistance program and explicitly include reference to the cost of the initial ecological assessment of the land

²⁸ *Biodiversity Outlook Report* (n 4) 51.

²⁹ Ruoso and Plant (n 8) 13.

³⁰ *Ibid* 13.

³¹ *Auditor General Report* (n 4) 33.

42. A potential landholder's experience and access to information and technical support in relation to the operation of the schemes is another barrier faced by landholders. Access to individualised information and support through formal and informal networks can assist landholders make educated choices in relation to the entering into of agreements and how such agreements will affect their land and its value in the future.
43. Noting this, the Sub-Committee believes the BCT should assess the possibility of establishing a program for landholders to access pre-assessments of their land by liaison officers or technical advisors prior to fronting the costs of initial assessments and making decisions.³²

Recommendation 7: Establish a program for landholders to access pre-assessments of land with experienced advisors

Alternative incentives

44. The above recommendations cover some of the barriers landholders may face in accessing the current scheme. However, as noted above, the current scheme promotes a like-for-like system of biodiversity offsets as the dominant incentive for landholders to enter into the system and benefit. This does not necessarily operate to best restore and enhance biodiversity in NSW by enshrining environmental protections in law.
45. Rather, the Sub-Committee recommends alternative incentives for the preservation of land for biodiversity be explored in recognition of the diverse views of landholders on the effectiveness of offsets for achieving biodiversity. For example, tax incentives could be considered as one option to encourage participation and conservation management activities on land.³³

Recommendation 8: Consider alternative incentives for the private conservation of land, for example tax incentives

Does the Act provide the appropriate framework for avoiding and minimising impacts and addressing serious and irreversible impacts (question 14)?

46. The Sub-Committee submits that the BC Act does not provide an appropriate framework for avoiding and minimising impacts and addressing serious and irreversible impacts. An appropriate framework for avoiding and minimising impacts and addressing serious and irreversible impacts should require consideration and application of the precautionary principle.

³² Ruoso and Plant (n 8) 17.

³³ Smith et al, 'Reforms Required to the Australian Tax System to Improve Biodiversity Conservation of Private Land' (2016) 33 *Environmental and Planning Law Journal* 443.

47. The precautionary principle is a well-established principle of ecologically sustainable development (ESD). It is defined in s 6(2)(a) of the *Protection of the Environment Administration Act 1991* (NSW) (POEA Act) as follows:³⁴

"...If there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

In the application of the precautionary principle, public and private decisions should be guided by:

(i) *Careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and*

(ii) *An assessment of the risk-weighted consequence of various options."*

48. The leading case in New South Wales considering the precautionary principle is *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 (**Telstra**), at [107]-[183].³⁵ At [121] of *Telstra*, Preston CJ of LEC stated:³⁶

"The principles of ecologically sustainable development are to be applied when decisions are being made under any legislative enactment or instrument which adopts the principles: Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources [2004] NSWLEC 122 (7 April 2004) at [178]; and Bentley v BGP Properties Pty Ltd [2006] NSWLEC 34 (6 February 2006) at [57]."

49. The purpose of the BC Act within s 1.3 is "to maintain a healthy, productive and resilient environment for the greatest well-being of the community, now and into the future, consistent with the principles of ecologically sustainable development (described in section 6(2) of the [POEA Act]),³⁷ thereby capturing adopting the principles of ESD and the precautionary principle in decision-making under the BC Act.

50. However, currently there are no specific frameworks or requirements within the BC Act for decision makers to consider and apply the precautionary principles other the guiding purpose under s 1.3 of the Act. It is recommended that ecologically sustainable development, and the precautionary principle, are embedded more firmly into the decision-making steps under the BC Act to ensure that environmental impacts are addressed in an appropriate way.

Recommendation 9: That the BC Act be amended to *require* decision makers to consider and apply the precautionary principle.

51. Further, the BC Act does not provide an appropriate framework for avoiding and minimising impacts and addressing serious and irreversible impacts because it, and specifically the biodiversity credits and offsets framework it provides for, does not explicitly consider the incremental and cumulative impacts on

³⁴ *Protection of the Environment Administration Act 1991* (NSW) s 6(2)(a).

³⁵ *Telstra Corporation Limited v Hornsby Shire Council* (2006) 67 NSWLR 256; [2006] NSWLEC 133, [107]-[183] (Preston CJ).

³⁶ *Ibid* [121] (Preston CJ).

³⁷ *Biodiversity Conservation Act 2016* (NSW) s 1.3.

the environment of multiple or repeated actions. As Preston CJ of stated in *Telstra* at [130] (our emphasis):³⁸

“Threats to the environment that should be addressed include direct and indirect threats, secondary and long-term threats and the incremental or cumulative impacts of multiple or repeated actions or decisions. Where threats may interact or be interrelated (for example where action against one threat may exacerbate another threat) they should not be addressed in isolation: see “Guidelines for applying the precautionary principle to biodiversity conservation and natural resource management”, R Cooney and B Dickson (eds) Biodiversity and the Precautionary Principle, Risk and Uncertainty in Conservation and Sustainable Use, Earthscan, 2005 at p. 302, Guideline 6. “

52. There has been ongoing criticism of biodiversity offsetting schemes, such as the one established under the BC Act. These include:
- a. The scientific community has widely criticised the approach of biodiversity offsetting that says that the loss of native vegetation can be "offset" through improving the native vegetation in another area. This does not necessarily add to the biodiversity of any area.³⁹
 - b. "Offsetting" the loss of biodiversity in one area with something similar in another area may lead to fragile ecosystems and ecosystem interconnectedness. This will be exacerbated by climate change, with increases in temperature and climate causing species to migrate from traditional locations. The resulting loss of biodiversity and habitat will further force species into more developed areas and will result in more impacts to species populations.
 - c. The BC Act also provides for the payment into a fund, rather than securing and retiring "like for like" biodiversity credits, which has been criticised as legitimising, rather than preventing, habitat destruction,⁴⁰ and could be seen to exacerbates a disconnect between the destruction of biodiversity and "offsetting". The Sub-Committee is unsure in practice how the fund is used to ensure that ESD principles are considered as part of the offsetting and conservation objectives of the BC Act.

Recommendation 10: That the BC Act’s framework for biodiversity credits and offsets explicitly consider the incremental and cumulative impacts on the environment of multiple or repeated actions.

Concluding Comments

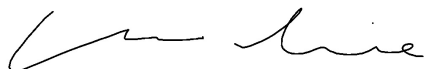
NSW Young Lawyers thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

³⁸ *Telstra Corporation Limited v Hornsby Shire Council* (2006) 67 NSWLR 256; [2006] NSWLEC 133, [120] (Preston CJ).

³⁹ Ruoso and Plant (n 8).

⁴⁰ Roel Plant and Laure-Elise Ruoso, ‘Landholder perceptions of biodiversity offsetting rights and responsibilities: implications for policy reform in New South Wales, Australia’ (2023) 19(1) *Ecosystems and People* 1.

Contact:



Olivia Irvine

President

NSW Young Lawyers

Email: president@younglawyers.com.au

Alternate Contact:



Brigitte Rheinberger

Chair

NSW Young Lawyers Environment and Planning
Committee

Email: envirolawexec@gmail.com