



Biodiversity
Conservation
Trust

Guidelines for proponents and consent authorities – using offset conservation agreements

When development consent conditions require the use of conservation agreements to establish biodiversity offsets

Version 2: July 2020

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1. INTRODUCTION

The Biodiversity Conservation Trust (BCT) was established in August 2017 under the *Biodiversity Conservation Act 2016*. Details about the BCT's purpose, functions, powers and programs can be found on the BCT's [website](http://www.bct.nsw.gov.au) (www.bct.nsw.gov.au).

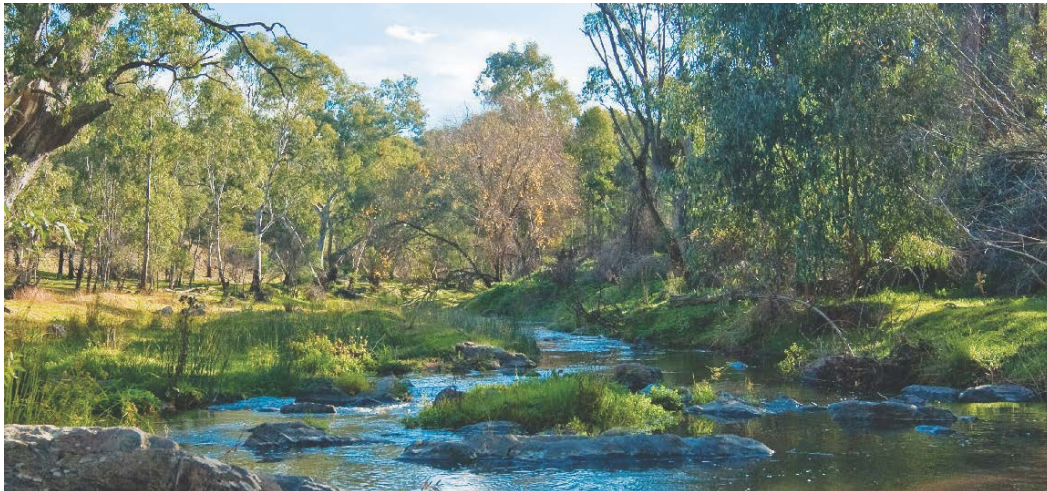
The BCT's mission is to maximise the biodiversity conservation outcomes achieved with the public and private resources entrusted in the BCT to support private land conservation. Our work is strongly guided by the Biodiversity Conservation Investment Strategy made by the NSW Government.

One of the BCT's key functions is to deliver a strategic biodiversity offsetting service.

Under the *Biodiversity Conservation Act*, responsibility for private land conservation agreements has been concentrated in a single government entity, the BCT. The BCT administers three types of agreements: biodiversity stewardship agreements, conservation agreements and wildlife refuge agreements. These agreements are primarily used in the delivery of the BCT's programs, as outlined in the BCT's Business Plan and on the BCT's [website](http://www.bct.nsw.gov.au).

The BCT has a strong focus on supporting landholders to protect their land to achieve conservation outcomes. All landholders with a private land conservation agreement are provided with ecological and technical support by the BCT's regional ecologists and landholder support staff to equip landholders to implement conservation management. This support occurs through site visits, telephone support, technical guidelines, compliance monitoring, field days and workshops to share skills and knowledge.

The BCT is also committed to understanding and reporting on the ecological outcomes being achieved through private land conservation, through the establishment of a state-wide monitoring, evaluation and reporting program.



1.1 Purpose of the guidelines

These guidelines aim to clarify the BCT's role in entering conservation agreements where specified in development consent conditions or an agreed planning proposal to establish biodiversity offsets ('offset conservation agreements').

For the purposes of these guidelines, 'development consent' and 'planning proposal' are defined as described in the NSW *Environmental Planning Assessment Act 1979*. In general terms, 'development consent' refers to an approval for a specific project while 'planning proposal' refers to proposed amendments to planning instruments, such as Local Environmental Plans.

The purpose of these guidelines is to balance the potential to secure conservation outcomes through the use of conservation agreements in these circumstances, with the need to maintain the integrity of the private land conservation agreement system, prioritise the delivery of the BCT's core programs, and ensure limited BCT resources are targeted to optimise conservation outcomes.

The BCT aims to provide clear guidance to development proponents, councils and planning authorities in the use of offset conservation agreements under development consent conditions.

