

21 April 2023

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Biodiversity Conservation Act Review
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UDIA response to BC Act Review Consultation Paper

Dear Dr Henry,

The Urban Development Institute of Australia (UDIA) NSW is the state's leading industry body representing the interests of the urban development sector. We have over 450 member companies across the spectrum of the industry, including developers, planners, ecologists, councils and service providers. We bring an evidence-based, solutions-focused approach to our advocacy for the creation of liveable, affordable, and connected smart cities.

In delivering the majority of new housing and employment-generating land development for the residents of NSW, our industry has significant and frequent interaction with the Biodiversity Conservation Act (BC Act, or Act), and is one of the largest users of the biodiversity offsets scheme (BOS) under the Act. UDIA and our members value and support the principles of ecologically sustainable development (ESD) and aim to work constructively with all levels of government and other stakeholders to support ESD under the NSW planning system and related legislation, including the BC Act. We appreciate this opportunity to provide feedback on the Consultation Paper for the 5-year statutory review of the Biodiversity Conservation Act.

UDIA was grateful for the chance to meet with the review panel in October 2022 to share the development industry's experience with the BC Act and outline our concerns that the Act is not delivering good outcomes for NSW from either an environmental or development perspective. We followed that meeting with a letter and additional background material and recommendations, which we link here and commend again for the review panel's consideration:

- 2022 [UDIA letter to review panel](#)
- 2019 UDIA-commissioned [EMM Issues Paper on the Biodiversity Offsets Scheme](#)
- [Summary of UDIA's recommendations](#)

UDIA maintains that to date, the BC Act has failed to deliver ESD and the Act has had a detrimental impact on achieving the NSW Government's strategic goals for conservation, housing and jobs.

We highlight that there is a housing shortage in NSW, and unfortunately, the implementation of the BC Act is a significant contributing factor.

Our submission addresses what in our view are the Act's fundamental failings and recommends ways to improve the BC Act to support better outcomes for biodiversity conservation as well as deliver the housing and jobs called for under the NSW strategic planning framework.

UDIA offers the following recommendations to improve the BC Act:

1. **Modify Objective (k) to read: to enable ecologically sustainable development by establishing a framework to avoid, minimise and offset the impacts of proposed development and land use change on biodiversity, having regard to the relevant NSW strategic planning documents and environmental planning instruments.**
2. **Take a more strategic approach to land use planning, whereby biodiversity avoidance and minimisation are resolved early, and working to achieve an outcome on the site that is in line with its strategic merit.**
3. **Provide clear guidance on avoid and minimise so that the principles are applied consistently across planning authorities, with a clearly defined threshold of what must be avoided.**
4. **Apply the avoid and minimise actions once only (i.e., either at rezoning or as part of the DA, not both), and establish a clear and conclusive resolution point as early as possible in the planning process.**
5. **Add clarity to the SAI principle by determining the SAI 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 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.**
6. **Maintain the option to offset impacts through payment into the Biodiversity Conservation Fund.**
7. **Investigate ways to make private land conservation, including the establishment of BSAs, more attractive to landholders.**
8. **Improve the process for the certification pathway to enable better strategic land use outcomes under the principles of ESD.**
9. **Merge the functions of the BCF and the Credits Supply Taskforce and provide for all offsetting to be coordinated through the BCF/Taskforce entity.**
10. **Add restoration as an Objective of the Act and provide private-sector incentives to repair habitat loss, including allowing restoration to contribute toward offsetting.**
11. **Accelerate conservation and repair through more conservation and restoration of private land by significantly increasing Government's investment in the Credits Supply Fund.**
12. **Ensure that the updated BC Act is compatible with the new federal Nature Repair Market scheme and other reforms under the Nature Positive Plan.**

Background

UDIA and our members recognise and value the importance of biodiversity conservation, both for the liveability of our urban areas today as well as to achieve inter- and intra-generational equity for Australia's current and future residents.

