The Australia Institute
Research that matters.

# Payments to destroy and lessons not learned

## Report on the Environment Protection Reform Bill 2025

***The Bill weakens environmental protection, replicating the problematic NSW biodiversity offsetting scheme. It establishes a 'payments to destroy' fund that transfers responsibility for nature destruction from project proponents to the public, creating time lags in responding to environmental impacts and reducing the likelihood that such responses will replace like with like.***

**Frances Medlock**
**Fergus Green**

**November 2025**

## The Australia Institute - Research that matters

Established in 1994, The Australia Institute is an independent public policy think tank with offices in Canberra, Hobart, Melbourne and Adelaide providing intellectual and policy leadership across a broad range of economic, social and environmental topics. We conduct research that drives the public debate and secures policy outcomes that make Australia better – research that matters.

The Australia Institute is funded by donations from philanthropic trusts and individuals, as well as grants and commissioned research from business, unions and non-government organisations. We do not accept donations or commissioned work from political parties. With no formal political or commercial ties, the Institute maintains its independence while advancing a vision for a fairer Australia.

Donations to our Research Fund are tax deductible, and can be made via our website or by calling the Institute:

Level 1, 113 Canberra Avenue,
Griffith, ACT 2601
Tel: (02) 6130 0530
Email: mail@australiainstitute.org.au
Website: www.australiainstitute.org.au

## Acknowledgement of Country

The Australia Institute recognises the ancestral connections and custodianship of Traditional Owners throughout Australia. We pay respect to Aboriginal and Torres Strait Islander cultures and to Elders past and present.

# Contents

# Summary

This paper outlines how the proposed reforms to the Australian biodiversity offsetting scheme in the Environment Protection Reform Bill 2025 replicate well-known problems in the New South Wales (NSW) offsetting regime, and exacerbate problematic features of the national scheme.

The Albanese Government has introduced environmental law reforms to Parliament. This follows from the failure of the 'nature positive' package in 2024, and coincides with the five-year anniversary of Professor Graeme Samuel's damning review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) to the (then Coalition) Federal Government. During this time, the health of the Australian environment has continued to decline.

National nature laws certainly need reform, and in particular the national biodiversity offsetting framework needs amendment. **However, the Environment Protection Reform Bill 2025 contains amendments which could lead to worse environmental outcomes, including by giving a free pass to developers and polluters to 'pay to destroy'.**

The amendments create a new option for proponents under national nature laws to pay 'restoration contributions' into a fund on approval of a new project, rather than securing direct, like-for-like biodiversity offsets. This represents a weakening of national nature laws that could undermine any improved protection the Environment Protection Reform Bill 2025 might lead to in other areas.

In NSW, a similar 'pay to destroy' scheme has been operating for over a decade, leading to poor outcomes for nature and significant integrity risks. This paper compares the NSW regime with the proposed Federal Bill and finds that lessons from NSW have not been learnt.

The introduction of restoration contributions into federal environmental law should be rejected, and the Environment Protection Reform Bill 2025 should be amended to remove these provisions.

**Key takeaways**

- **Introducing 'pay to destroy' contributions let proponents off the hook for the damage their project will cause. Restoration contributions are fundamentally different to a biodiversity offset.**
- **Restoration payments shift responsibility from the proponent (the one causing the damage to the environment), to a statutory body.**

- **Including the mitigation hierarchy in the legislation is a useful start, but Ministerial discretion in approval and conditioning undermines its application to decision-making.**
- **The Restoration Contributions Holder (RCH) has significant discretion in deciding to use proponent money for 'alternative restoration actions', which are not required to be like-for-like and which will undermine protection of the impacted species.**
- **Longer time lags for the RCH to apply funds to protect biodiversity means greater risk for the impacted species, particularly in the context of climate change.**
- **The RCH may assume compensation liability via an offset payment, and the project proceed, but there is no guarantee the RCH will find an equivalent offset or that offsetting will even be possible for the harm caused.**
- **The 'net gain test' can be deemed to be passed at the Minister's discretion, potentially without securing a genuine, equivalent benefit to the protected matter being harmed.**
- **The Bill removes the 2023 prohibition on using Nature Repair Market (NRM) certificates for biodiversity offsetting, exacerbating ongoing concerns about interchangeability of certificates, and about the integrity and governance of the NRM.**

# Introduction

The general outlook for Australia's unique and precious environment is poor, deteriorating, and under increasing threat from climate change, habitat loss, invasive species, pollution and resource extraction.[1] As noted by former Environment Minister Tanya Plibersek in the early days of the Albanese Government, Australia is a world leader in species extinction, and holds the dubious record of sending more mammal species extinct than any other continent.[2]

With a remarkable degree of consensus across business, industry, civil society and the scientific community, as well as Australians at large, it is agreed that our flagship environmental law, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), is not fit for purpose. Simply put, it doesn't protect the environment nor conserve biodiversity.