These guidelines:

- apply to legacy conditions of consent and new conditions of consent
- define a discrete set of circumstances where the BCT considers it appropriate to use offset conservation agreements for major projects or local development
- provide discretion for the BCT to use an offset conservation agreement outside of these circumstances if an exceptional case can be made on the conservation value
- outline the process for specifying the use of an offset conservation agreement as a condition of consent
- specify the BCT's fees for applications for offset conservation agreements and for ongoing management of offset conservation agreements.

1.2 Scope of the guidelines

These guidelines do not apply to any requirement for development proponents to acquire and retire biodiversity credits under the NSW biodiversity offsets scheme. The expansion of the biodiversity offsets scheme to most types of development means the application of these guidelines is likely to be limited.

These guidelines and offset conservation agreements can be used apply to projects that do not trigger the biodiversity offsets scheme.

Where projects do trigger the biodiversity offsets scheme, offset conservation agreements can be used as a mechanism to secure conservation outcomes on land where biodiversity impacts have been minimised but not completely avoided.

These guidelines apply to local development under Part 5 of the EP&A Act and major projects or planning approvals under Part 3A EP&A Act as set out below.

Local development

These guidelines apply to:

- legacy conditions of consent requiring offset conservation agreement(s) issued before the publication of these guidelines
- new conditions of consent requiring offset conservation agreement(s) issued after the publication of these guidelines

- conservation agreements specified in an approved planning proposal.

Major projects

These guidelines only apply to legacy conditions of consent for major projects requiring offset conservation agreement(s) issued prior to October 2014, when the NSW Government 'Biodiversity Offsets Policy for Major Projects' was introduced.

Consistent with current policy settings, the BCT will not enter offset conservation agreements for major projects where conditions of consent were issued after October 2014, unless the former Office of Environment and Heritage or the BCT has provided prior written agreement to the use of a conservation agreement.

1.3 Contacting the BCT

Councils, development proponents or landholders with questions about these guidelines can contact the BCT at info@bct.nsw.gov.au or 1300 992 688.

1.4 Offset mechanisms available after introduction of the Biodiversity Conservation Act 2016

Under the *Biodiversity Conservation Act 2016*, the private land conservation mechanisms available for securing offsets have changed. The Act streamlined private land conservation agreements into three types: biodiversity stewardship agreements, conservation agreements and wildlife refuge agreements; all managed by the BCT. These mechanisms—alongside section 88 covenants and land being gifted to councils—provide the suite of four mechanisms currently available to protect and manage private land as offsets.

Biodiversity stewardship agreements

Biodiversity stewardship agreements (BSAs) are now the primary mechanism by which landholders can generate and sell biodiversity credits for the purpose of offsetting the unavoidable impacts of development as specified in contemporary development consents. BSAs are overseen by the BCT and supported by technical advice and annual stewardship payments. BSAs establish a rigorous regime for securing offsets.

The acquisition and retirement of biodiversity credits by proponents from landholders holding biodiversity stewardship agreements is now the main mechanism for securing biodiversity offsets. The thresholds for participation in the biodiversity offset scheme are outlined on DPIE's website at: <https://www.environment.nsw.gov.au/biodiversity/entryrequirements.htm>.

Conservation agreements

Conservation agreements provide another effective mechanism for permanent or long-term protection and conservation management of land.

Under the *Biodiversity Conservation Act 2016*, conservation agreements are primarily used in the delivery of the BCT's Conservation Management Program and Conservation Partners Program:

- Conservation Management Program: encourages landholders within priority investment areas or with conservation assets on their property to enter funded conservation agreements, in accordance with the priorities outlined in the Biodiversity Conservation Investment Strategy.
- Conservation Partners Program: encourages landholders anywhere in certain priority investment areas with eligible properties (over 20 hectares) to enter partnership conservation agreements (which become eligible to apply for the BCT's conservation partners grants).

There is ongoing demand from councils for conservation agreements to be used to achieve biodiversity offset outcomes associated with development. These will continue to be a suitable mechanism for securing private land conservation outcomes where they meet the requirements set out in these guidelines.

Section 88 covenants

Councils can establish Section 88 covenants under the *Conveyancing Act 1919*. The Act enables councils to create public positive covenants on land they do not hold, to impose obligations on the owner of the land. Section 88 covenants can be registered on the title of the land and can bind successors in title. They can be combined with a requirement to establish a vegetation management plan and/or a bond to secure the implementation of a vegetation management plan.

