

11 August 2023

Biodiversity Assessment Method Review
Locked Bag 5022
Parramatta NSW 2124

Via email: BAM.Consultation@environment.nsw.gov.au

Dear Sir or Madam,

Biodiversity Assessment Method 5-year review

As the leading development industry body, representing more than 450 member companies and agencies across the public and private sector the Urban Development Institute of Australia NSW (**UDIA**) welcomes the review of the Biodiversity Assessment Method (BAM) and appreciates the opportunity to offer our comments.

UDIA invests in evidence-based research to inform our advocacy to Government which enables our industry to create liveable, affordable and connected smart cities. Our members are committed to ecologically sustainable development and to improving environmental outcomes in NSW. We support the use of a transparent scientific method to evaluate development proposals to achieve optimal environmental, social and economic outcomes.

In the context of the current housing crisis, it is important to acknowledge that unresolved biodiversity issues have become a major constraint to delivering housing in NSW, especially in the regions. UDIA's 2022 Greenfield Land Supply Pipeline Report revealed that 62% of greenfield lots in the development pipeline are held up due to biodiversity constraints in the Lower Hunter and Central Coast. Feedback from UDIA members indicates that the loss of yield on zoned land and/or the cost of biodiversity offsetting both have material impacts on the financial viability of proposed projects. Our concern is that many projects will have become unviable after the application of the BAM.

Where development land can be delivered, biodiversity offsetting adds to the cost of delivering housing, employment land and infrastructure, and contributes to making housing more expensive. For example, research commissioned by UDIA in 2021 using Biodiversity Offset Payment Calculator (BOPC) pricing at the time, suggests that biodiversity offsetting adds at least \$14,000 to the cost of delivering a new housing lot in the Lower Hunter.

That cost will be higher today, since recent reforms have generally increased offset credit pricing, in some cases by as much as 500%. A copy of the EMM report is available at this [link](#).

UDIA maintains significant concerns about the operation of the biodiversity system in NSW and continues to advocate for reform. UDIA is concerned that the Biodiversity Conservation Act (BC Act)

is not working: its implementation is creating a lack of connectivity for conservation land around urban growth areas and an undersupply of offset credits while at the same time, stymying the delivery of desperately needed new housing, jobs and infrastructure for growing communities. UDIA's most recent recommendations about the system can be found in our submission to the statutory 5-year review of the BC Act at [this link](#).

In this context, UDIA welcomes the review of the BAM as an opportunity to evaluate whether the method is fit for purpose to achieve ecologically sustainable development (**ESD**).

Background

The BC Act establishes the Biodiversity Offsets Scheme (BOS) which guides actions and decisions, predicated on the use of scientific methodology through the Biodiversity Assessment Methodology to determine the biodiversity impacts of a development proposal.

While the theoretical concepts underlying the BOS are sound, its implementation has added too much uncertainty, complexity and cost to the development process. It has also been criticised as hindering optimal biodiversity outcomes.

Section 1.3 (k) of BC Act states one of the purposes of the Act is:

to establish a framework to avoid, minimise and offset the impacts of proposed development and land use change on biodiversity

UDIA believes a workable framework has not been adequately or appropriately established since the enactment of the BC Act, and this failing is the underlying cause of much of the problems.

In evaluating the state of the environment, some have criticised the BC Act and claimed that the BOS makes it too easy to clear land and places too much emphasis on offsetting, versus avoiding and minimising. UDIA strongly rejects that assertion. The development industry's experience clearly points to the opposite conclusion: the BC Act has made it much harder to deliver new housing, jobs and infrastructure on land already zoned for that purpose, and much more difficult to rezone new land.

UDIA recommends the three changes below with further detail provided later in this document:

- 1. Changes are made to the BAM to provide clear guidance on avoid and minimise so the principles are applied consistently across planning authorities. This should include clearer definitions and where appropriate, quantify what must be avoided.**
- 2. Apply the avoid and minimise actions once only (either at rezoning or as part of the DA, but not both), and establish a clear and conclusive resolution point as early as possible in the planning process.**
- 3. Add clarity to the Serious and Irreversible Impacts (SAI) principle by determining the SAI list by an independent scientific review panel with public consultation; including**

adding the list as a schedule of the Act; clarifying that mapping triggers a further investigation, not an automatic refusal; and clarifying that a SAll decision should be based on the principle of whether the individual project in question *significantly contributes* to a risk of extinction of the SAll entity.

Recommendation 1: Changes are made to the BAM to provide clear guidance on avoid and minimise so the principles are applied consistently across planning authorities. This should include clearer definitions and where appropriate, quantify what must be avoided.

Recommendation 2: Apply the avoid and minimise actions once only (either at rezoning or as part of the DA, but not both), and establish a clear and conclusive resolution point as early as possible in the planning process.

The NSW Government has not provided adequate definitions and guidance, making the hierarchy's application inconsistent across, and within, consent authorities including the Department of Planning, Regional and Local Planning Panels, and the 128 councils across the state. There have been a limited number of court judgements on the subject, but they are too narrow in scope to provide real and practical direction in a general sense.

The lack of guidance has resulted in enormous uncertainty about whether the Act is achieving its purpose. For industry, the lack of guidance reduces the number of new homes and jobs able to be delivered when and where government envisions them, due to the significant time delays, additional risks and costs of navigating this ambiguous policy area. This effect is exacerbated by structural problems which inhibit the full consideration of ESD for individual proposals.

UDIA agrees conceptually with the approach of avoid, minimise and offset, but the process must be clear, and all parties must agree up front on the intents. Any approach to avoid, minimise and offset should be implemented with the purpose of supporting ESD principles.