Biodiversity offsetting arrangements under the EPBC Act have directly contributed to this outcome.

> ***WHAT IS BIODIVERSITY OFFSETTING?***
>
> *When a developer wants to clear land to build a warehouse, or a mining company wants to build a coal mine, Australian law typically requires that they 'offset' the damage they cause to nature as a condition of the planning approval. The concept of an offset relies on the idea that an approved harm to the environment and an environmental benefit secured elsewhere are interchangeable. If you destroy koala habitat in one place, then you must secure safe koala habitat elsewhere. The offset is compensating for losses of biodiversity at an impact site by generating ecologically 'equivalent' gains elsewhere.*

National-level biodiversity offsetting is managed under the EPBC Act through the Environmental Offsets Policy 2012.[3] The Independent Review of the EPBC Act by Professor Graeme Samuel AC, a review of the legislation which is required to be carried out every ten years, found that the way this policy deals with environmental offsets directly contributes to environmental deterioration rather than restoration.[4] The Samuel Review emphasised that

[1] Department of Climate Change, Energy, the Environment and Water, *Australia State of the Environment Report 2021*, (2021) https://soe.dcceew.gov.au/about-soe/about-report.

[2] The Hon Tanya Plibersek MP, Minister for the Environment, 'National Press Club Address' (Speech, 19 July 2022) https://minister.dcceew.gov.au/plibersek/speeches/national-press-club-address.

[3] *Environment Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy* (October 2012).

[4] Professor Graeme Samuel AC, *Independent Review of the EPBC Act* (Final Report, 2020) (**Samuel Review**) 138.

offsets are used too often as a default measure for proponents; that the regime is ineffective at compensating for environmental loss; and that rules are being flouted.[5]

This is clear in more recent audits carried out by the Department, which have found that offsetting requirements under the Environmental Offsets Policy and relevant project conditions are simply not being complied with, that projects are going ahead without first securing the necessary offsets, or that sites supposedly secured for habitat protection are in a worse condition than they were before. The damage is being done, but the commensurate protection is not being secured.

This is demonstrated by the fact that, between June 2023 and March 2024, a Departmental review found that of the 222 approvals investigated, 32 (14% or 1 in 7) were non-compliant or potentially non-compliant with their approval conditions and required further investigation.[6] A ground truthing review then carried out in June 2024 found that a third of the offset sites sampled had worse site conditions, and that two other sites had land that overlapped with other existing offset sites.[7]

Accordingly, the Albanese Government is now attempting to reform the EPBC Act, and in late October introduced the Environment Protection Reform Bill 2025 to Parliament. Among other things, the Bill amends the biodiversity offsetting arrangements in national nature laws.

The Bill introduces a new concept into national nature law, which will allow proponents to 'pay to destroy' rather than secure an offset directly. This moves the system even further away from best practice principles of biodiversity offsetting, and threatens to undermine any improvements to environmental protection in the reforms at all. **The offsetting reforms contained in the Environment Protection Reform Bill 2025 will weaken and undermine environmental protection, taking us in the wrong direction. They should be rejected and the Bill amended.**

[5] Ibid 44.

[6] DCCEEW *Environmental Offsets Audit* (2024) https://www.dcceew.gov.au/sites/default/files/documents/environmental-offsets-audit-report.pdf.

[7] DCCEEW *Ground-truthing of EPBC Act offset site information summary report* (2024) https://www.dcceew.gov.au/sites/default/files/documents/ground-truthing-offsets-summary-report.pdf.

# Replicating the NSW scheme

## AND FAILING TO LEARN FROM IT

Key features of the NSW scheme have meant that it has not actually offset biodiversity impacts and harm, but instead has facilitated a net loss of biodiversity. Unfortunately, it appears that the Albanese Government is seeking to replicate this model.

Under the *Biodiversity Conservation Act 2016* (NSW) (**BC Act**), developers that incur offset obligations when they obtain approval for a project that will have an impact on nature can satisfy those obligations by either purchasing biodiversity credits through the NSW biodiversity credit market, or by making payments into a fund managed by the Biodiversity Conservation Trust (**BCT**). The Trust must then acquit the developer's offset obligation, while the development proceeds.