UDIA is increasingly concerned that the current system regulating biodiversity conservation in NSW undermines Government's strategic goals for conservation, housing and jobs because of the uncertainty built into it. The system is becoming a major constraint to delivering the housing and jobs expected by

Government and is consequently a disincentive for future private investment, particularly in regional NSW markets with high growth pressure.

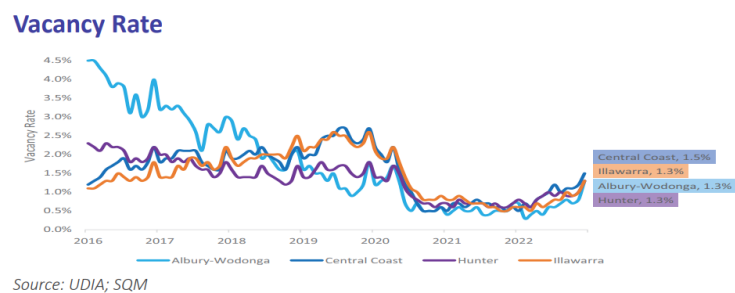
UDIA calls for meaningful changes to the BC Act to ensure the biodiversity regulatory system is efficient and equitable. We are seeking system changes that will achieve these key criteria:

- Improve biodiversity outcomes;
- Reduce the complexity of the system; and
- Increase certainty to meet governments' strategic goals for housing and jobs.

The NSW Housing Shortage

UDIA's national flagship *State of the Land 2023 Report* revealed that NSW is facing a deepening housing supply and affordability crisis, the worst of all Australian markets. Read the full report at this [link](#).

We continue to see demand far outstripping supply across NSW, evidenced by rents escalating by over 14% in the last year and record low vacancy rates of 1% and lower. The housing supply shortage is likely to be exacerbated as international migration ticks back up and overseas students return, with NSW set to take the highest proportion of this intake. The figure below shows the low supply evidenced by sub-3% vacancy rates in key regional NSW markets.



Housing supply is increasingly challenged by biodiversity constraints: less land area is available for new housing; offsetting imposes higher direct costs; and the complex assessment system adds further costs through uncertainty and delays. All of these effects work together to reduce the viability of development projects, reducing housing supply overall.

Today's challenges are directly linked to the consequences of prior land clearing which largely occurred without the imposition of any significant environmental cost to beneficiaries of the clearing. As a result, given current biodiversity offsetting costs are driving up the price of new housing delivery, today's new home buyers bear a substantially higher relative cost for biodiversity conservation, compared to past generations (particularly for homes built prior to the *Threatened Species Conservation Act 1995* which imposed direct offsets costs).

The development industry has weathered significant challenges over the recent years, and the outlook appears equally daunting. The impacts from the pandemic on supply chains, material costs and resourcing constraints continue to be felt by industry and these challenges are expected to persist.

Unfortunately, the complex, slow and often misaligned processes of the NSW planning system continue to be a major impediment to new housing in NSW. The BC Act is part of the suite of legislation and regulations related to the planning framework under the *Environmental Planning and Assessment Act 1979* (EP&A Act) that must be navigated to deliver new housing. For land development, the BC Act has made it much more difficult to deliver new housing on existing residential-zoned land within identified

Urban Release Areas, and also made it much more difficult to rezone new land for residential purposes. In other words, the BC Act constrains housing supply. The interactions of the BC Act with the EP&A Act, particularly in regard to the consideration of a site's economic and social strategic merit under ESD, need to be re-examined and improved to allow NSW to deliver the housing it needs.

There is real concern the housing crisis will spiral out of control without government action. Tackling the shortage of housing is now beyond critical and the new Labor Government in NSW has indicated that boosting housing supply is a top priority.

The new Labor leadership has stated they will align with the Federal Government's National Housing Accord, which means planning for 300,000 new homes in NSW over the next 5 years. To do this, Government must acknowledge the significant headwinds that persist and pull on all government levers to work with industry to boost supply and place downward pressure on prices and rents.

Within this context of the NSW housing shortage, UDIA's submission highlights the issues that we believe must be resolved related to the BC Act to enable Government to meet its housing supply goals and provide inter-generational equity in terms of access to affordable housing.

