

6 September 2024

Ms Sue Higginson MLC
Chair
Portfolio Committee No. 7 – Planning and Environment
Parliament House
Macquarie Street
SYDNEY NSW 2000

Via email: portfoliocommittee7@parliament.nsw.gov.au

Re: UDIA submission to Biodiversity Conservation Amendment (BOS) Bill 2024

Dear Ms Higginson,

The Urban Development Institute of Australia NSW (UDIA) is the peak industry body representing the leading participants in urban development across NSW through our over 450 member organisations. Our members include the developers, consultants, councils and state agencies who work together to deliver new housing and employment land sites for NSW. UDIA invests in evidence-based research that informs our advocacy to local, state, and federal government, so that development policies and critical investment is directed to where it's most needed to shape the places and cities where people will live for generations to come.

We appreciate this opportunity to offer our comments on the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024 (BC Amendment Bill) which was introduced to Parliament on 15 August 2024 and referred to Portfolio Committee No. 7 for inquiry.

The residential and employment land development sector represents the highest volume user of the Biodiversity Offsets Scheme (BOS) under the *Biodiversity Conservation Act 2016* (BC Act). Consequently, our members have vast experience with the BOS. UDIA is on record through many submissions to NSW Government and the Independent Review of the BC Act, expressing our strong concern and frustration that the BOS fails in two fundamental respects: the BOS fails to deliver good biodiversity outcomes, and the BOS is a primary constraint to the delivery of new housing and jobs in NSW.

We consider the introduction of the BC Amendment Bill into the NSW Parliament is premature as there has not been sufficient consultation with stakeholders during the drafting of the Bill and the policy rationale for many of its provisions has not been properly articulated by the Government. While we appreciate the intention of the Bill to address the failures of the BOS, UDIA does not believe the current draft Bill will improve the BOS. In fact,

as drafted, we believe the proposed BC Amendment Bill will further undermine confidence in the BC Act.

There is a direct correlation between the current ambiguity in the BOS and the ability to deliver housing and jobs in NSW, and the proposed Bill would make the situation worse at a time when the NSW Government is seeking to deliver more houses under the five-year National Housing Accord than we have ever delivered in NSW history.

Our recommendations are summarised below, and our submission offers detailed analysis about the potential implications of the provisions as drafted under the BC Amendment Bill. We have also made a number of recommendations for additional matters to be included in the Bill to address the uncertainty inherent in the BOS.

UDIA recommends:

- 1. Do not proceed with legislation unless the proposed regulations and Better Regulation Statement(s) are prepared and provided at the same time and accompany the Bill which is debated in the Parliament.**
- 2. Clearly define all new terms that are included in the draft Bill and work with industry to develop implementation guidelines.**
- 3. Delete the provision to require the Minister to develop a net positive strategy.**
- 4. If a net positive strategy is produced, the strategy and any operational amendments, regulations and guidelines should be developed in consultation with stakeholders including the development industry.**
- 5. Any transition to net positive should be achieved at an overall strategic, landscape scale and not imposed on individual BDAR/BCARs.**
- 6. Delete the provision adding the AMO hierarchy to the purposes of the Act.**
- 7. If AMO hierarchy is maintained in the Bill, then add a requirement that DCCEEW will work with and provide clear guidance to proponents, accredited assessors and consent authorities about what will be regarded as satisfactory to avoid and minimise impacts, including clear definitions of terms.**
- 8. Adopt a consistent definition of “practicable” as it relates to avoid and minimise, which defines it as “available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes.”**
- 9. Do not place any limits on payments into BCF to acquit offset obligations.**
- 10. Increase funding to BCT and Credits Supply Taskforce to ensure credits are available for purchase and easily sourced, including through improvements to the credits registry.**
- 11. Remove the provisions allowing the Environment Agency Head (EAH) to issue directions to accredited assessors.**
- 12. Prescribe by regulation the process for ongoing engagement during the assessment process between DCCEEW and the accredited assessors, proponents and consent authorities. The regulations should be developed in consultation with stakeholders.**