The Trust may acquit this liability through either purchasing and retiring biodiversity credits through the biodiversity credit market; or by directly securing an environmental offset. But the developer can proceed to build their project before the Trust secures offsets for the ensuing damage to nature, and the offsets the Trust eventually secures need not be 'like-for-like'.

The scheme has been widely criticised, including:

- The 2023 Independent Review conducted by Dr Ken Henry AC found the BC Act is not delivering its primary purpose, and that biodiversity is not being conserved. The scheme was overemphasising offsetting rather than avoiding harm, while it was unclear if offsets were even delivering real, long-term and additional value.[8]
- The NSW Auditor-General Report in 2022 found that credit supply through the NSW market was lacking and poorly matched to the demand from developers resulting in an under-supply of credits for numerous endangered species. This created the risk that biodiversity gains made under the scheme were not sufficient to offset the losses from approved development impacts.[9]
- The Independent Pricing and Regulatory Tribunal has continually recommended that the option for development proponents to pay into the fund should be phased out

[8] NSW Parliament, Legislative Council Portfolio Committee No. 7, *Integrity of the NSW Biodiversity Offsets Scheme* (Report, November 2022) https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf.

[9] Audit Office of New South Wales, *Effectiveness of the Biodiversity Offsets Scheme* (31 August 2022) https://www.audit.nsw.gov.au/our-work/reports/effectiveness-of-the-biodiversity-offsets-scheme.

and the Biodiversity Conservation Trust should develop a strategy for reducing the backlog of unacquitted credits in the Biodiversity Conservation Fund.[10]

- Following extensive reporting and investigation by the Guardian, both the Auditor-General Report and a 2022 NSW Parliamentary Committee Inquiry found major integrity problems in the scheme, including windfall gains for environmental consultants, conflicts of interest, and a lack of transparency.[11]
- Responding to these criticisms, the NSW Government in 2024 released the NSW Plan for Nature.[12] Following from this Plan, key amendments have been made to the biodiversity offsetting scheme under the BC Act, and associated regulations, to try and improve the failing model.[13]

It is this embattled legislation and biodiversity offsetting model that the Federal Government is seeking to replicate through the Environmental Protection Reform Bill 2025. The proposed reforms even include opening up offsetting under environmental assessment laws to the Nature Repair Market in the same way the NSW scheme relies on the biodiversity credit market. This is despite the fact that, under the purview of the BC Act and biodiversity offsetting scheme, biodiversity is in decline across NSW: only 50% of threatened species are expected to survive the next 100 years; and only 29% of the capacity of habitat to support native species remains.[14] **While it remains to be seen if the 2024/25 amendments to the NSW regime will be able to turn around this trajectory, it appears a poor choice for the 'once-in-a-decade' reform Australia needs at the federal level.**

[10] Independent Pricing and Regulatory Tribunal (**IPART**), *Biodiversity Credits Market Monitoring Annual Report 2023–24* (December 2024) https://www.ipart.nsw.gov.au/sites/default/files/cm9_documents/Annual-Report-2023-24-Biodiversity-Credits-Market-Monitoring-December-2024.PDF; IPART, *Biodiversity Market Monitoring Annual Report 2022–23* (December 2023) https://www.ipart.nsw.gov.au/sites/default/files/cm9_documents/Annual-Report-2022-23-BiodiversityMarket-Monitoring-December-2023.PDF.

[11] NSW Parliament, n 8. See also, Lisa Cox, '"Enormous Sum of Money": $40m Windfall from NSW Environmental Offsets Sparks Calls for Inquiry' *The Guardian* (15 April 2021) https://www.theguardian.com/environment/2021/apr/16/enormous-sum-of-money-40m-windfall-from-nsw-environmental-offsets-sparks-calls-for-inquiry

[12] NSW Government (2024) *NSW plan for nature*, https://www.nsw.gov.au/departments-and-agencies/cabinet-office/resources/nsw-plan-for-nature

[13] For example, through creating new public registers that record offset obligations, introducing a net positive requirement and the mitigation hierarchy, and amending variation rules.

[14] NSW Department of Planning and Environment, *NSW Biodiversity Outlook Report 2024* (2024) https://www.environment.nsw.gov.au/news/nsw-biodiversity-outlook-report-2024.

# Elements of the Bill that expand and weaken national biodiversity offsetting rules

The Environment Protection Reform Bill 2025, introduced to Parliament in late October will, among other things, amend the EPBC Act to expand and further weaken the national biodiversity offsetting arrangements that are already failing so badly.