Evaluating the Purpose and Objectives of the Act

The *Biodiversity Conservation Act 2016* states:

“The purpose of the *Biodiversity Conservation Act 2016* is to maintain a healthy, productive and resilient environment for the greatest wellbeing of the community, now and into the future, consistent with the principles of ecologically sustainable development (described in section 6(2) of the *Protection of the Environment Administration Act 1991*)”.

UDIA agrees with this Purpose, and we strongly support reliance on the principles of ecologically sustainable development.

Unfortunately, UDIA does not believe that the Objectives and implementation of the BC Act support the Purpose with regard to being consistent with ecologically sustainable development.

Biodiversity is a fundamental consideration in the whole-of-government decision making about development, but it is not and should not be the singular consideration. The suite of NSW legislation should work together to enable decision making that fully considers the state's environmental, social and economic priorities, including the imperatives for housing and employment.

The Consultation Paper mirrors the statement of the Chief Judge of the Land and Environment Court of New South Wales, the Honourable Justice Brian Preston, in explaining that ESD “requires the effective integration of environmental, social and economic factors in decisions about development.”¹ Case law also explains: “Consideration of these principles does not preclude a decision to approve an application in any cases where the overall benefits of the project outweigh the likely environmental harm. However, care needs to be taken to determine whether appropriate and adequate measures have been incorporated into such a project to confine any likely harm to the environment.”²

These commonly accepted explanations of ESD speak to the whole-of-government strategic resolution that government must find to support its various environmental, social and economic priorities. We

¹ Hon. Brian J Preston SC, “Principles of Ecologically Sustainable Development”

² BGP Properties Pty Limited v Lake Macquarie City Council [2004] NSWLEC 399 revised - 05/05/2005

acknowledge the difficulty inherent in making decisions where the various priorities may not be obviously aligned.

The NSW planning framework, established under the *Environmental Planning and Assessment Act 1979* (EP&A Act) and its regulations, seeks to enable appropriate decisions through strategic and statutory land use planning, in part by including reference to the BC Act.

UDIA believes ESD is the proper principle to guide planning decisions about development. Unfortunately, we believe the strategic ambition of ESD is hamstrung by the structure of the BC Act, and that structure also undermines the strategic planning framework under the EP&A Act.

The Act lists 15 Objectives aimed at supporting its Purpose, which includes being consistent with the principles of ESD.

However, none of the Act's Objectives adequately support or enable the full strategic assessment of development under the principles of ESD. There is no acknowledgement in the Objectives or the Act itself of the Department of Planning's role in ultimately determining development decisions. In practice, the implementation of the BC Act has undermined the planning framework in NSW by effectively conferring the full evaluation of ESD on the Biodiversity and Conservation division (BCD) of the Environment and Heritage Group, under the Minister for Environment. We believe this is inappropriate, as the Minister for Environment does not have jurisdiction over the other ESD aspects – the social and economic considerations – of the relevant development proposal.

How then, can ESD be adequately facilitated, when the decision maker (the consent authority) is bound by the concurrence of the Environment Agency Head or Minister for Environment, who is not required to consider, nor has jurisdiction over the relevant social and economic factors of the development proposal?

The BC Act and its regulations should make clear that a development decision made under the EP&A Act is informed by, not subservient to, the BC Act. UDIA recommends that ESD should be enabled by clarifying that the Act plays an important but supporting role in the integration of environmental, social and economic factors in the whole-of-government decision-making about ecologically sustainable development.

It has also become clear that the BC Act stifles the underlying objects and stated purpose of the *Aboriginal Land Rights Act 1983* (ALRA). The ALRA was intended as an empowering Act, providing opportunity for Local Aboriginal Land Councils (LALC) to support the economic development of their communities. However, the BC Act inhibits the effective operation of ALRA. This is because most LALC land holdings are zoned for conservation, and the BC Act makes it very difficult for the LALC developer to rezone those parcels for development to enable an economic outcome for the local Aboriginal community.