Section 88 covenants are a potentially useful tool to achieve biodiversity conservation outcomes for sites not suitable for a conservation agreement. The BCT recognises, however, that councils have identified a number of constraints with using section 88 covenants to achieve conservation outcomes, and improvements are needed in their operation to ensure they complement the private land conservation agreements offered by the BCT.

Land transferred into council ownership

Councils can choose to accept the transfer of private land into council ownership, to ensure the land is managed for biodiversity conservation. This could include the provision of adequate management funding to cover the costs to council of managing the land. In some instances, councils use the biodiversity assessment method to calculate an appropriate level of management funding.

1.5 Application of these guidelines

These guidelines include two main components:

- requirements for entering an offset conservation agreement, including elements such as size, biodiversity values and configuration (section 2)
- fees for entering into a conservation agreement (section 3).

These components of the guidelines apply to local development and major projects, as set out in Figure 1.

Figure 1. Application of the guidelines to local development and major projects

Local development	Minimum Requirements	Fee schedule
<ul style="list-style-type: none"> • Legacy condition of consent (issued prior to the adoption of the policy) 	*	✓
<ul style="list-style-type: none"> • New conditions of consent 	✓	✓

• Agreements under planning proposals	✓	✓
Major projects	Minimum Requirements	Fee schedule
• Legacy conditions of consent (issued prior to October 2014)		✓

*a business case for an offset conservation agreement can be submitted to the BCT for consideration

2. USING OFFSET CONSERVATION AGREEMENTS

2.1 BCT Minimum requirements

The BCT has established minimum requirements to ensure that offset conservation agreements will deliver viable biodiversity conservation outcomes to offset unavoidable development impacts.

Size

Proposed conservation areas must exceed five hectares.

Biodiversity values

The proposed offset conservation agreement site must satisfy one or more of the following minimum requirements:

- is on the [Biodiversity Values \(BV\) Map](#) which identifies land with high biodiversity value, as defined by clause 7.3(3) of the Biodiversity Conservation Regulation 2017.
- is identified as high environmental value in a council strategic plan or local priority area mapping
- contains an endangered or critically endangered ecological community
- contains significant habitat for a critically endangered species
- contains entities that are likely to meet the serious and irreversible impact principles and criteria
- improves landscape connectivity or stepping stone corridors at a local or regional scale, is part of a larger area of remnant vegetation or is connected to a protected area.

Configuration

The proposed offset conservation agreement site must satisfy all the following minimum requirements:

- has a common, responsible party across all lots involved
- has configuration that is relatively contiguous and is likely to remain as the one property entity for the foreseeable future
- has configuration is appropriate to manage edge effects (e.g. it does not consist of small ribbons of land on the perimeter of multiple lots)
- has configuration has an area of land excluded from the covenanted area large enough for a dwelling and suitable APZ.

Condition

The proposed offset conservation agreement site must satisfy all the following requirements:

- is in overall moderate to good ecological condition
- does not include significant areas in poor condition (i.e. more than 10% of the site).