***KEY TERMS***

***Restoration contribution charge*** *= restoration payment or offset payment. The cash payment made to a statutory body by a proponent which will then undertake the actual compensation for the harm the proponent is causing.*

***Restoration action*** *= used interchangeably with environmental offset and biodiversity offset. An action which directly compensates for the damage caused by a residual significant impact of an action on a protected matter.*

***Compensation liability*** *= liability on the proponent to 'make up' for the harm their project is causing, so far as that harm is not avoided or mitigated. Compensation can take the form of an environmental offset, or payment of a restoration contribution charge.*

***Proponents/developers*** *= used interchangeably, referring to the person proposing to take the action that will harm the environment.*

***Residual significant impacts*** *= the harm caused to a protected matter which is not being avoided or mitigated by the proponent (the EPBC Act is concerned with 'significant' impacts on protected matters).*

## RESTORATION PAYMENTS ARE 'PAYMENTS TO DESTROY'

The key change to national biodiversity offsetting rules is the introduction of the concept of restoration contribution charges (hereafter restoration payments). These payments allow proponents to discharge their responsibility to provide biodiversity offsets to compensate for the harm their project is doing by instead paying into a fund, managed by the Restoration Contributions Holder (**RCH**). Essentially, proponents will have the ability to 'pay to destroy' rather than securing the direct offset as outlined in the explanatory memorandum:

> The purpose of this amendment is to facilitate the ability for an approval holder to pay a restoration contribution charge to the Commonwealth in order to discharge their liability to compensate for the damage likely to be caused by [...] their proposed action, **rather than being required to deliver a restoration action (offset) themselves that compensates for any such damage to a net gain.**[15]

This system replicates the NSW system: with their liability discharged through the payment, the proponent is free to undertake the action in line with their approval, and need not be concerned about further compensation for the damage to nature they have been approved to cause. This shifts the locus of responsibility from the proponent (the one causing the damage to the environment), to a statutory body.

This is a significant departure from the principle underpinning biodiversity offsetting: that if you cause harm in one place, then you must ensure ecologically equivalent and measurable benefit is secured in another place.[16] While the proposed federal reforms include some requirements purportedly aimed at ensuring that the principle will be honoured, as explained below, they are inadequate to this task.

**Key takeaways:**
**- Introducing 'payments to destroy' lets proponents off the hook for the damage their project will have. Restoration contributions are fundamentally different to a biodiversity offset.**
**- Restoration payments shift responsibility from the proponent (the one causing the damage to the environment), to a statutory body.**

## LITTLE TO STOP RESTORATION PAYMENTS BEING THE DEFAULT OPTION FOR NEW APPROVALS

It will be the decision of the Minister granting the approval to impose conditions requiring the holder of the approval to pay a restoration contribution charge.[17]

In deciding whether to attach a restoration payment condition, the Minister must 'consider' whether the proponent has taken appropriate measures to avoid, mitigate or repair the impact or damage likely to be caused by their project (**the mitigation hierarchy**). In making their decision, the Minister may also consider any matter the Minister considers relevant.[18]

[15] Environment Protection Reform Bill 2025 (Cth) Explanatory Memorandum, 184. (Emphasis added.)
[16] Maron, Martine et al, 'Biodiversity Offsets, Their Effectiveness and Their Role in a Nature Positive Future' (2025) *Nature Reviews Biodiversity* 1, 183 https://doi.org/10.1038/s44358-025-00023-2.
[17] Environment Protection Reform Bill 2025 (Cth) s 134(3)(ac).
[18] Environment Protection Reform Bill 2025 (Cth) s 134(3F).

Including the mitigation hierarchy in the proposed legislation is a step forward from the current offsetting arrangements, insofar as the mitigation hierarchy has been elevated into legislation and now forms a key part of the Ministerial decision-making. This was only elevated recently in the NSW scheme as well.[19] The intention is to ensure proponents are incentivised to design their actions to avoid or, alternatively, mitigate impacts, rather than relying on the ability to 'just compensate' for the remaining impacts.[20] However, this decision-making process includes significant Ministerial discretion, and little guidance as to what would constitute an 'appropriate measure' for the proponent to have undertaken to avoid or mitigate their impact. It is not clear what evidence will be required to establish that the residual impact is truly unavoidable, rather than just expensive or inconvenient. This discretion largely undermines the inclusion of the mitigation hierarchy in the Minister's decision-making.

New provisions also allow for the regulations to prescribe matters for which damage is not able to be offset or 'compensated' for, because of the nature of the protected matter or because of the particular circumstances of that matter. For example, this might include "where there is currently no appropriate habitat available that is able to be used for compensation purposes for a particular listed threatened species."[21] If such a matter is prescribed, then the Minister must not attach conditions to an approval which would require the payment of a restoration contribution or securing of an offset in relation to that matter.