- 13. Additional information is needed about why section 6.21(3A) has been prepared, and the circumstances in which the EAH can determine that the First TFD Payment amount is “not appropriate” should be clearly set out in the regulations.**
- 14. The ability of the EAH to determine another amount to be paid as the First TFD Payment if it considers that the usual amount “is not appropriate” should be limited to requiring a lower payment than the usual amount.**
- 15. Define how a DA or type of development can be “in connection with” a natural disaster.**
- 16. Clarify the phrase “if it is justified in the circumstances” with regard to amendments to section 7.1 of the BC Act.**
- 17. Remove the ability of the Minister to increase the number and/or class of biodiversity credits required, as this adds uncertainty for development.**
- 18. The registry of measures to avoid and minimise impacts should include all lands avoided in rezoning actions under *Threatened Species Conservation Act* and BC Act and should identify the relevant development-zoned land to which they apply.**
- 19. Confirm that land areas on the registries will remain able to be considered for future rezoning.**
- 20. Any amendments to the BC Act or BAM should be subject to savings or transitional provisions which confirm that sites with existing approvals, or applications under assessment at the time of the amended legislation being introduced, are exempt from the new requirements of the BC Amendment Act, including a grandfather clause to ensure any future modifications to existing approvals are not subject to the BC Amendment Bill’s revisions to the BOS.**
- 21. Apply the principle of avoidance only at the rezoning stage of a development by including land avoided under the rezoning action on the new registry of measures to avoid and minimise, and removing any further avoidance obligation at the Development Application stage for any relevant development-zoned land created by that rezoning.**
- 22. Include the 3 amendments outlined in our submission to improve the efficiency and effectiveness of the biodiversity certification process by the following: displace all future requirements for further avoidance; provide that an application will be “deemed refused” after 90 days; and add a right to appeal in the Land and Environment Court against the decision to refuse certification.**

BACKGROUND

UDIA has long acknowledged the need to protect strategic areas of biodiversity for the liveability of our urban areas today and for future generations. It must be acknowledged that new housing, new jobs and the environment have to co-exist. It is imperative that we resolve land use issues strategically and with a view to not only environmental but also social and economic outcomes. The current approach under the BOS of assessing the biodiversity consideration in isolation will result in our communities falling further behind socially and economically as we progressively fail to meet the state’s housing and employment needs while failing to adopt a strategic level assessment of biodiversity conservation.

The NSW Government has committed to deliver 377,000 new homes in the next five years under the National Housing Accord. While UDIA supports the NSW Government policy focus on delivering more housing density in urban areas, it is impossible to ignore that without more land being made available for housing we will fail to deliver the housing supply required, and a type of housing supply that remains in strong demand from purchasers. Put simply: we need more of every type of housing, and we need it everywhere in the State.

The uncertainty and complexity inherent in the BC Act and BOS combine to create a fundamental barrier for development. UDIA research reveals a quarter of all detached new housing in the 5-year Housing Accord development pipeline is delayed due to biodiversity assessment issues¹. The problem is especially acute in the regions where NSW Government has not delivered strategic bio-certification plans.

Arguably, land use controls have more widespread impact on the lives of ordinary Australians than any other regulation. Since its implementation, UDIA observes the BOS typically makes housing more expensive and restricts the growth of successful urban areas.

Under the current BOS, the effects on the ability to use land to deliver housing are accreted over time with no cost-benefit analysis. Unfortunately, the same approach has been applied to the BC Amendment Bill. There has been no cost-benefit analysis, Better Regulation Statement or basic justification for the provisions of the proposed Bill, nor is there an accompanying regulatory proposal that would demonstrate how the changes would be implemented. Without the details of the proposed regulations, the purpose of some of the amendments is not clear, and we are unable to consider how most of the provisions will be applied and what impacts they could have on the development industry.

Governments are often accused of proposing legislation which lacks the necessary detail and accompanying regulations to be properly scrutinised by the Parliament and this was a common refrain of the former Labor opposition. Accordingly, before consideration of the BC Amendment Bill proceeds, we request that proposed regulations are drafted and accompany the Bill as it is debated in the Parliament. We also request that a Better Regulation Statement(s) are also prepared and provided which , answers to the following questions:

1. What problem is each provision seeking to solve, and how is that problem documented?
2. What is the evidence to demonstrate that the provision will solve the problem(s)?
3. How will the changes be operationalised in regulation or otherwise?
4. Provide the Better Regulation Statement justifying each provision.

In general, UDIA does not support the BC Amendment Bill because overall it will:

- create further ambiguity through the introduction of undefined terms;

¹ UDIA National Housing Pipeline NSW Report, August 2024. [Link](#)

- leave the implementation detail to the Department of Climate Change, Energy, the Environment and Water (DCCEEW), whose only aim is the protection of biodiversity without due regard to supporting Government's additional social and economic goals; and
- continue to delay and restrict the delivery of housing during a housing crisis.

UDIA would support legislative amendments that achieve the following in the Act and proposed regulations that accompany the Bill:

- The "avoid" test is only applied once in the planning process on a site.
- The existing zoned development pipeline is delivered through offsets only, after demonstrating no serious and irreversible impact (SAIL).
- The biodiversity certification process is improved so that more sites are able to achieve timely certification at the start of the planning process.
- Investment is committed to deliver NSW Government-led Strategic Conservation Plans for key growth precincts.
- Key terms are clearly defined – including if used: avoidance, net positive, reasonable measures – and clear application guidance is developed in consultation with stakeholders.

Recommendation #1 – Do not proceed with legislation unless the proposed regulations and Better Regulation Statement(s) are prepared and provided at the same time and accompany the Bill which is debated in the Parliament.