Achieving optimal environmental, social and economic outcomes requires all stakeholders, including the developer, BCD and the consent authority, to bring a solutions-focused approach to the challenge. The BCD needs to do its part to deliver on the government's strategic plans by working with proponents to find feasible solutions on proposals with strategic merit.

Unfortunately, the structure of the BC Act has produced an implementation approach that has resulted in a lack of strategic alignment across government that significantly impedes the delivery of new housing and jobs in NSW. The implementation approach taken to date has been contrary to, and undermines, the established planning framework under the EP&A Act and hinders the NSW government's ability to fully implement the principles of ESD.

To fix this fundamental problem with the structure of the BC Act, UDIA recommends two changes:

Recommendation #1: Modify Objective (k) to read: to enable ecologically sustainable development by establishing a framework to avoid, minimise and offset the impacts of proposed development and land use change on biodiversity, having regard to the relevant NSW strategic planning documents and environmental planning instruments.

Recommendation #2: Take a more strategic approach to land use planning, whereby biodiversity avoidance and minimisation are resolved early, and working to achieve an outcome on the site that is in line with its strategic merit.

This is discussed in more detail in the following sections.

Biodiversity Offsets Scheme

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 (BAM) 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.

Objective (k) of the BC Act states:

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 that 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.

The NSW Government has not provided adequate definitions and guidance, making the hierarchy's application inconsistent across, and even within, consent authorities being variously 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 the structural problems outlined above 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.

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 article³ 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 discussed as "available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes". 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 legislation, regulations and guidelines:

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.

- UDIA recommends the appropriate threshold should be aimed at avoiding serious and irreversible impacts (SAIL) on ecosystems, species or populations identified under state law.
- 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, i.e., how the development footprint has considered alternatives and been adjusted to avoid biodiversity impacts.

The avoid exercise should be conclusively resolved at rezoning.

- 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.

³ Hon. Brian J Preston SC (2015) "Biodiversity Offsets: Adequacy and Efficacy in Theory and Practice," *IUCN Academy of Environmental Law*

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

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

Serious and Irreversible Impacts (SAII)

There needs to be more clarity around what constitutes SAI 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 listings should be made by an independent scientific panel, and the decision process should include public consultation. The SAI 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 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 refusal; rather, mapping should be the trigger for a further SAI investigation.

UDIA recommends that the assessment of SAI 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.

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.
- NSW Government should work to increase the supply of available credits.
- UDIA strongly supports the option to acquit offset obligations through payment into the BCF. The BCF option must remain available and be viable.

Background

Unfortunately, the offsetting scheme and market have not matured since the implementation of the BC Act. To date, offsetting under the BC Act's BOS has hindered development due to the scheme's high degrees of complexity, uncertainty, costs and/or lack of credit supply. The scheme has also been criticised for not delivering optimal biodiversity outcomes in terms of time lags and high-cost, poor connectivity outcomes at a landscape scale. Many of these problems are due to the fundamental failure of the market to deliver an adequate supply of offset credits.

To enable offsetting, the BC Act establishes an offsets credit trading market (market) to encourage private landholders to conserve land in perpetuity under BSAs and offer like-for-like ecosystem or species credits for sale to developers who require them. Developers may opt to create their own BSAs for purposes of generating the required offset credits, or they can seek credits from other BSA landowners via the market.

The BC Act also establishes the Biodiversity Conservation Fund which allows developers to pay a premium into the BCF and thereby transfer their offset obligations to the Biodiversity Conservation Trust (BCT), who are then required to secure the appropriate credits. The BCF option is used when the required like-for-like offset credits are not readily available on the market.

