

27 September 2023

The Hon. Penny Sharpe MLC
Minister for the Environment

UDIA response to BC Act Review Final Report

Dear Minister,

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.

We are writing to provide our views on the Final Report of the Independent Review of the Biodiversity Conservation Act 2016 (Final Report) which was tabled in the NSW Parliament on 24 August 2023. We would like to offer our assistance as you, your staff and the Department consider the recommendations and formulate the Government's response, including any potential legislative changes.

UDIA and our members value the importance of biodiversity in NSW and across Australia, and we aim to work constructively with all levels of government and other stakeholders to improve biodiversity outcomes, while also delivering the housing and jobs needed to support the people of NSW.

In delivering the majority of new housing and employment-generating land development in NSW, our industry has significant and frequent interaction with the *Biodiversity Conservation Act 2016* (BC Act, or Act), and is one of the largest users of the biodiversity offsets scheme (BOS) under the Act. In doing so, our members make a substantial contribution to biodiversity conservation on private land by directly establishing or creating demand to support the establishment of Biodiversity Stewardship Agreement (BSA) sites.

UDIA's long-held position is that the BC Act is failing to deliver good biodiversity outcomes and the Act is also having a detrimental impact on achieving the NSW Government's strategic goals for housing and jobs. We engaged with the Independent Review Panel by meeting and providing written background materials and recommendations. Links to those materials are provided at the end of this letter.

The fundamental finding of the Review is that the BC Act is not meeting its primary purpose of maintaining a healthy, productive and resilient environment. UDIA agrees, and we want to assist in creating better environmental outcomes.

UDIA also agrees with the Review's finding that the regulatory provisions of the Act are "complex and uncertain, with high compliance costs." We are encouraged that the Final Report acknowledges the major concerns we outlined about the current Act and its implementation, and calls out the need to reduce complexity, improve certainty and reduce compliance costs for participants; increase offset credit supply;

and “make assessment faster, easier and cheaper”. We are hopeful we can work with you to find tangible improvements in these areas.

However, we must caution that many of the Final Report’s recommendations would exacerbate the current regulatory problems. While we recognise the potential benefits for the environment in some recommendations *if implemented carefully*, overall, we believe that **adopting the Review Panel’s recommendations in full would make it much more difficult to deliver new housing and jobs in NSW.**

Our initial comments are set out below. We are keen to work with you to find practical solutions to the issues raised by the Review. Some changes can and should be implemented now under the existing Act. Any changes made should be done to improve the environment, while also supporting the Government’s further important priorities for housing supply, the transition to renewable energy and the ongoing economic growth of NSW.

Background: Impact of the BC Act on Housing Supply

UDIA represents the industry that is one of the largest (likely the largest by volume) participants in the BOS under the BC Act. The implementation of the BC Act has become a major constraint to delivering new housing and employment-generating land development across the state.

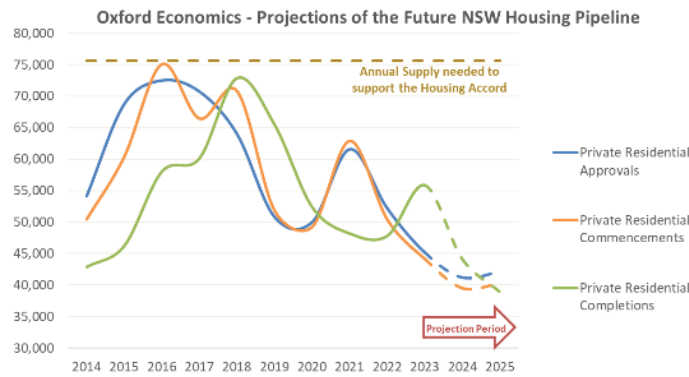
It is vitally important that the NSW Government carefully considers any changes to the Act in the context of how those changes could impact on achieving other Government priorities, such as increasing housing supply.

We would like to work with you as you work through the substantial implications of considering a potential move to a “Nature Positive” approach, including considering adopting a new setting of “net gain” and/or giving the Act primacy over competing legislation. While we understand the reasoning behind these recommendations, we believe they would impose very high risks to achieving other goals for the people of NSW. Indeed, the Report acknowledges that a Nature Positive framing poses “significant challenges for government in balancing various priorities, for example, housing and associated infrastructure requirements to support a growing population.”