At present there is no quantification relating to the avoid and minimise steps and in the absence of such, outcomes are largely subjective. This is evidenced by the notable difference in the application of avoid and minimise requirements between councils in different regions and indeed between different Officers at the same Council.

To better facilitate ESD, we recommend that the NSW Government consider implementing avoid, minimise and offset under the model as practiced in the United States. This model is discussed in a definitive article¹ on the subject, authored by the Chief Judge of the Land and Environment Court. The US model is described as:

1. Avoid to the maximum extent practicable;
2. Minimise to the extent appropriate and practicable; and then
3. Offset any remaining impacts.

The word 'practicable' is defined in the US Regulation as "available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes".

¹ Hon. Brian J Preston SC (2015) "Biodiversity Offsets: Adequacy and Efficacy in Theory and Practice," *IUCN Academy of Environmental Law*

The benefit of this model is that it involves a comparison of options having regard to the project's purpose, which allows for a fuller consideration of ESD.

In line with this approach, UDIA recommends that the following principles of the hierarchy should be clearly stated and adopted in the application of the BAM:

Avoid

To avoid should mean to set aside and conserve those parts of the land parcel in question that have such high biodiversity value that they are not suitable for offsetting.

Guidance needs to make clear where the threshold lies and the threshold must be quantitative and UDIA recommends:

- Guidance should set an appropriate threshold aimed at avoiding serious and irreversible impacts (SAII) on ecosystems, species or populations identified under state law.
- Given the threatened species listing process assigns a category of threat to each listed entity (Vulnerable, Endangered, Critically Endangered) this hierarchy should be a consideration.
- Location and connectivity of vegetation in a landscape should also be a critical consideration embedded in the avoid assessment.
- It should be clear that avoidance is the first step in a process that is meant to enable a viable development outcome and that also supports offsetting of residual impacts.

The proponent should demonstrate how avoidance has been undertaken by providing evidence of a design response, for example how the development footprint has considered alternatives and been adjusted to avoid biodiversity impacts.

The avoid exercise should be conclusively resolved at rezoning, applying the follow principles:

- The avoid exercise should be done once only, at the rezoning stage, so that the future land use is clear and can be efficiently utilised to its highest and best development use. Failing to maximise development outcomes for a land parcel's zoned purpose undermines the whole-of-government approach to strategic land-use planning and increases pressure to rezone new land to accommodate the housing and employment needs of NSW.
 - In the case of land that was rezoned prior to the implementation of the BC Act, the avoid exercise should be applied at the DA stage.
- Guidelines should make clear that once the avoid exercise has been undertaken and resolved, it will not be re-visited except in the case of new SAII discovered at the DA stage.

Minimise

To minimise should mean to work within the remaining space available for development (after avoiding), to make reasonable and practicable accommodations in the development proposal, where possible, to lessen the biodiversity impact of the development footprint. The minimise exercise should apply the following principles:

- The minimise exercise is not another avoid exercise.
- Minimising the impact should include practicable alterations within the development footprint, on-site rehabilitation or restoration of biodiversity, or other reasonable means.

- The minimise exercise should be conclusively resolved as early as possible in the planning process.

Offset

To offset should mean that where residual impact remains after the avoid and minimise exercises have been resolved, those impacts should be appropriately compensated through offsetting, according to agreed and transparent scientific methodology developed through stakeholder consultation (i.e., the BAM).

Market mechanisms should continue to be used to provide for offsetting. Under the BC Act, developers have three options to meet their offset obligations: purchase credits on the offsets credit trading market, generate credits through their own Biodiversity Stewardship Agreement (BSA) site, or pay into the Biodiversity Conservation Fund (BCF). All three options should continue. UDIA strongly supports the option to acquit offset obligations through payment into the BCF. The BCF option must remain available and be viable and the NSW Government should also work to increase the supply of available credits.

Recommendation 3: Add clarity to the SAI entity principle by determining the SAI entity list by an independent scientific review panel with public consultation; including the list as a schedule of the Act; clarifying that mapping triggers a further investigation, not an automatic refusal; and clarifying that a SAI entity decision should be based on the principle of whether the individual project in question *significantly contributes* to a risk of extinction of the SAI entity.

There needs to be more clarity around what constitutes SAI entity for purposes of avoidance, and determination of project assessments.

The listing of SAI entities should be more robust and transparent. UDIA believes that decisions on SAI entity listings should be made by an independent scientific panel, and the decision process should include public consultation. The SAI entity list should be included as a schedule of the Act that is updated upon decisions from the independent scientific review panel.

UDIA supports ongoing improvement to mapping to indicate where further SAI entity investigations are warranted. However, it must be acknowledged that Government mapping has limitations and individual site-level surveys are the best means to determine any real impact. It should be clear to consent authorities that mapping does not trigger an automatic SAI entity refusal; rather, mapping should be the trigger for a further SAI entity investigation.

UDIA recommends that the assessment of SAI entity should be based on the principle of whether the individual project in question *significantly contributes* to a risk of extinction of the SAI entity, as opposed to whether the project has *any* impact on a SAI entity. Cumulative impacts are best addressed through overall offsetting and restoration actions, ideally through Government investment in landscape-scale certification such as regional strategic conservation planning.

Conclusion

UDIA appreciates the opportunity to offer our comments to the BAM review. We are interested to read the final report and engage further with NSW Government as it considers potential amendments.

If you have any questions or would like to arrange a meeting to discuss our submission, please contact UDIA NSW Regional Manager Elizabeth York at eyork@udiansw.com.au.

Yours sincerely,



Steve Mann
CEO