PROVISIONS OF THE BILL

Definitions of Terms

The proposed Bill further undermines confidence in the *Biodiversity Conservation Act 2016* by introducing additional ambiguity with undefined terms. Examples include:

1. What is 'genuine measures' with reference to s6.12,
2. What is 'reasonable measures' with reference to s6.3A, and
3. What is 'net positive' with reference to s6.2.

The continued use of undefined terms leaves proponents and consent authorities confused which in turn requires the Court to define these terms through subsequent case law. This is occurring now with how avoidance measures are applied; however, the case law to date is fairly narrow and not particularly useful across applications. The introduction of the BC Amendment Bill provides an opportunity to clearly define such measures in statute, avoiding future uncertainty for proponents and Government alike.

Recommendation #2 – Clearly define all new terms and work with industry to develop implementation guidelines.

Transition to “net positive”

The BC Amendment Bill requires the Minister to prepare a “strategy” to transition to a “net positive” biodiversity outcome position. The transition relies on a strategy that has not been prepared, and guidelines for which have not been provided. It is not possible to understand how development proponents would be impacted by such a transition until further detail is provided about how and when the transition will occur.

This provision is unnecessary and premature and UDIA recommends it be deleted. Legislation is not required to permit the Minister to develop a strategy.

Any strategy and its implementation should be developed in close consultation with stakeholders including the development industry. Any amendments to the strategy should also be subject to public consultation.

The term “net positive” is not adequately defined, and not enough detail has been provided about how the BOS would be transitioned to provide “net positive” biodiversity outcomes.

UDIA’s strong position is that any transition to net positive should only be achieved at an overall strategic, landscape scale. It should not be a requirement of every Biodiversity Development Assessment Report (BDAR) or Biodiversity Certification Assessment Report (BCAR) to achieve a net positive result.

Site-by-site application of net positive would exacerbate the current situation where isolated pockets of land are avoided to meet a strict requirement without an overall consideration of connectivity or long-term integrity of the avoided patch. The approach would also add costs and delays if proponents are required to undertake additional avoidance, minimisation and offset measures to ensure individual developments have a net positive impact on biodiversity values.

Recommendation #3 – Delete the provision to require the Minister to develop a net positive strategy.

Recommendation #4 – If a net positive strategy is produced, the strategy and any operational amendments, regulations, guidelines and amendments should be developed in consultation with stakeholders including the development industry.

Recommendation #5 – Any transition to net positive should be achieved at an overall strategic, landscape scale and not imposed on individual BDAR/BCARs.

Avoid, Minimise, Offset (AMO) Hierarchy

The BC Amendment Bill inserts the AMO hierarchy as one of the purposes of the BC Act, defines the AMO hierarchy in the BC Act, and states it to be the “key principle” for avoiding, minimising and offsetting impacts under the BOS. The definition provides that, to follow the

AMO hierarchy, proponents must first take all “reasonable measures” to avoid impacts on biodiversity values, then take all reasonable steps to minimise the impacts and, finally, offset or compensate any impacts that remain (known as “residual impacts”). The terms “reasonable measures” and “reasonable steps” are not defined.

UDIA does not agree that the AMO hierarchy needs to be enshrined in legislation, and we recommend this provision be deleted. The process outlined in the Bill for avoiding, minimising and offsetting impacts under the BOS is already evident and consistent with the process adopted by the Land and Environment Court. The provisions in the Bill could narrow the discretion of the consent authority to reach a balanced and considered decision.

Currently, reaching agreement about when avoidance and minimisation have been satisfactorily achieved is the most contentious aspect of the BOS and the source of most of the uncertainty and delays under the Scheme. This is due to two factors:

- The BOS is set up to assess biodiversity in isolation, without regard to the social or economic strategic merit of a development proposal. Avoidance is a comparative exercise, and “reasonable” implies a balance, but under the current approach to the BOS, there is no balance; it is a one-sided judgment with sole regard to biodiversity outcomes. The BOS approach is in conflict with the merit assessment approach under the EPA Act, with which the BC Act interacts. This conflict creates enormous challenges to deliver the state’s housing and jobs goals under the NSW strategic land use planning regime.
- There are as many interpretations and opinions about how to apply avoid and minimise as there are assessors and consent authorities. All users of the Scheme require much more clarity and guidance in this area.

Therefore, if this provision is maintained, then the legislation should include the requirement that DCCEEW will provide clear guidance to proponents, accredited assessors and consent authorities about what will be regarded as satisfactory to avoid and minimise impacts.

UDIA notes additional amendments to sections 6.12, 6.13 and 6.16 of the BC Act that would provide that BDARs and BCARs are to include and assess the “genuine measures” a development proponent or applicant has taken or proposes to take to avoid, minimise and offset impacts on biodiversity values. The use of two different standards will only confuse matters further. Neither “genuine” nor “reasonable” measures are defined; all terms need to be defined.