The BCF was established to ensure that development would not be unreasonably delayed by the market's inability to supply timely credits. The BCF remains a crucially important mechanism to facilitate the timely delivery of new housing and employment projects. Since the implementation of the BC Act, we have seen the BCF option used to a high degree, due to the failures of the market. The market failures have been well-documented by many stakeholders, including UDIA. We outlined our concerns and recommended improvements in our papers which were previously supplied:

- 2019 UDIA-commissioned [EMM Issues Paper on the Biodiversity Offsets Scheme](#)
- [Summary of UDIA's recommendations](#)

We highlight that to date, there is a chronic market mismatch in supply and demand for the necessary like-for-like credits. The under-supply of offset credits is largely due to:

- a lack of information on credit demand;
- lengthy timeframes and costly process in establishing credits;
- the low incentives available to entice private landowners into private land conservation, i.e., to set up BSAs. Our papers (above) provide recommendations to improve the administrative process and financial issues surrounding BSA establishment. For example, the rules around the Total Fund Deposit impose delays on cash flow, and
- a Capital Gains Tax liability arising at creation of the credits instead of revenue receipt.

UDIA has worked with the NSW government on its BOS improvement plan, including updates to the BCF charge model, and the formation of the Credits Supply Taskforce (Taskforce) and Fund. We are strongly supportive of the NSW Government's investment in the Fund and the work of the Taskforce to assist

landholders in generating more credit supply. The NSW Government should invest further to make private land conservation more attractive to landholders by addressing the issues highlighted above. This work is essential to minimise time lag in offsetting residual impacts, provide improved biodiversity offsetting outcomes and to assist in addressing the state's housing shortage.

But regardless of the good work of the Taskforce, we expect inherent challenges in the credits market will persist. UDIA maintains that once the scientific method under the BAM has determined any residual impacts that must be offset, the practicalities of executing that offset must be certain and simple.

The BCF is likely to remain a preferred offsetting pathway for developers, even despite its higher cost, because of the relative certainty and simplicity it offers. Recent changes to the administration of the BCF have improved its functionality, most notably through the availability of offset cost estimates and quotes valid for three years. UDIA applauds this type of service improvement which offers more cost certainty for industry, thereby supporting NSW Government's strategic goals for new housing and jobs. To provide a base level of certainty, we emphasise that the BCF pathway must always continue to be a viable option for developers to acquit their offset obligations.

Overall, UDIA believes fundamental improvements are needed to the BOS, which is addressed in the penultimate section.

RECOMMENDATION #3: Provide clear guidance on avoid and minimise so that the principles are applied consistently across planning authorities, with a clearly defined threshold of what must be avoided.

RECOMMENDATION #4: Apply the avoid and minimise actions once only (i.e., either at rezoning or as part of the DA, not both), and establish a clear and conclusive resolution point as early as possible in the planning process.

RECOMMENDATION #5: Add clarity to the SAIL principle by determining the SAIL 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 SAIL decision should be based on the principle of whether the individual project in question *significantly contributes* to a risk of extinction of the SAIL entity.

RECOMMENDATION #6: Maintain the option to offset impacts through payment into the Biodiversity Conservation Fund.

RECOMMENDATION #7: Investigate ways to make private land conservation, including the establishment of BSAs, more attractive to landholders.

Certification

Part 8 of the BC Act establishes a pathway for biodiversity certification of land (certification).

UDIA supports the use of the certification pathway as a means of resolving biodiversity considerations on land parcels and strongly believes the certification option must be maintained and encouraged.

Theoretically, the certification pathway is available to any planning authority or landowner applicant(s) on any size area. Different rules apply if the application is by a planning authority and the Minister deems it a strategic application.

The benefits of certification are many, primarily related to outcome certainty, both for biodiversity conservation as well as for development. Certification provides a framework for large-scale, up-front land use assessment so that biodiversity conservation corridors can be assured in the long term, and the cumulative impacts of any development are known and appropriately offset and managed. For the developer, certification streamlines future approvals on certified land, enabling more timely delivery of new homes and jobs to support Government's housing and economic development plans. These are all positive outcomes of certification and should be supported with more Government investment.

UDIA strongly recommends that the NSW Government invest in strategic certification in areas with high development growth pressure. The Cumberland Plain Conservation Plan (CPCP) is an example of regional strategic certification, and a similar project is currently underway across growth corridors on the Central Coast. Industry fully supports these government-led endeavours and we encourage additional investment in strategic certification / conservation planning for other growth areas such as the Hunter.