Similarly, offsets and restoration payment conditions cannot be applied to unacceptable impacts, however this is with the exception of the broad national interest exemption, or where the Minister decides that conditions attached to the approval could lead to mitigation or repair of that damage.[22]

The inclusion of the mitigation hierarchy, the ability to prescribe non-offsetable matters, and the new definition of 'unacceptable impacts' are important limitations. **However, the Minister retains significant discretion in decision-making around these limitations, and additional regulations are relied on for specific matters.** It would be preferable to state clear red lines in the primary legislation for when offsetting or restoration payments are simply inappropriate.

**Key takeaway:**
**Including the mitigation hierarchy in the legislation is a useful start, but Ministerial discretion in approval and conditioning undermines its application to decision-making.**

[19] See new section: *Biodiversity Conservation Act 2016* (NSW) s 6.3A.

[20] Environment Protection Reform Bill 2025 (Cth) Explanatory Memorandum, 187.

[21] Environment Protection Reform Bill 2025 (Cth) Explanatory Memorandum, 185.

[22] Environment Protection Reform Bill 2025 (Cth) ss 134(3AA)-(3AC).

# THE RCH HAS SIGNIFICANT DISCRETION IN HOW IT SPENDS THE RESTORATION PAYMENT

The RCH will receive money into the Restoration Contributions Special Account. The RCH will be a new statutory office, and will use the funds in the Special Account to deliver restoration actions (offsets) and other activities. The default obligation for the RCH is to spend the restoration contribution charge provided by a proponent for a specific activity on a 'general restoration action'. A general restoration action is an action which is directed towards protecting, conserving or restoring the specific matter harmed, in the specific area, and which results in a net gain for the matter.

The RCH may instead spend the money on an 'alternative restoration action' if the RCH is satisfied that a general restoration action is not 'feasible', or that it wouldn't provide the 'best environmental outcome'. This action does not need to be like-for-like. While the overarching 'net gain' requirement does apply, it is not clear that this concept retains any useful meaning when one species is being protected more in exchange for a *different* species being harmed. The legislation directs the RCH to seek a matter protected by the same provision as that which is being harmed, and in the same bioregion, but is undermined by the generous corollary 'so far as is reasonably practicable.'[23]

Matters for which a general restoration action is not feasible are likely to be matters where the protected species or ecosystem is under significant threat, such that a relevant area cannot be found to protect. That is, securing an offset is not considered feasible because the species is not there, or protecting it is considered too expensive. Simply allowing the RCH to use the money to instead protect a *different* species, or give funding for research, or another indirect activity, fundamentally undermines the concept of like-for-like, and indeed the rationale for biodiversity offsetting in the first place.

The decision to deliver either action relies on the RCH's state of satisfaction: i.e. it is a discretionary decision, which gives significant leeway to the RCH. Neither 'feasible' nor 'best environmental outcome' appear to be defined. In addition, the RCH can take advice on these matters from the Restoration Contributions Advisory Committee, but the composition of this new Committee is wholly determined by the Minister of the day, including the qualifications of members – an opaque new body which will have advisory functions influencing how the RCH exercises its discretion.[24]

**This broad discretion ultimately means that RCH can choose whatever option is easiest, not necessarily better for the harmed species or ecosystem for which it is ostensibly supposed to be compensating.** This has been borne out in NSW, where the BCT is not obliged to acquit offset obligations using like-for-like credits purchased on the market, or by

[23] Environment Protection Reform Bill 2025 (Cth) s 177CS(5).

[24] Environment Protection Reform Bill 2025 (Cth) s 505F.

undertaking like-for-like actions.[25] As a result, the proportion of acquittals which are like-for-like has declined in recent years,[26] and the impact on nature has been substantial.[27]

The concept of 'like-for-like' is essential to the idea of what an 'offset' is and does.[28] Hypothetically, a like-for-like biodiversity offset should look like 'net zero' harm to nature – the harm is cancelled out by the benefit. It is highly likely that the discretion allowed to the RCH to depart from this concept will result in worse outcomes for Australia's biodiversity.