UDIA recommends a single term and standard be adopted, and we recommend using the term “practicable” instead. “Practicable” should be defined to mean “available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes.” This is the approach to limiting impacts taken in the United States. It is superior in that it has regard to the economic and social circumstances of the proposed development’s overall purpose. This would introduce much-needed clarity that the exercise of avoidance and minimisation should be done with a solutions-focused

approach in the context of achieving a feasible development outcome on the land. The aim should be to achieve the highest and best use which allows land to be maximised for its zoned purpose (e.g., more housing can be delivered) which in turn reduces pressure to rezone more land to make up for the loss in yield when avoid and minimise is imposed impracticably.

If “practicable” is not adopted, then UDIA prefers “reasonable and feasible measures”. “Genuine measures” should not be used, it is far too subjective and would increase uncertainty and delays to the planning process. The terms “reasonable and feasible” are used in State Significant Development (SSD) and State Significant Infrastructure (SSI) consents and already understood by proponents and consent authorities. “Reasonable” is defined as “the application of judgement in arriving at a decision, taking into account mitigation benefits, cost of mitigation versus benefits provided, community views and the nature and extent of potential improvements.” “Feasible” considers what is possible and practical in the circumstances. Definitions such as these may assist with the AMO hierarchy as it applies to SSD, SSI and local development.

Recommendation #6 – Delete the provision adding the AMO hierarchy to the purposes of the Act.

Recommendation #7 – If AMO hierarchy is maintained in the Bill, then add a requirement that DCCEW will work with and provide clear guidance to proponents, accredited assessors and consent authorities about what will be regarded as satisfactory to avoid and minimise impacts, including clear definitions of terms.

Recommendation #8 – Adopt a consistent definition of “practicable” as it relates to avoid and minimise, which defines it as “available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes.”

Alternatives to retiring credits

The BC Amendment Bill provides that, as an alternative to retiring biodiversity credits, a proponent can undertake “prescribed biodiversity conservation measures” and may only be able to make a payment into the Biodiversity Conservation Fund (BCF) in certain circumstances. The circumstances for each would be prescribed in accordance with the regulations.

Again, the draft regulations are not known, and no additional information or guidance has been provided about what the regulations may prescribe in this regard. It is therefore not known what “prescribed conservation measures” include, or when a person is excluded from making a payment into the BCF instead of retiring credits from the market. These amendments to the BC Act cannot properly be considered until additional information is provided.

What are the “prescribed conservation measures” and to which applications would they apply? It appears that the obligation to retire credits will not be satisfied until a prescribed conservation measure has been undertaken. We are concerned this will result in delays to development if such measures are difficult to complete.

The purpose of these amendments is not clear. Presumably, they are to stimulate the credit market and improve the efficiency and effectiveness of the BCF and Biodiversity Conservation Trust (BCT), which have been found to be operating at an ineffective level, while also recognising that proponents cannot always source required credits in the current biodiversity market.

UDIA strongly objects to any limitations on being able to pay into the BCF to acquit an offset obligation. No amendments should be made that would add time or complexity for proponents. Removing access to the relatively streamlined BCF payment process will only make it harder to deliver more housing and jobs in NSW.

Overall, the BOS adds enormous cost, time and complexity to a development project. In some instances, the developer may be willing to pay a premium to get a faster result that will reduce the costs associated with financing and acquiring land and preparing a development proposal. The BCF is generally the most expensive option, so there is already an incentive not to use it. However, the BCF can also represent the most efficient means to satisfy the obligation, because appropriate credits can be difficult to find on the market.

The inaccessibility of the market is a feature of low market information, and not necessarily indicative of credit supply. There is an opportunity for the biodiversity credit registry to facilitate a smoother and faster credit transaction and retirement process than currently occurs. For example, significant time is spent by sellers, purchasers, or those retiring credits in proving their identity, and the current processes seem to be cumbersome and slow, adding significant time to meeting credit obligations. We would anticipate that a credit registry should be capable of having a much smoother digital identification and approval process. Furthermore, if automated the credit transfer and retirement fees would encourage purchase and use of credits from the market, rather than use of the BCF to meet credit obligations.

It would be counter intuitive to not allow proponents to pay into the BCF even when credits are available on the market, since in that situation, the BCT would be able to find them relatively quickly. If the proponent is willing to pay into the Fund at a premium to expedite the process of acquitting their offset obligation, the premium paid will only help make the Scheme more sustainable.

Rather than limit use of the BCF, to address potential inefficiencies UDIA recommends more funding should be provided to the BCT and the Credits Supply Taskforce to ensure credits are generally more available for purchase and easily sourced.

Recommendation #9 – Do not place any limits on payments into the BCF to acquit offset obligations.