Where the development proponent is the applicant, UDIA observes that the certification process has had limited utility to date. This is primarily due to the lack of guidance on how to "avoid" and "minimise" (as outlined above), as well as process uncertainty including the ambiguous roles and interactions of BCD and the consent authority.

The certification pathway could be improved with actions in four categories:

1. Per UDIA Recommendation #3, provide clear guidance on avoid and minimise, and require the Department of Planning to advise BCD on the site's strategic merit.
2. Speed up the process.
 - a. Add statutory timeframes on responses from BCD to the applicant and planning authority (if different).
 - b. Align certification with the rezoning assessment so that they happen concurrently. UDIA members report that they often wait for the certification outcome several months post-gazettal of the rezoning.
 - c. Facilitate alignment of the BC Act certification approval with federal EPBC Act approval.
3. Clarify roles. Where council is not the applicant, the regulations should establish that BCD should take more of a lead over council in the process, and there should be clear guidance that council is to be consulted but council concurrence is not required.
4. Lock in the relevant ecosystem and species entities at a certain point in the assessment process whereby no new surveys will be required in response to new entity listings. This is the approach taken by the federal government. UDIA recommends this be done at the initial lodgement date. There must be a point in time where the goalposts do not change, otherwise the application can be delayed indefinitely.

Certification offers many benefits for better strategic outcomes for biodiversity and development; however, its practical applications need to be improved to make it a viable pathway.

RECOMMENDATION #8: Improve the process for the certification pathway to enable better strategic land use outcomes under the principles of ESD.

Rethinking the BOS

UDIA recommends a fresh assessment of how the BOS could be better applied to achieve improved biodiversity conservation and nature repair on a more strategic landscape-scale, by applying three new approaches:

1. Merge the functions of the BCF and Credits Supply Taskforce and provide for all offsetting to be coordinated through the BCF/Taskforce entity;
2. Add restoration as an Objective of the Act and provide private-sector incentives to repair habitat loss, including creating a second tier of BSA focused on regeneration, and allowing restoration to contribute toward offsetting; and
3. Accelerate repair through more conservation of private land by significantly increasing Government's investment in the Credits Supply Fund.

Combined BCF/Taskforce Entity

The work of the BCF and Credits Supply Taskforce offer opportunity to improve outcomes by streamlining offsetting overall. UDIA recommends the functions of the BCF and the Credits Supply Taskforce and Fund should be merged and all offsetting should be coordinated via the BCF/Taskforce entity. The NSW Government should invest more heavily in the Credits Supply Fund as well as the BCF/Taskforce's important work of increasing credit supply and coordinating offsets.

The BCF/Taskforce should be able to work with landowners to create BSAs, purchase credits from BSA sites, and maintain a warehouse of offset credits. Developers could then purchase the required offset credits from the BCF/Taskforce, or if the necessary credits are not in the warehouse at the time, then the developer could transfer their offset obligation to the BCF/Taskforce by making payment, as per the current arrangement.

A combined BCF/Taskforce function would have several benefits:

- Accelerate the maturation of the market, with more transparency of demand and supply, and resourcing to encourage more supply;
- Conserve more land more quickly by working with more landowners to create BSAs sooner;
- Increase credit supply and thereby increase the chances that like-for-like offsets will be secured at the time the impact occurs;
- Apply a strategic lens and work with landowners in important biodiversity corridors to create better connectivity on a regional landscape-scale; and
- Ensure that offsetting is not a barrier to meeting the Government's environmental, social and economic strategic goals.

RECOMMENDATION #9: Merge the functions of the BCF and the Credits Supply Taskforce and provide for all offsetting to be coordinated through the BCF/Taskforce entity.

Supporting Nature Repair and Generational Equity

UDIA believes that biodiversity is a broadscale societal benefit that is essential to the well-being of current and future generations, and that today's generation must do what is reasonably possible to conserve and

restore biodiversity for future generations (inter-generational equity) while also meeting its present-day social and economic needs (intra-generational equity).