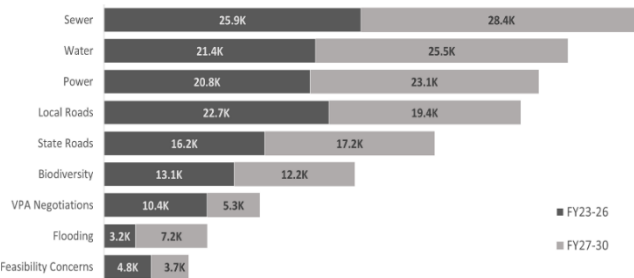
The Minns Government has committed to deliver 378,000 new homes in the next five years as part of the National Housing Accord. This commitment equates to 76,000 new homes each year, a rate never before achieved and 60% above our current annual supply. Based on current projections, we are already at risk of falling 200,000 homes short in the five years.

To meet our commitments, NSW will have to increase its delivery of **all** types of housing, including housing subject to the BC Act. UDIA agrees that we need to “go up” to deliver more transit-oriented development and more social and affordable housing. But we cannot meet the Housing Accord targets unless we also “go out” and deliver more detached homes on all currently zoned land, plus find new land to rezone.

The following charts illustrate the challenge NSW is facing to achieving the Housing Accord targets, and the supply turn around needed across all housing types.

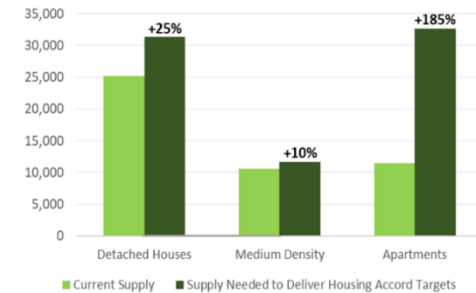


Number of Lots Impacted By Constraints in the Six Cities Megaregion



Source: UDIA Greenfield Land Supply Pipeline Report, 2022

Table: Supply uptake needed to meet 75,600 new homes in NSW



Source: UDIA NSW; ABS

Unfortunately, since its implementation the BC Act has become a major constraint on new housing supply, particularly in regional markets where Government has not delivered a strategic conservation plan. UDIA's 2022 *Greenfield Land Supply Pipeline Report* shows that 62% of development sites in the Hunter and Central Coast, and 41% in the Illawarra-Shoalhaven, are unable to be delivered due to challenges under the BC Act (primarily in the regulatory implementation of the BOS).

Given the BC Act is a major hurdle to meeting our Housing Accord targets, we would like to work constructively with you and your staff to:

1. Make regulatory changes now under the BC Act that would help deliver housing supply while supporting good environmental outcomes; and
2. Fully analyse further potential legislative changes to ensure they are a help and not a hindrance to delivering on Government's commitment to deliver more housing and jobs.

Improvement Areas Needed to Support Housing Supply

We outlined the challenges for development during the Review, and the Final Report includes several statements and recommendations recognising that the implementation of the Act has been problematic for its participants. The following themes were raised by UDIA and the Final Report calls out the need to address these:

- Reduce complexity
- Improve certainty for participants
- Improve the certification pathway
- Provide clearer guidance on avoid and minimise, and achieve this early in the planning process
- Reduce compliance costs

- Make assessment faster, easier and cheaper
- Increase credit supply
- Use strategic landscape-scale planning to manage biodiversity

Some of the Final Report's Recommendations, if implemented carefully, could help alleviate these issues. We would like to work constructively and urgently with you and your staff to find and implement practical solutions to the above issues which much be solved as part of the Government's efforts to address the housing crisis.

UDIA recommends the following immediate actions which should be implemented now under the current Act, working with industry to ensure positive and practical outcomes:

- 1. 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.**
- 2. 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.**
- 3. 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.**
- 4. Improve the process for the certification pathway, including by setting timeframes and clarifying roles.**
- 5. Enhance the efforts under the Credit Supply Taskforce to support landholders in the establishment of BSAs.**
- 6. Add clarity to the SAIL principle by clarifying that mapping triggers a further investigation, not an automatic refusal.**

The rationale and suggested approaches to the above are detailed in our submission to the Review Panel, which is linked at the conclusion of this letter.

Impact of Major Recommendations on Housing Supply

The Final Report makes several significant recommendations to fundamentally alter the principles and objectives of the BC Act. UDIA welcomes the intent behind the recommendations, to conserve, restore and repair the valuable biodiversity of NSW. However, every policy and action has consequences and UDIA believes that adopting the Review Panel's recommendations in full would make it much more difficult to deliver new housing and jobs in NSW.

Below we outline the impact of the Review's major recommendations on our industry and housing supply.

1. Nature Positive

The Final Report references Australia's adoption of the Kunming-Montreal Global Biodiversity Framework, which calls for reversing biodiversity loss, and the Australian Government's Nature Positive Plan.

Fundamentally, Government must carefully consider the best approach to maintaining a healthy, productive and resilient environment while also delivering on its social and economic priorities.