**Key takeaway:**
**The Restoration Contributions Holder (RCH) has significant discretion in deciding to use proponent money for 'alternative restoration actions', which are not required to be like-for-like and which will undermine protection of the impacted species.**

# KEY PRINCIPLES IN THE DRAFT OFFSETS STANDARD ILLUSTRATE THE WEAK LIMITATIONS ON THE RCH

A key component of the Samuel Review was the recommendation for National Environmental Standards. The Standards were intended to be clear, outcome-focused legislative instruments that are legally required in environmental decision-making.[29] The Government has now provided the Draft Offsets Standard for public comment parallel to the process of the Bill passing through the Parliament.[30] It contains key principles of biodiversity offsetting, including **requiring like-for-like offsets, direct and tangible benefits, and securing additionality.[31]**

As noted in the accompanying Policy Position to the draft, the Offsets Standard will be important in determining what conditions to attach to an approval, including if the proponent can use the Restoration Contributions Fund. That is, the Minister (or decision-maker) will likely consider the Standard at the point of deciding whether or not to approve

[25] *Biodiversity Conservation Act 2016* (NSW) s 6.31. Note recent amendment to the regulations to limit flexibility for when proponents are seeking to purchase credits to offset impacts. The BCT retains the ability to access variation rules.

[26] IPART, *Biodiversity Market Monitoring Review: Discussion Paper 2024–25* (30 October 2025) https://www.ipart.nsw.gov.au/sites/default/files/cm9_documents/Discussion-Paper-2024-25-Biodiversity-Market-Monitoring-Review-30-October-2025.PDF.

[27] NSW Parliament, n 8.

[28] See generally, Pope, J et al, 'When Is an Offset Not an Offset? A Framework of Necessary Conditions for Biodiversity Offsets' (2021) 67 *Environmental Management* 424 https://doi.org/10.1007/s00267-020-01415-0.

[29] Samuel Review, n 4.

[30] Available at https://www.dcceew.gov.au/about/news/hys-draft-national-environmental-standards.

[31] For a fulsome description of biodiversity offsetting principles, see: IUCN Policy on Biodiversity Offsets (2016).

an action, and what conditions to attach to an approval. The Minister may need to be satisfied that their decision is 'not inconsistent' with the Standard.[32]

Once the approval has been issued, if the Minister has determined that payment to the RCH is an appropriate condition, it is unclear what influence the Standard will have on the RCH. The Policy Position on the Draft Offsets Standard states clearly that the RCH will only be obliged to 'consider' the Standard and is not bound by it,[33] while the legislation may require the RCH to be satisfied it is not acting inconsistently with a Standard, which must be prescribed by regulation.[34] As such, it is unclear if the Offsets Standard will be prescribed.

**Given the inclusion of key principles of biodiversity offsetting in the Standard, the fact that the RCH is clearly anticipated to depart from the Standard serves to further illustrate the integral problems with restoration payments.** Restoration payments are clearly not offsets, as they rely on a wholly different logic; and should not be considered exchangeable with them. Setting up a scheme in which restoration payments are interchangeable with direct offsets can only result in poor outcomes for nature, because the harms caused by new projects will not be properly compensated.

# LONG TIME-LAG RISKS WORSE DAMAGE TO NATURE

Long time lags in securing environmental offsets can lead to severe resource bottlenecks, during which time the impacted species or ecosystem might be under increasing threat from other sources (including climate change impacts).[35] If time lags are unacceptably long, even a high-integrity offset will not reduce the risk of exacerbated or unanticipated harm to an acceptable level.[36] Generally, where possible, offsets should be secured before the harm occurs.

Accordingly, the Draft Offsets Standard contemplates that restoration actions should secure direct offsets prior to the harm occurring, i.e. an area is protected before the commensurate area is harmed.[37] By contrast, the RCH may receive the restoration contribution charge from a proponent, and not secure protection for some time despite the harm taking place. The

[32] Environment Protection Reform Bill 2025 (Cth) s 136A. Note the relevant NES still needs to be prescribed through regulation to be applicable (s 136A(1)).

[33] Draft Policy Position: *National Environmental Standard (Environmental Offsets) 2025*, 26.

[34] Environment Protection Reform Bill 2025 (Cth) s 177DC.

[35] McDonald et al, 'Promoting resilience to climate change in Australian conservation law: the case of biodiversity offsets' (2016) 39(4) University of New South Wales Law Journal 1612-1651.

[36] Maron, M et al, 'Faustian Bargains? Restoration Realities in the Context of Biodiversity Offset Policies' (2012) 155 *Biological Conservation* 141 https://doi.org/10.1016/j.biocon.2012.06.003.

