

NELA briefing note on key issues for environmental reform in NSW

1 Biodiversity Offsets Scheme reform

The Biodiversity Offsets Scheme (**BOS**) arguably lacks transparency, sustainability and integrity, ultimately hindering the Scheme's effectiveness. The Scheme's inefficacy risks biodiversity gains being insufficient to offset losses resulting from development. To counter issues with the BOS, the Department of Planning and Environment (**DPE**) and the Biodiversity Conservation Trust (**BCT**) should adopt a **long-term strategic plan** for the Scheme, make improvements to the **operation and transparency of the market and credit supply**, introduce frameworks to ensure the **financial and ecological sustainability** of biodiversity stewardship sites, develop enhanced **public recording and data management** and resolve issues in **conflicting governance and oversight**. These recommendations are consistent with those suggested in the Effectiveness of the BOS report.¹

2 Resource Recovery Framework²

The NSW waste regime was criticised by the Land and Environment Court in the long-running *Grafil*³ prosecution. In response to such criticism, the Government commissioned the Independent Review of the NSW Resource Recovery Framework (**RRF**) which has since been handed down.⁴ The Review was to assess whether the regime is practical, effective and fit for purpose. The Court criticised the RRF on the basis that it exposed consumers to legal and financial risk. This was because the method lacked a strategy for dealing with asbestos, presented difficulties in proving compliance with exemptions, required onerous record keeping requirements, and was ambiguous as to whether temporary stockpiling was permitted. The Review makes recommendations directed towards improving **administration and decision making**, reconsidering the **definition of waste** and improving the **regulatory framework**, facilitate **circularity** and improving approaches to **known and emerging contaminants**.

3 Plastics regulation⁵

There have been several recent developments in the plastics and product stewardship space, one of which is the introduction of the *Plastic Reduction and Circular Economy Act 2021* (**PRCE Act**). The PRCE Act bans certain plastic products and makes it an offence to supply prohibited plastic items. In doing so, the PRCE Act furthers product stewardship regulatory arrangements. The introduction of the PRCE Act is in alignment with reforms at a national level, including the introduction of the National Waste Policy Action Plan. While the PRCE Act makes progress in regulating plastic usage, it has an extensive exemption regime which arguably undermines the purpose of the Act in banning single-use plastics. For example, the PRCE Act does not ban 'integrated packaging' which is packaging used to seal or contain food, includes a narrow definition of 'lightweight plastic bags' to mean a bag with handles, and permits the usage of plastic bowls designed or intended to have a spill-proof lid. To have meaningful impact, NSW should consider **stronger plastics regulation (including soft plastics regulation)**, **better and more consistent recycling practices** and innovation to **improve the circular economy**.

¹ Audit Office, 'Effectiveness of the Biodiversity Offsets Scheme' (30 August 2022) <<https://www.audit.nsw.gov.au/our-work/reports/effectiveness-of-the-biodiversity-offsets-scheme>>.

² Cathy Wilkinson, 'Independent Review of the NSW Resource Recovery Framework' (30 September 2022) <<https://www.epa.nsw.gov.au/your-environment/recycling-and-reuse/resource-recovery-framework/independent-review>>.

³ See *Environment Protection Authority v Grafil Pty Ltd; Environment Protection Authority v Mackenzie* (No 3) [2020] NSWLEC 90.

⁴ Cathy Wilkinson, 'Independent Review of the NSW Resource Recovery Framework' (30 September 2022) <<https://www.epa.nsw.gov.au/your-environment/recycling-and-reuse/resource-recovery-framework/independent-review>>.

⁵ Peter Briggs, Rebecca Davie and Brigitte Rheinberger, 'Thoughts on waste in NSW part 2: plastics and product stewardship – is NSW doing enough?' (16 December 2021) <<https://hsfnotes.com/environmentaustralia/2021/12/16/thoughts-on-waste-in-nsw-part-2-plastics-and-product-stewardship-is-nsw-doing-enough/>>.

4 Emissions reduction policies

In the NSW State of Environment Report 2021 (**SOE 2021**), the NSW Environment Protection Authority (**EPA**) emphasised that further investments and efforts are needed to achieve the reductions necessary to meet net zero objectives by 2050. The SOE 2021 said that actions beyond current policies will be necessary to address emissions from most sectors, including heavy duty vehicles, agriculture, stationary energy, industry, mining, aviation and land clearing. It may also be necessary to attract more support for the bolstering of **carbon sequestration** and supporting of the expansion of premium **carbon markets**. The International Energy Agency notes that, while technologies on the market today can offer immediate emission reductions, almost half the reductions needed to meet a global goal of net zero by 2050 will need to come from technologies that are currently at the demonstration or prototype phase.⁶ This means that **major innovation** efforts will be required this decade to develop new technologies and bring them to market.⁷

5 Responding to climate change

The NSW Climate Change Adaption Strategy outlines four key decision-making objects for adequately responding to climate change. These include creating well adapted environment and infrastructure; well adapted biodiversity, ecosystems and natural resources; well adapted economy, businesses, industries and livelihoods; and well adapted society, government, communities, families and individuals. These decision-making objectives are intended to facilitate the fulfilment of the four key priorities under the Adaption Strategy. These key priorities identify that the NSW Government commits to developing robust and trusted metrics and information on climate change risk, completing climate change risk and opportunity assessments, developing and delivering adaption action plans, and embedding climate change adaption in NSW Government decision-making. Embedding climate change adaption in NSW Government decision-making should involve the **updating of policies, guidance, processes and standards** so that decision-makers are required to **consider climate change risks, opportunities and adaptations in assessment processes**, the **appointment of climate change risk officers** to embed climate change risk and adaption across NSW Government actions and decisions, and **require all NSW Government agencies to identify their own climate change risks** in alignment with the Climate Risk Ready NSW Guide⁸ and climate change projections by the end of 2023.⁹

The EPA has released its draft Climate Change Policy and Action Plan in response to the decision in *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority*,¹⁰ which forced the EPA to fulfil its duty to develop policies, guidelines and objectives to protect the environment from climate change. The draft Climate Policy lays out a three-pillar framework of 'inform and plan', 'mitigate' and 'adapt'. The draft Action Plan proposes to set **emission reduction targets for key industry sectors** and require **climate change mitigation and adaptation plans (CCMAPs)** for existing and new licensees. However, the draft Action Plan does not propose industry sector targets will be enforceable. Also, the draft Action Plan focusses on industries not currently subject to requirements. Consideration should be given to implementing **carbon pricing, load-based licensing**, and a **Protection of the Environment Policy (PEP)** focussed on climate change – measures which could be implemented under the *Protection of the Environment Administration Act 1991* and *Protection of the Environment Operations Act 1997*.

⁶ International Energy Agency, 'World Energy Outlook 2021' (27 October 2022) <<https://www.iea.org/reports/world-energy-outlook-2021>>.

⁷ New South Wales Environment Protection Authority, 'NSW State of the Environment 2021' (19 July 2022) <<https://www.soe.epa.nsw.gov.au/>>.

⁸ New South Wales Government, 'Climate Risk Ready NSW Guide' (March 2021) <<https://www.climatechange.environment.nsw.gov.au/sites/default/files/2021-06/NSW%20Climate%20risk%20ready%20guide.pdf>>.

⁹ Clayton Utz, 'Climate change adaption front and centre for New South Wales Government decisions and planning' (August 2022) <<https://www.claytonutz.com/knowledge/2022/august/climate-change-adaptation-front-and-centre-for-new-south-wales-government-decisions-and-planning>>.

¹⁰ [2021] NSWLEC 92.