Biodiversity regulatory costs on development have significantly increased under the BC Act, in part because of the losses imposed by previous generations under past government policies (or lack thereof). We agree that the costs of any new losses should be borne by the impactor. However, the Final Report's recommendations would add further costs to new development, including moving to a higher, "net gain" principle and setting credit obligations at 120% of calculated biodiversity loss.

UDIA would oppose the imposition of additional "Nature Positive" offset costs on new development. While we agree that the impactor (developer) should pay to offset biodiversity losses due the specific project clearing, UDIA believes a Nature Positive outcome in NSW can only be achieved if the Government is willing to apply the substantial cost of the initiative to all beneficiaries across society (i.e., a Nature Positive levy across the population).

Implementing a Nature Positive / net gain approach would have direct and indirect costs. Without a major shift in policy, those costs will predominantly be carried by NSW residents seeking housing, as follows:

- Direct costs
 - Imposing all incremental "net gain" costs on new development will make new housing more expensive, since the higher biodiversity assessment and offsetting costs will be passed on to the new home buyer through the purchase price.
- Indirect costs:
 - Lower supply of new housing will increase house prices.
 - giving biodiversity 'primacy' on land use decisions will reduce land available for housing
 - 'no-go' areas plus stricter avoidance measures will reduce land available for housing
 - Ministerial call-in power to determine SAI will risk politicising land-use decisions instead of relying on science, likely reducing land available for housing
 - Restricting BCF offset options will add administrative constraints to timely development, reducing project viability and likely reducing housing

Government's environmental, social and economic priorities continue to be intertwined. It must be acknowledged that if the Act makes it too hard to deliver greenfield development, there will be no offsetting, i.e., there will be no private sector funding for the offset credits that are the foundation of the biodiversity repair outcomes the Review is recommending.

We need to work together to find a practical approach that delivers the environmental outcomes, but also delivers the housing and delivers the jobs.

2. Giving Primacy to BC Act

The Review recommends aligning with the international movement to a 'Nature Positive' and 'net gain' approach, giving biodiversity consideration and the BC Act 'primacy' over competing legislation such as the Environmental Planning and Assessment (EP&A) Act.

Giving the BC Act primacy over the EP&A Act would mean that the process of strategic land use planning becomes irrelevant for any consideration other than environmental outcomes.

This would undermine Government's ability to meet its Housing Accord commitment, by reducing land available for development.

3. No-Go Areas Spatial Tool

The Final Report recommends, as a means of achieving certainty for BOS participants, a Government-developed single spatial tool that identifies 'no-go' areas of high biodiversity value/SAII, where development is not allowed. While we acknowledge the theoretical benefit of clarity on where not to develop, any such tool would not actually provide certainty for development, since any proposals outside the 'no-go' maps must still go through the highly uncertain BOS.

UDIA would oppose the use of a 'no-go' area spatial tool without corresponding 'go' maps, identifying where the BOS does not apply. If Government can undertake sufficient high level assessment to rule an area out, it should be able to do enough high level assessment to rule an area in. This would streamline land use planning and provide certainty for all stakeholders.

UDIA strongly supports the use of landscape-scale strategic biodiversity planning where biodiversity obligations are resolved. We note the theoretical system discussed above would not be dissimilar to the current use of Government-led strategic conservation plans – or even the “regional offset investment plans” envisioned under Recommendation 27 of the Final Report. UDIA strongly supports Government investment and leadership in strategic conservation planning in high growth areas, and we urge Government to utilize a landscape-scale strategic approach more broadly, including in identified development precincts.

Coming back to the concept of the 'no-go' area spatial tool, if this were attempted without corresponding 'go' mapping, the approach would present many implementation challenges. Any 'no-go' spatial tool would have to mitigate risks by incorporating, at a minimum:

- a ground-truthing pathway to allow challenges to the map;
- transition rules to exempt land that is already zoned or identified for development in an endorsed strategic land use plan. This is necessary to allow the current pipeline of projects to deliver the housing yield Government is counting on.

4. Requiring Certification at Rezoning and Improving Certification Pathway

UDIA welcomes and strongly supports Recommendation 21 of the Final Report, which calls for a review of “the biodiversity certification process to address barriers and improve transparency and confidence in the outcomes it delivers.”

Our members' experience with BCD in assessing the BCAR includes:

- there are no set timeframes, so the process is open-ended with delayed responses being the norm;
- guidelines keep changing;
- there is inconsistency in approach and opinion between different officers;
- the proponent's accredited assessor's professional opinion set out in the BCAR is subjectively challenged by officers; and
- final sign-off can take months with no reliable updates.

These types of process pain points can be addressed if we work together. UDIA recommends BCD should convene a series of workshops with industry to identify the best ways to streamline the certification process to make it more transparent, faster and certain for all parties.