[37] *National Environmental Standard (Environmental Offsets) 2025 – Exposure Draft,* cl 15.

legislation states that timeframes may be set for the RCH to complete each relevant restoration action in the regulations, but it appears this is not mandatory.[38]

In NSW, developers have been paying into the fund much faster than the Trust is able to find required offsets.[39] This is leading to excessive and concerning time lags, such that amendments made in 2024 have now applied a three-year time period for acquittal. **No such time limit applies at the federal level, which runs the risk of worsening impacts on nature while offsets are identified and secured – if they are secured at all.**

| |
|---|
| **Key takeaway:**<br>**Longer time lags for the RCH to apply funds to protect biodiversity means greater risk for the impacted species, particularly in the context of climate change.** |

## NO FEASIBILITY MEANS NO PROTECTION

Under the Draft Offsets Standard, proponents will need to ensure that the offset they deliver is feasible, including consideration of scientific certainty, suitable data and likely impacts of climate change.[40] This same requirement does not apply to the activities of the RCH.

In contrast, the Environment Protection Reform Bill directly contemplates the RCH acquiring liability to discharge a restoration contribution even if the offset which would be needed to be equivalent to the damage from the project is not feasible. Of course, **this matches the relaxation of the like-for-like requirement described above, but it enables a scenario in which the RCH continues to accept restoration contribution payments - and projects proceed - despite no offsets ever being found for those specific impacted species and ecosystems.**

NSW again provides a model of how this looks in practice: a chronic undersupply of biodiversity credits and lack of action by the BCF means that environmental losses may simply not be offset at all.[41] In total, of the 80,000 obligations received by the BCF over the life of the scheme only 23% have been fully acquitted (i.e. credits have been purchased by the Biodiversity Conservation Trust and subsequently retired, or approved conservation actions have been taken to meet its obligations).[42]

[38] Environment Protection Reform Bill 2025 (Cth) s 177DD.

[39] IPART (2024) n 10.

[40] *National Environmental Standard (Environmental Offsets) 2025 – Exposure Draft,* cl 8.

[41] Audit Office of New South Wales, n 9.

[42] IPART (2025) n 26.

There do not appear to be any safeguards in the Environment Protection Reform Bill that would prevent a similar outcome at the national level; in fact, it appears to be directly contemplated that this scenario may occur. Without detailed assessment of feasibility prior to approval, there is a continued risk of 'backloading', a process by which post-approval condition-setting leads to continued biodiversity loss.[43]

| **Key takeaway:** |
| --- |
| **The RCH may assume compensation liability via an offset payment, and the project proceed, but there is no guarantee the RCH will find an equivalent offset or that offsetting will even be possible for the harm caused.** |

# NEW NET GAIN TEST IS RELATIVE AND SUBJECTIVE

The Bill introduces a new concept into national environmental law of the 'net gain test'. This is generally welcome, intended as it is to deliver overall improvements for nature and guide decision-making. However, the definition of 'passing the net gain test' appears to be circuitous when it comes to restoration payments.

The Minister may only approve the taking of an action if satisfied that the approval passes the net gain test, which means that all residual significant impacts of the action on protected matters are compensated to a net gain. New section 527K sets out that an action will pass the net gain test if a condition is attached to the approval which requires the proponent to either compensate for their likely residual impact (i.e. a direct offset) or pay a restoration contribution to the RCH. Compliance with the offset or restoration condition must result in a net gain for the matter harmed, which will either be prescribed in the regulations, or simply 'that the Minister is satisfied is appropriate.'[44]

Once the restoration payment has been made to the RCH, the RCH must undertake a 'general' or 'alternative' restoration action which provides a net gain (for either the affected matter, or a matter protected by the same provision, respectively). But the definition of what constitutes a net gain for these actions again relies on prescriptive regulations or the Minister's satisfaction of appropriateness.[45]

Overall, this means the Minister can be satisfied that if the proponent pays into the restoration fund, a net gain will be achieved. This is regardless of the fact no offset has yet been secured by the RCH. Further, as described above, the weak like-for-like and feasibility requirements mean that the offset the RCH eventually does procure, or purchases through

[43] Evans, M C, 'Backloading to Extinction: Coping with Values Conflict in the Administration of Australia's Federal Biodiversity Offset Policy' (2023) 82 *Australian Journal of Public Administration* 228 https://doi.org/10.1111/1467-8500.12581.

[44] Environment Protection Reform Bill 2025 (Cth) s 527K.

[45] Environment Protection Reform Bill 2025 (Cth) s 177CS.

the Nature Repair Market, may relate to a different protected matter than the one harmed. **The net gain test will be deemed to be passed at the Minister's discretion, and potentially without a genuine, equivalent benefit to the protected matter harmed by the new project.** To be useful, the test should be based on objective criteria and the best scientific evidence available – not the whims of the Minister, and certainly not deemed to be passed just because a restoration payment will be made.