We are concerned that past generations did not operate under the same approach to ESD and inter-generational equity for biodiversity, and as a result, our society is in a more challenging position today.

Government should ask the question: will we generate adequate resources under the current approach to achieve the outcomes we desire for biodiversity conservation and repair?

The current state of biodiversity today in NSW is largely a result of historical land clearing where the beneficiary of that clearing did not bear the costs of the environmental impact. UDIA notes that since 1995 under the *Threatened Species Conservation Act 1995* (TSCA), NSW has imposed direct costs on new homeowners and other new development to offset biodiversity impacts. These costs have continued to escalate increasingly under the BC Act. Prior to 1995, the cost of the biodiversity impact was not included in development. UDIA accepts the approach of “impactor pays”, but it is unreasonable and not feasible to expect today’s new home owners to bear the full burden of repairing others’ past (unpaid) impacts. From an inter-generational equity perspective, we believe the “impactor pays” approach should be supplemented with a “beneficiary pays” approach.

UDIA believes the current approach of conservation and offsetting alone will not be adequate to support the desired biodiversity aims of conservation and repair. To meet the challenge, we believe the NSW Government should expand its toolbox in two ways:

1. Add restoration as an Objective of the Act and provide private-sector incentives to repair habitat loss by:
 - a. Encouraging BSA landholders to generate credits by undertaking restoration.
 - b. Creating a second tier of BSA that restores native vegetation but has lower sustainability thresholds for plant community types. This “biodiversity restoration stewardship agreement” would generate fewer credits; however, it would make it easier for more landowners to enter into, recreating lost habitat and enhancing connectivity overall.
 - c. Allowing restoration on public lands to contribute towards meeting an offset obligation. This would leverage the current BOS to bring a larger scale to investing in repair.
2. Augment current offsets with broader societal resourcing to tackle the repair challenge. In recognition of past generational inequities, allocate significantly more government investment to the Credits Supply Fund to conserve and restore more private land.

Given biodiversity conservation and repair is a priority for our society as a whole, and our society is serious about avoiding further species losses, then we need to find ways to share in the solution.

RECOMMENDATION #10: Add restoration as an Objective of the Act and provide private-sector incentives to repair habitat loss, including allowing restoration to contribute toward offsetting.

RECOMMENDATION #11: Accelerate conservation and repair through more conservation and restoration of private land by significantly increasing Government’s investment in the Credits Supply Fund.

Compatibility with Federal Reforms

UDIA is engaging with the Australian Government on its *Nature Positive Plan*, including initiatives to overhaul the Environmental Protection, Biodiversity and Conservation (EPBC) Act system to streamline assessments and approvals, establish a new Nature Repair Market, and other proposals aimed at improving environmental, social and economic outcomes.

The suite of reforms being considered at the federal level is likely to have impacts on operations of the BC Act in NSW. For example, UDIA is concerned that if not designed and implemented carefully, the new federal Nature Repair Market has the potential to reduce the supply of credits available for offsetting in NSW.

We urge the reviewers to highlight in their report the evolving federal regulatory landscape and stress the importance of ensuring the BC Act is capable of working within any changes at the federal level.

RECOMMENDATION #12: Ensure that the updated BC Act is compatible with the new federal Nature Repair Market scheme and other reforms under the *Nature Positive Plan*.

Conclusion

UDIA appreciates this opportunity to offer our input to the Consultation Paper on the Statutory Review of the Biodiversity Conservation Act 2016. UDIA believes the Act has not achieved its purpose regarding being consistent with ecologically sustainable development.

Given the significant impacts the Act has on the industry's ability to deliver the housing and employment projects needed in NSW, we respectfully request that the review panel schedule a workshop with UDIA while it is still developing its recommendations to Parliament.

To arrange follow-up engagement or if you have any questions about our submission, please contact Elizabeth York at eyork@udiansw.com.au or 0434 914 901.

Kind Regards,



Steve Mann
Chief Executive
UDIA NSW