5. Clearer Guidance on Avoid & Minimise

UDIA wholeheartedly welcomes Recommendation 23 of the Final Report which calls for clearer guidance on the requirements to avoid and minimise impacts to biodiversity from development.

Currently, the application of the avoid-minimise-offset hierarchy is overly subjective and highly uncertain and is one of the greatest pain points for developers in the current system. UDIA would like to work closely with the Department as it drafts guidelines for avoid and minimize. There are many practical project-delivery issues that need to be considered to ensure the guidelines achieve the goal of retaining high value biodiversity, while also enabling the development outcome.

To deliver enough houses to meet our Housing Accord targets, NSW will need to maximise the use of our current pipeline – in other words, we need to use the full capacity of the land that is already zoned for development or identified for housing in an endorsed strategic plan. To do so, UDIA recommends that currently zoned or identified residential land should move straight to offsetting. Avoid and minimize should not be imposed on the current land supply, unless there are SAIL matters that need to be avoided. This approach would maximise yield on strategically-identified land, which in turn reduces pressure to rezone and clear more land and would provide better certainty for Government to meet its housing targets.

This would also stop the nonsensical retention of small, isolated patches of avoided vegetation, which contribute only minimally to biodiversity conservation and are a management challenge. This was an issue identified in the rationale behind Recommendation 16 of the Final Report (explore ways to adjust the thresholds to better balance the regulatory burden for small developments).

6. Increasing Credit Supply and Improving Market Function

UDIA strongly agrees that more needs to be done to increase credit supply and support a viable offsets credit trading market, including by giving greater value to restoration credits.

We acknowledge the work of the Credits Supply Taskforce and the investment in the Credits Supply Fund, which are having some success in establishing BSAs and increasing supply. We support Recommendation 28 of the Final Report, which calls for continued investment in the Fund which we believe is urgently needed. We have consistently called for more funding in this area.

We also support the Final Report's pragmatic suggestions to increase credit supply by:

- using restoration to generate credits;
- providing more incentives (e.g., bonus credit generation) for private land conservation in high value biodiversity corridors; and
- using public land to generate credits.

The establishment of Biodiversity Stewardship Agreement (BSA) sites on private land is the fundamental tool for conservation in NSW under the Act. Government policies need to reduce barriers and provide real incentives to create more BSAs. This starts with generating credit demand so the BSA holders have a product to sell. It is important to acknowledge that without the development, there would be no credit demand and therefore no incentive for private land conservation. For the system to work, this market balance must be achieved.

We are compelled to call out the lack of logic on page 28 of the Final Report, which states that "[a]ction needs to be taken to reduce demand for credits by: according primacy to avoiding and

minimising impacts...” Respectfully, this does not make sense. Reducing demand for credits will reduce credit supply, thereby reducing private land conservation via the offsets market. Such an approach would undermine the fundamental market-based system of the Act. We agree the first step is to avoid and minimise impacts, but a functioning offset credit market should be the goal. UDIA believes Government needs to invest more heavily in supporting the establishment of the market.

As it stands, there are not yet enough like-for-like credits available to meet demand, an issue the Taskforce is working on (again, more resourcing is needed). The undersupply causes developers to default to acquit their offset obligations by paying into the Biodiversity Conservation Fund (BCF), which must then source the credits once they are available.

The BCF has been faulted for not buying credits fast enough. This is only because credit supply is so low. If credit supply matched demand, then the BCF funds would not accumulate as they have. The BCF payment option must be maintained to avoid further unnecessary delays in housing delivery. UDIA strongly objects to Recommendations 29 and 30 of the Final Report which would put unreasonable restrictions on payments into the BCF “if credits are available on the market”. Acquitting the offset obligation is a requirement on the critical path of development, but as acknowledged in the Final Report, market information is inadequate. The recommended restrictions would be highly likely to create additional administrative barriers to timely development, resulting in cumbersome delays and increased uncertainty in an already complicated and burdensome regulatory process. Recommendations 29 and 30 should not be implemented.

Conclusion

UDIA appreciates this opportunity to offer initial views on the Final Report of the Independent Statutory Review of the *Biodiversity Conservation Act 2016*. Given the significant impacts the Act has on the industry’s ability to deliver the housing and employment projects needed in NSW, we request that the Department hold a series of workshops specifically with the development industry, including UDIA, to:

1. find and implement immediate improvements, per our above recommendations; and
2. work through the implications of Government’s response to the Review.

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

Attachments:

- 2023 [UDIA submission to the BC Act Review Consultation Paper](#)
- 2022 [UDIA letter to review panel](#)
- 2019 UDIA-commissioned [EMM Issues Paper on the Biodiversity Offsets Scheme](#)