**Key takeaway:**
**The 'net gain test' can be deemed to be passed at the Minister's discretion potentially without a genuine, equivalent benefit to the protected matter being harmed.**

## OPENING UP THE NATURE REPAIR MARKET FOR OFFSETTING IS A CYNICAL STEP BACKWARDS

The Nature Repair Market (**NRM**) was established in 2023, and creates tradeable property rights in the form of biodiversity certificates. Certificates are based on activities which protect biodiversity in a given area in accordance with a registered method, for example by a landowner who replants native species on their previously cleared property.[46] It is administered by the Clean Energy Regulator (**CER**), and currently relies on 'voluntary' investment and purchasing of certificates. That is, the Nature Repair Act explicitly prohibits the use of biodiversity certificates generated through the NRM to be used for environmental offsetting purposes.[47]

This prohibition was a key requirement for the support of the Greens in the Senate for the Nature Repair Act to pass,[48] and was a recommendation from a broad range of scientific and legal experts involved in the Senate Inquiry into the Act.[49] The Environment Protection Reform Bill overturns this prohibition.[50]

Details of how the certificates will be used under the EPBC Act will be set out in subordinate legislation and NRM methodology, so it is still unclear how this connection will operate (including the role of the RCH in purchasing Nature Repair certificates). Regardless, this is a highly concerning move, given that the integrity issues identified in the Nature Repair Act – relating to transparency, permanence and additionality of biodiversity outcomes – assume

[46] The only currently registered method is the *Replanting native forest and woodland ecosystems method.*
[47] *Nature Repair Act 2023* (Cth) s 76A.
[48] Parliament of Australia, Senate Hansard, 5 December 2023.
[49] Senate Environment and Communications Legislation Committee, *Nature Repair Market Bill 2023 and Nature Repair Market (Consequential Amendments) Bill 2023 [Provisions]* (Inquiry Report, December 2023).
[50] Environment Protection Reform Bill 2025 (Cth) s 625.

greater importance when certificates issued through the NRM are being used to offset harm.

As an example, the permanence period for a project under the NRM, for which a biodiversity certificate has been issued, may vary – it could be 25 years, 100 years, or it could be determined in the relevant methodology.[51] But if that certificate is being used as an offset, to justify permanent damage to a protected species, habitat or ecosystem, then anything less than an in-perpetuity gain will result in a net loss to the impacted species, habitat or ecosystem. In addition, the administration of the scheme by the Clean Energy Regulator (and overall modelling of the NRM on the carbon market) remains a source of concern, given criticisms of the CER's ability to govern the carbon market[52] – let alone a new biodiversity market unrelated to the CER's core business.

The NSW biodiversity credit market, which is linked directly to biodiversity offsetting for developments, has been plagued by problems which it appears will now be replicated at the national level. As outlined above, it has failed to protect nature, has a serious undersupply of credits required to offset the harm being done by development, and the BCT has failed to purchase and acquit relevant certificates in accordance with the pace of development and money being paid into the fund. And, at the fundamental level, adding tradeable certificates to an environmental offsetting regime further emphasises the problems with treating biodiversity outcomes as fungible. **As seen in NSW, this will likely further facilitate the move away from 'like-for-like'.** Ecosystems and species are not inherently tradeable; treating them as such will only lock-in the extinction trajectory.

**Key takeaway:**
**The Bill removes the 2023 prohibition on using Nature Repair Market (NRM) certificates for biodiversity offsetting, exacerbating ongoing concerns about interchangeability of certificates and about the integrity and governance of the NRM.**

[51] *Nature Repair Act 2023* (Cth) s 34.

[52] See for example, Morton, A., 'Australia's carbon credit scheme 'largely a sham', says whistleblower who tried to rein it in' *The Guardian* (23 March 2022) https://www.theguardian.com/environment/2022/mar/23/australiascarbon-credit-scheme-largely-a-sham-says-whistleblower-who-tried-to-rein-it-in.

# Conclusion

Fundamentally, payments to destroy in the form of restoration contributions are no longer biodiversity offsets. They depart from the essential principles of biodiversity offsetting including requirements for like-for-like: that koala habitat harmed over here, must be replaced by koala habitat protected over there. This means that the new scheme will risk worsening environmental outcomes for threatened species overall, and exacerbate the integrity problems already inherent in biodiversity offsetting at the national level.

New parameters introduced in the Bill, including the statutory enshrinement of the mitigation hierarchy and the addition of a net gain requirement, are welcome. But they are not enough to overcome the inherent problems with the restoration contribution model, which are compounded by high levels of discretion in decision-making, and shifting of responsibility onto the RCH.

The Environment Protection Reform Bill 2025 should be amended to remove these provisions.