Recommendation #10 – Increase funding to BCT and Credits Supply Taskforce to ensure credits are available for purchase and easily sourced, including through improvements to the credits registry.

Obligations of the BCT to apply money

The BC Amendment Bill imposes obligations on the BCT to apply money in certain ways and within 3 years after the money is paid into the BCF.

Under these provisions, there is potentially more flexibility in how the BCT can apply the money paid into the BCF to meet the relevant offset obligations; however, specific details about how the BCT may apply money from the BCF towards securing offsets in substitution for acquiring the relevant credits under the regulations is not known. The 3-year time limit may or may not improve the efficiency of the BCT. There do not appear to be any reasons why this regime would disadvantage the development industry, provided the ability to pay into the BCF is maintained, per above.

Directions issued to accredited assessors

New section 6.10A of the BC Act will provide that the EAH may, by written order, issue directions to accredited assessors if it is satisfied that the accredited assessor is not complying with a requirement of the accreditation scheme in the preparation or modification of a biodiversity assessment report.

As a result of amendments to section 6.15 of the BC Act, if a written direction is issued that concerns a certified biodiversity assessment report, the report is taken not to have been certified or submitted from the date the written direction is issued and will not be certified or submitted until the direction is complied with (or withdrawn by the EAH). It is not known and it is unclear what these amendments would achieve.

UDIA strongly objects to these amendments to the BC Act. They are counterproductive to genuine discussion and problem solving among professionals and they have the potential to completely block development assessment with no mechanism to appeal. They should be removed.

Any directions issued to accredited assessors will result in delays to the assessment of applications, and uncertainty about outcomes for proponents. Based on the information provided so far, there is no ability to appeal or review any direction issued.

As such this amendment could create circumstances where a development application (DA) would be incomplete and could not even be lodged for assessment until the

circumstances around the report are resolved. This would inappropriately insert the EAH as the arbiter of when a DA can be lodged and remove the adjudication mechanism prescribed under the EPA Act.

The appeal process under the EPA Act allows a proponent to appeal to the Land and Environment Court if a DA in the system is deemed refused after a period of time; the mechanism requires the DA to be able to be lodged in the first place. This provision inappropriately removes that ability.

Any issues with the content of biodiversity assessment reports should be (and currently are) raised in the assessment process. There is also a scheme for accrediting assessors, under which accredited assessors must renew their registration periodically. If the content of a biodiversity assessment report is questioned or not accepted, a consent authority may issue a request for information and may ultimately refuse an application altogether. There is therefore no apparent reason why a biodiversity assessment report should be taken to have never been certified or submitted if a direction is issued.

These provisions would not achieve an outcome that cannot already be achieved through the existing application assessment and accreditation scheme processes.

Unfortunately, the lived experience of UDIA members is that DCCEEW staff often do not engage constructively with proponents and accredited assessors when there is a difference of opinion. What is needed is more support for early, "good faith" discussions to talk and work through items that don't fit nicely under the current Biodiversity Assessment Method (BAM).

Rather than using this proposed outsized hammer, the intent of any improvements to the BOS should be aimed at improving early, ongoing, constructive engagement during the assessment process between DCCEEW and the accredited assessors, proponents and consent authorities, and ensuring a good accredited scheme for assessors.

Recommendation #11 – Remove the provisions allowing EAH to issue directions to accredited assessors.

Recommendation #12 – Prescribe by regulation the process for ongoing engagement during the assessment process between DCCEEW and the accredited assessors, proponents and consent authorities. The regulations should be developed in consultation with stakeholders.

Amount to be paid on the first transfer or retirement of biodiversity credits

Under the current BOS, the amount to be paid into the Biodiversity Stewardship Payments Fund (BSPF) towards the total fund deposit (TFD) on the first transfer or retirement of biodiversity credits (First TFD Payment) is calculated according to the number of credits

generated under the relevant Biodiversity Stewardship Agreement (BSA), the number of credits being retired or sold, and (if relevant) the total sale price.

The BC Amendment Bill includes additional sub-section (3A) to section 6.21, which provides that the EAH can determine another amount to be paid as the First TFD Payment if it considers that the usual amount “is not appropriate”.

The circumstances in which the EAH can determine that the First TFD Payment amount is “not appropriate” should be clearly set out. The existing section 6.21 ensures that the First TFD Payment amount is the higher of the total sale price, or the pro-rata amount determined according to the number of credits sold. If biodiversity credits are being transferred, the First TFD Payment amount is able to be calculated by the vendor when completing an application to transfer the credits to the purchaser. It is not appropriate for the EAH to require a party to make a higher First TFD Payment than is already required. Parties to BSAs must already expend considerable time and money before receiving any benefit under the BSA, and potentially needing to pay a higher First TFD Payment amount may create another barrier to parties entering into BSAs.