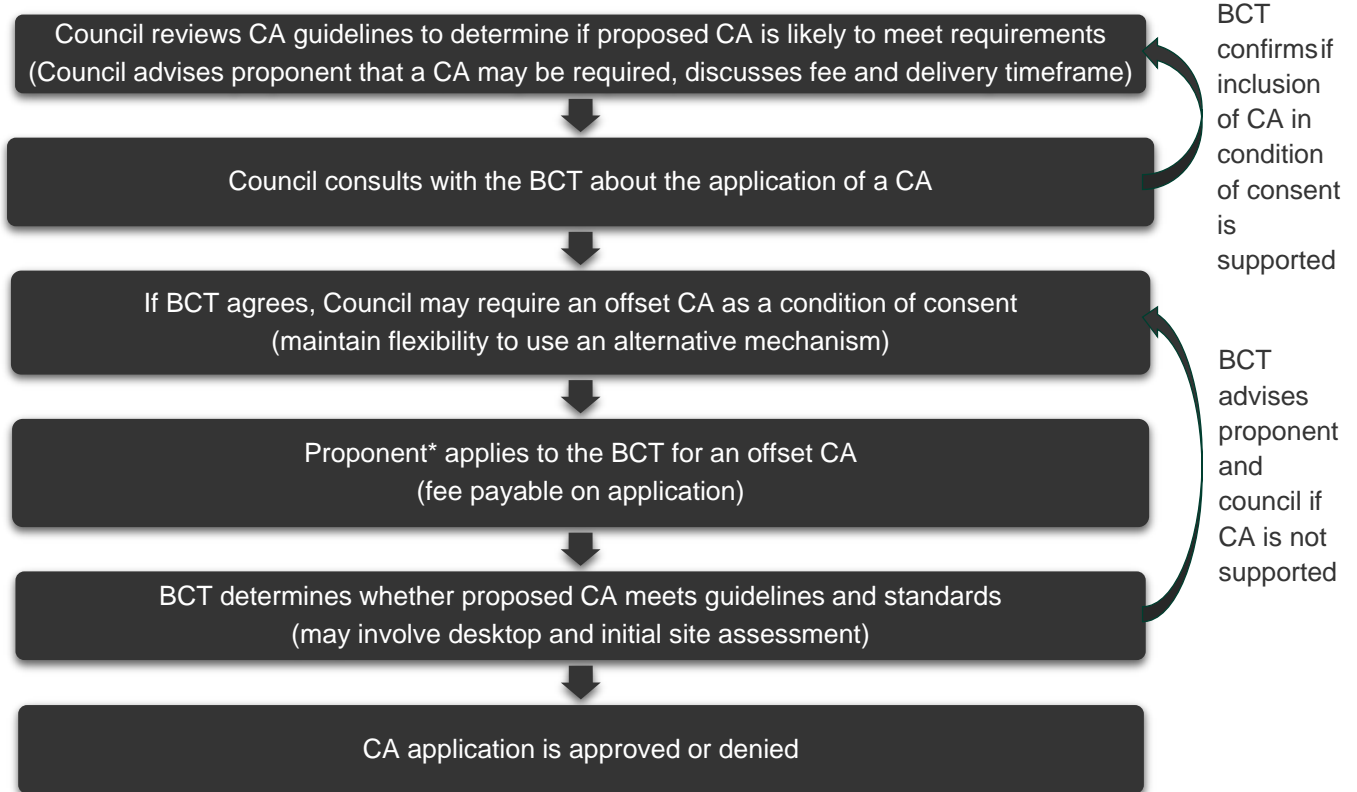
Exceptional circumstances

Where a proposed site does not meet some of these requirements, a business case for an offset conservation agreement can be submitted to the BCT for consideration.

2.2 Process for specifying use of a conservation agreement in a consent condition

Figure 2 sets out the process for specifying use of an offset conservation agreement as a condition of consent. The BCT recommends councils follow a similar process to consult with the BCT if considering a conservation agreement as part of a planning proposal.

Figure 2. Process for including a conservation agreement in a condition of consent



*The applicant must be the land owner. This may be the proponent. If it is not the proponent, the proponent may enter into arrangements with landholders to lodge applications for offset conservation agreements to satisfy the proponents offset obligations. Such landholders are encouraged to establish appropriate arrangements, including financial arrangements, by way of a contract or other suitable mechanism.

Figure 3 provides a summary of key roles and responsibilities involved in this process for specifying and implementing an offset conservation agreement.

Figure 3. Roles and responsibilities for implementing an offset CA as a condition of consent

Role	Proponent	Consent authority	BCT
Development proposal submitted	✓		
Offset site assessed against CA guideline requirements		✓	
Consultation with proponent and BCT about proposed use of CA		✓	
Agreement to proposed offset CA application			✓
Requirement for offset CA included in conditions of consent		✓	
Application for CA submitted to BCT	✓		
Review of CA application			✓
Confirmation of CA arrangements and preparation			✓
Site visits and data collection to create CA	✓		✓
Drafting and finalisation of CA			✓
Execution of by all parties to CA	✓		✓
Registration on title			✓
Ongoing management and annual reporting on CA site	✓		
Ongoing administration, landholder support, periodic site audit			✓

3. BCT FEES

Two fees are applicable for Conservation Agreements developed to meet conditions of consent. A one-off establishment fee and an ongoing annual service fee.

3.1 Establishment fee

To apply for an offset conservation agreement, the applicant (the land owner) must pay a minimum fee of \$7,350 to the BCT at the time of lodging their application.