Additional information is needed about why section 6.21(3A) has been prepared, and in what circumstances will it be applied. It should also be limited to requiring a lower payment than the usual First TFD Payment amount.

Recommendation #13 - Additional information is needed about why section 6.21(3A) has been prepared, and the circumstances in which the EAH can determine that the First TFD Payment amount is “not appropriate” should be clearly set out in the regulations.

Recommendation #14 – The ability of the EAH to determine another amount to be paid as the First TFD Payment if it considers that the usual amount “is not appropriate” should be limited to requiring a lower payment than the usual amount.

Minister may make exemptions to requirement of BDAR

These provisions apply mainly to circumstances of natural disaster or other “exceptional circumstances”. The ability for certain development applications to be expedited and not require a BDAR if responding to (or “in connection with”) a natural disaster will provide positive outcomes to vulnerable communities.

However, further guidance is required about how a development application or type of development can be “in connection with” a natural disaster.

Recommendation #15 – Define how a DA or type of development can be “in connection with” a natural disaster.

Staged retirement of biodiversity credits

UDIA welcomes this amendment to Section 7.13 of the BC Act, which has the potential to improve the development process by allowing additional time for proponents to secure credits required for a staged development, which must be retired prior to the commencement of the relevant stage to which those credits apply.

Conditions to retire credits for SSD and SSI

Amendments are proposed to section 7.14 of the BC Act which provide that a consent authority for SSD or SSI applications must impose conditions of consent requiring the retirement of biodiversity credits to offset any residual impacts on biodiversity or, alternatively, it can seek concurrence of the Minister to impose a different condition other than to retire the biodiversity credits that would otherwise be required.

A consent authority may also decide to increase the number or class of credits required to be retired under this section “if it is justified in the circumstances”. The consent authority does not require the concurrence of the Minister if it decides to increase the number of credits required.

The amendments to section 7.14 of the BC Act also apply to modification applications as a result of amendments to section 7.17.

UDIA is concerned the phrase “if it is justified in the circumstances” is unclear and may be problematic for proponents. It may also create uncertainty for SSD and SSI proponents associated with the feasibility of projects.

The Minister should not be permitted to increase the number and/or class of biodiversity credits required to be retired. This would be inconsistent with reliance on the BAM and such a decision has the potential to create uncertainty and render some projects unexpectedly unfeasible.

Recommendation #16 – Clarify the phrase “if it is justified in the circumstances” with regard to amendments to section 7.1 of the BC Act.

Recommendation #17 – Remove the ability of the Minister to increase the number and/or class of biodiversity credits required, as this adds uncertainty for development.

Additional public registers

The BC Amendment Bill would add the following additional public registers to be kept and maintained by the EAH:

- DAs exempted from requiring a BDAR.
- Decisions to grant consent for SSD, SSI or Part 5 EPA Act activities that the Minister opines has serious and irreversible impacts (SAIL) on biodiversity values.
- Decisions to refuse planning approvals, vegetation clearing approvals or biodiversity certification if the grounds included SAIL.
- Conditions of planning approvals and vegetation clearing approvals that require “biodiversity conservation measures” to be taken to offset residual impacts.
- Measures to avoid and minimise impacts identified in a BDAR, or that the proponent must take under an approval.

It is not clear what “biodiversity conservation measures” are under the BC Act, and whether they are the same as the “prescribed biodiversity conservation measures” that may be accepted as an alternative to retiring credits (noting that the regulations are to provide details about the prescribed measures, which are currently unknown).

UDIA requests clarification about what proponents will be required to provide as additional information to the EAH to facilitate the registers. It should be the intention to ensure that proponents are not burdened by excessive additional administrative work.

UDIA recommends that the registers include areas of historical avoidance from past rezoning exercises under the *Threatened Species Conservation Act 1995* and BC Act. It is helpful to understand the full extent of avoided land associated with land that is currently zoned for development.

UDIA also requests confirmation that the land areas identified on registers will not be restricted from consideration for future rezoning that would allow development, particularly for the register of measures to avoid and minimise impacts. This is important because there is no scientific way to know what is best for the future. Society’s determination of the highest and best use of particular parcels of land could be subject to change.

Recommendation #18 – The registry of measures to avoid and minimise impacts should include all lands avoided in rezoning actions under *Threatened Species Conservation Act* and BC Act and should identify the relevant development-zoned land to which they apply.

Recommendation #19 – Confirm that land areas on the register will remain able to be considered for future rezoning.

Other provisions

The BC Amendment Bill also includes the following further amendments to the BC Act:

- (a) The BAM may include savings or transitional provisions if/when the BAM is amended (under amendments to section 6.8 of the BC Act); and

- (b) The regulations may provide for fees to be payable to the EAH “for services provided... by the EAH under the [BC] Act”, including the method for calculating these fees (under amendments to section 6.6 of the BC Act).