The fee range represents the different size and complexity of potential sites. The upper fee range is for large sites with multiple management zones. The fee range is outlined in more detail in Figure 4 below.

Figure 4. Application fees

Base application cost	\$7,350 plus any additional costs set out below
Property size above 100 ha	+ \$550
Property size above 500 ha	+ \$1,100
4-6 management zones	+ \$275
7-10 management zones	+ \$550

The BCT will not progress an application unless the fee has been paid. The application fee will cover the BCT's costs of establishing the agreement. This includes a site visit, preparation of the management plan, negotiation of the agreement, legal and other review processes.

Discounts

The BCT may exercise discretion to reduce or discount the BCT's standard fee for:

- smaller-scale or more straightforward offset conservation agreements for non-commercial or for-purpose developments
- instances where the same applicant is applying for more than three offset conservation agreements in close geographic proximity and the BCT can achieve some economies of scale in processing these applications.

3.2 Annual service fee

Under the Act, holders of Biodiversity Stewardship Agreements must also pay the BCT an annual fee of \$1,500 (escalated with inflation) per annum.

Section 5.22(e) of the Act provides that a conservation agreement may contain terms requiring the owner to contribute towards costs incurred which relate to the agreement.

The BCT will impose the same ongoing fees for offset conservation agreements.

Holders of offset conservation agreements must remit a service fee of \$1,500 per annum to the BCT along with the submission of their annual report, unless covered by one of the exemptions or

discounts set out below. The BCT will commence invoicing for these fees as annual reports fall due from 1 July 2020.

The annual service fee will cover the BCT's costs in managing each agreement, maintaining registration, administering annual reporting and inspection requirements, providing landholder support services, conducting audits and ecological monitoring.

The BCT will apply this fee to all new offset conservation agreements associated with major projects or local development entered after publication of this guideline on 15 June 2020. Offset conservation agreements entered after the publication of this guideline will include a condition requiring the agreement holder to remit an annual fee of \$1,500 per annum to the BCT along with the submission of their annual report.

Exemptions

The BCT will not apply this annual service fee to existing offset conservation agreements entered prior to publication of this guideline.

The BCT will not apply the annual management fee to existing offset conservation agreements entered prior to publication of this guideline that were associated with local development.

Discounts

The BCT may exercise discretion to reduce the BCT's standard annual service fee for:

- smaller-scale or more straightforward offset conservation agreements for non-commercial or for-purpose developments
- instances where the same landowner holds more than three offset conservation agreements in close geographic proximity and the BCT can achieve some economies of scale in its management of these agreements.
- conservation agreements for local developments where the planning authority commits to ongoing monitoring of the site under a s88B instrument. This would be a mutual agreement between BCT and the local government authority.

In situations where landholders demonstrate high levels of compliance in the first three years of the conservation agreement, they can participate in an audit program to reduce frequency of inspection. This may result in a reduced annual service fee while ever compliance with agreement was maintained.

Future landholders

Annual service fees are in addition to any ongoing management costs, associated with implementing the conservation agreement management plan, borne by the owner.

The BCT encourages any landholder being commissioned by a proponent to apply for an offset conservation agreement, or any landholder considering purchasing land with an offset conservation agreement in place, to carefully consider appropriate contractual and/or financial arrangements to cover these ongoing fees.

4. BACKGROUND

Prior to the introduction of the *Biodiversity Conservation Act 2016*, councils had access to several different mechanisms to secure a biodiversity offset outcome on private land associated with a development.

Historically, development consents were used to require the Office of Environment and Heritage to enter voluntary conservation agreements or Local Land Services to enter conservation property vegetation plans. Some councils chose to adopt these mechanisms as requirements in conditions of consent associated with development or as a pre-requisite to approving a planning proposal.

Some councils used covenants under section 88 of the *Conveyancing Act 1919* with an associated vegetation management plan to secure conservation outcomes over private land.

In some instances, councils accepted ownership of parcels of land to help facilitate conservation outcomes.

Some developers opted into the voluntary BioBanking Scheme, establishing BioBanking Agreements to conserve valuable parcels of land in return for achieving a development outcome.

Anecdotal evidence from councils suggests the use of these mechanisms varied considerably across the state, with use of offset conservation agreements concentrated in specific council areas, predominantly along the coast.

Section 1.4 outlines the mechanisms that are available now.