Any amendments to the BAM should be subject to savings or transitional provisions. Proponents expend considerable time and money on relevantly qualified consultants to prepare biodiversity assessment reports in accordance with the BAM. It is unreasonable to require reports that are being prepared or that have been submitted in support of an application that has not been determined to be amended to comply with any amendments to the BAM. This would result in additional (and potentially unacceptable) costs and delays being incurred by proponents.

No information has been provided about what fees may be payable to the EAH, nor has a list of services been provided. Again, the details of this amendment have been deferred for the regulations, which are not available for consideration. Provisions imposing any additional fees for services are likely to involve imposing additional fees on applicants, which may prejudice development.

Overall, any changes to the requirements under the BOS including any revisions resulting from the BC Amendment Bill, must include savings or transitional provisions. Those provisions must ensure existing approvals, any future modifications to existing approvals, and applications already under assessment are not subject to the revisions. Industry requires clear rules that can be factored into investment decisions for projects that take several years to deliver. Strong savings and transitional provisions will lessen the uncertainty that accompanies any changes and support the delivery of the existing housing pipeline to meet the Housing Accord target.

Recommendation #20 – Any amendments to the BC Act or BAM should be subject to savings or transitional provisions which confirm that sites with existing approvals, or applications under assessment at the time of the amended legislation being introduced, are exempt from the new requirements of the BC Amendment Bill, including a grandfather clause to ensure any future modifications to existing approvals are not subject to the BC Amendment Bill’s revisions to the BOS.

RECOMMENDED ADDITIONAL INCLUSIONS

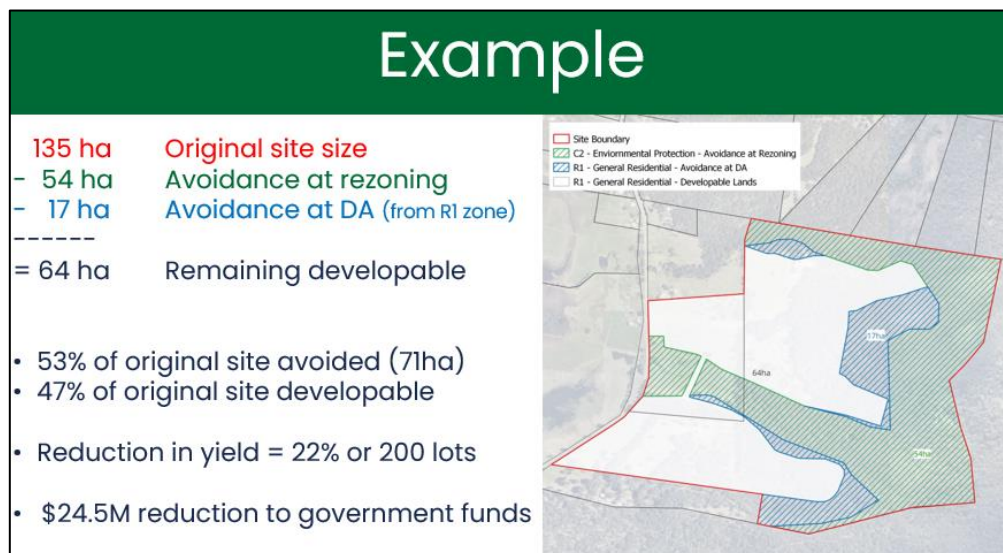
UDIA strongly recommends that the BC Amendment Bill include further provisions aimed at creating more certainty for biodiversity and development outcomes under the BOS. We recommend including provisions that:

- Limit avoidance to once in the planning process.
- Improve the standard bio-certification process.

Limiting avoidance to once in the planning process

As outlined above in the discussion on the AMO hierarchy, reaching agreement about when avoidance and minimisation have been satisfactorily achieved is the most contentious aspect of the BOS and the source of most of the uncertainty and delays under the Scheme.

Under the existing system, the proponent may be required to demonstrate avoidance multiple times on a parcel of land. This first occurs at rezoning, where some of the original land may be zoned for conservation while other parts are zoned for residential, employment or other development purposes. When a DA is lodged on the development-zoned land, the proponent is required under the BOS to apply the AMO hierarchy again, meaning the full use of the development-zoned land is unlikely to be utilised. There can be a third bite at the cherry if the EPBC is triggered. The result is enormous uncertainty about the development potential of a parcel of land, undermining investment and usually reducing the productive yield of the land. The following real-world NSW example illustrates how this plays out, resulting in loss of housing and the consequent loss in government revenue from reduced contributions to infrastructure, levies and taxes:



UDIA recommends 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.

We see potential to imbed this approach by using the new registry of measures to avoid and minimise. When land is avoided at rezoning, that measure will be captured on the registry. When a DA is lodged on the associated site, the land avoided at rezoning can be referenced in the BDAR to demonstrate avoidance. The BDAR will then demonstrate how impacts on the development-zoned land have been minimised and how residual impacts

will be offset. The proponent could propose positive management of those areas avoided at rezoning as part of their offsetting, contributing to improved biodiversity outcomes.

This process would be similar to bio-certification but would work as if the bio-certification process was split into two distinct steps. This process would achieve the same considered and balanced outcome as bio-certification, but could allow development assessment to proceed more quickly than is currently the case when seeking standard bio-certification.

An even more straight-forward approach would be to allow all existing development-zoned land to be delivered through offsets only, after confirming there is no SAI. Again, the registry can be helpful in demonstrating that measures have already been appropriately undertaken to avoid and minimise impacts. This approach would make it more likely that the NSW Housing Accord targets will be able to be met, given the Accord reliance on the assumption that zoned land will be able to deliver a certain number of new homes in the next 5 years.

We would be pleased to provide further details to the Committee on how to achieve more certainty by eliminating multiple rounds of avoidance on a parcel of land.

Recommendation #21 – Apply the principle of avoidance only at the rezoning stage of a development by including land avoided under the rezoning action on the new registry of measures to avoid and minimise, and removing any further avoidance obligation at the Development Application stage for any relevant development-zoned land created by that rezoning.

Improving the standard biodiversity certification process

We note that the BC Amendment Bill does not propose any substantive amendments to biodiversity certification that would result in the increased efficiency and effectiveness of this process. In the recent review into the BC Act, Dr Henry identified that the biodiversity certification process has the potential to improve biodiversity values and improve certainty of the assessment process for developers, however, this process was currently functioning inefficiently (and therefore ineffectively) due to extensive delays in the application process. Dr Henry's report noted it has taken up to 2 years and 8 months for an application to be assessed from the date an application is submitted to the date a certification order is published in the *Gazette*, which does not include the time it takes to comply with publication and consultation requirements prior to submission.

There are also provisions in some Local Environmental Plans and Development Control Plans that require a proponent to "avoid and minimise" impacts of a proposed development, meaning a proponent can be required to avoid and minimise impacts twice on land that has been certified. There are also provisions under the federal *Environment Protection and Biodiversity Conservation Act* (EPBC) which allow for additional avoid and minimise even after a NSW BCAR has been agreed between the parties, meaning a proponent may be required to avoid a third time.

Biodiversity certification has the potential to resolve biodiversity and development land use questions early in the planning process. However, the pathway has not had extensive success. UDIA is aware of several bio-certification applications in the system, all of which are stalled for one reason or another, to the frustration of the proponents.

Applying for biodiversity certification is an expensive and time-consuming exercise, and there is uncertainty about the outcome. Reform is required to this area to improve efficiencies. As a starting point, the following further amendments to the BC Act should be considered to improve the efficiency and effectiveness of the biodiversity certification process:

- (a) Section 8.4(6) of the BC Act should clearly displace any planning requirement under the EPA Act, an environmental planning instrument or a Development Control Plan for a proposed development on biodiversity certified land to avoid and minimise impacts relating to biodiversity;
- (b) The BC Act should provide applicants with a right to appeal against the decision of the Minister to refuse biodiversity certification, or to impose inappropriate conditions, where the appeal process would follow the same or similar format of a Class 1 Development Appeal in the Land and Environment Court; and
- (c) For the purpose of enabling appeals against decisions about biodiversity certification, the BC Act (or regulations) should provide that an application for biodiversity certification will be taken to be “deemed refused” if it is not determined within 90 days of the application being submitted.

Consideration should also be given to providing a pathway for bilateral approval under EPBC for a standard bio-certification.

UDIA seeks clarification from DCCEEW about how it intends to improve the efficiency and effectiveness of the biodiversity certification process in circumstances where no relevant amendments are sought to the BC Act under the BC Amendment Bill (noting this process is identified as an important area of reform in the review into the BC Act).

Recommendation #22 – Include the 3 amendments outlined in our submission to improve the efficiency and effectiveness of the biodiversity certification process by the following: displace all future requirements for further avoidance; provide that an application will be “deemed refused” after 90 days; and add a right to appeal in the Land and Environment Court against the decision to refuse certification.

Conclusion

The BC Act is a real risk to delivering new housing and jobs in NSW. If we don't solve the problems the BC Act has created, we will fail to deliver the social and economic outcomes NSW desperately requires. Unfortunately, we believe the BC Amendment Bill as currently drafted will do more harm than good. We urge the Committee in its final report to recommend changes to the draft Bill which would adopt all of UDIA's recommendations outlined in this submission.

UDIA is grateful for the opportunity to provide our comments on the Biodiversity Conservation Amendment (BOS) Bill 2024. Should your or other Committee members require further information, please contact UDIA NSW Regional and Policy Manager Elizabeth York on eyork@udiansw.com.au or 0434 914 901.

Kind Regards,



Stuart Ayres
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