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IN THE MATTER

OF

A PROPOSED COMPENSATION CLAIM BY FAP NOMINEES PTY LTD  
FOR INVESTMENT LOSSES INCURRED IN THE  
NSW BIODIVERSITY OFFSETS SCHEME

AGAINST

THE NSW DEPT OF PLANNING, INDUSTRY AND ENVIRONMENT  
AND  
THE BIODIVERSITY CONSERVATION TRUST

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INDEPENDENT OPINION ON THE PROPOSED CLAIM

BY

CHARLES O'NEIL FCIArb

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UPDATED

30 NOVEMBER 2021

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1. Executive Summary

- 1.1 The NSW "Threatened Species Conservation Act 1995" created a Biobanking Scheme with provision for private sector investment and trading in Credits to meet planning requirements. This scheme and the 1995 Act were replaced with the Biodiversity Offsets Scheme (BOS) under the Biodiversity Conservation Act 2016 and the Biodiversity Conservation Regulation 2017, including the new policy of "Reasonable Equivalence" in relation to changes to existing BBAM Credits.
- 1.2 The BOS was managed by the Biodiversity Conservation Trust (BCT) and the Office of Environment and Heritage (OEH) until July 2019 when OEH was dissolved and its functions taken over by the Environment, Energy and Science Group (EES) of the NSW Dept of Planning, Industry and Environment (DPIE). The EES also support the BCT, which is a Statutory Authority within the portfolio of the Minister for Energy and Environment.
- 1.3 In July 2018, FAP signed Biobanking Agreement Number 393 with OEH in respect of land owned in the Lake Macquarie Council area, following a feasibility by WSP Parsons Brinckerhoff. FAP invested \$3,468,246 and received diverse BBAM Credits, with 95% of value being 52,168 *Tetratheca juncea* (TJ) BBAM Credits. The Agreement stated that "\$5,844,709.17 is a best estimate of the market value of the biodiversity credits at the time of creation", with this being OEH's valuation.
- 1.4 An important factor in FAP's decision to invest was that the Scheme was being promoted, owned and managed by the NSW Government and should therefore offer investor security.
- 1.5 BBAM Credits under the 1995 Act were calculated according to the Biobanking Assessment Methodology and named accordingly. Under the new 2016-17 Act and Regulations they became subject to reassessment using a new methodology, the Biodiversity Assessment Methodology and were renamed as "BAM Credits".
- 1.6 On 23 July 2020 FAP was advised that their 52,168 BBAM TJ Credits had been changed under a new area assessment method to an equivalent 66 BAM *Tetratheca juncea* (TJ) Credits. FAP assert that they were not given reference to any statutory regulation enabling this change.
- 1.7 The only explanation they received was on 21 August 2021, when the Manager, Ecosystem Programs, Biodiversity and Conservation Division, DPIE advised FAP by email that "*The equivalence is done on ecological basis only. No consideration of finances is included. This is to ensure the ecological offsets for development are met by the new scheme.*"
- 1.8 On 27 August 2020, the BCT BOP team offered FAP \$0.18 for 40,132 of their BBAM TJ Credits, being BCT's assessed market value, for a total sum of \$7,293. This valued FAP's original holding of 52,168 BBAM TJ Credits at only \$9,390, compared to the estimated market value of \$5,552,473 for the TJ Credits included in Agreement 393 by OEH in July 2018. No reasons or explanation were provided for this offer.
- 1.9 At the same time, FAP's 52,168 BBAM TJ Credits were valued at \$160 each on the BOS Spot Price Index (SPI) of free-market trades published by the BCT, establishing a total value of \$8.34m.
- 1.10 FAP assert that the Reasonable Equivalence Regulation covers both financial and ecological equivalence and that the conversion of their BBAM TJ Credits to BAM TJ Credits fails to take this into account. They assert that they have not been provided with any credible reasons or explanation by BCT for the conversion of 52,168 BBAM TJ Credits to 66 BAM TJ Credits, or for the BCT offer to FAP of \$0.18 for BBAM TJ Credits at the same time that the SPI price published by BCT was showing as \$160.
- 1.11 This \$160 value is still showing on pages 6 and 7 of the SPI website on 30 November 2021. <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Biodiversity/spot-price-index-bbam-biodiversity-credits-user-guide-free-190629.pdf>
- 1.12 FAP assert that by ignoring the principles embodied in Reasonable Equivalence, these two extraordinary actions of BCT and DPIE have effectively destroyed both the free-market pricing



of the TJ Credits and the ecological protection of the species because there is no longer a financial incentive to do so.

- 1.13 Since July 2020, FAP has repeatedly demanded explanations from the BCT and the DPIE, including why the Reasonable Equivalence Regulation was not taken into account, but they have not received any credible response.
- 1.14 To assist them with this, FAP engaged Mr Barry Buffier AM in 2020 as expert adviser. Mr Buffier was Chair and CEO of the NSW Environment Protection Authority from 2012 to 2017.
- 1.15 FAP assert that the BCT and DPIE decisions were arbitrary and not supported by any legislature or Ministerial authority and that this totally unacceptable and unjustified departmental action has destroyed the free-market pricing and trading of the TJ Credits and caused FAP significant financial loss.
- 1.16 On 11 January 2021, FAP made a formal submission to the NSW Ombudsman as a result of the lack of cooperation and the provision of credible answers by DPIE and BCT. FAP advised that they were proposing a claim for compensation covering their original investment and the loss of profit from the free-market price ruling in August 2020 when BCT and DPIE destroyed the market and they requested the Ombudsman to undertake an investigation and make a recommendation supporting their proposed claim for compensation.
- 1.17 On 29 June 2021, the NSW Upper House announced a parliamentary inquiry to examine the integrity of the BOS. This followed widespread concern by investors and users about the management of the BOS by BCT and DPIE, including an open letter in July 2019 by 63 NSW accredited assessors to the CEO of BCT expressing their concerns regarding a number of elements associated with BAM and BOS and referring to "a potential lack of consistency when completing a credit equivalence associated with converting BBAM credits to BAM credits" and that they have "difficulties recommending their clients enter into Biodiversity Stewardship Agreements for the sole purpose of placing BAM credits on the 'open market' as it is often not a financially viable option under BOS."
- 1.18 On 28 October 2021, Mr Jerry Lees, FAP Director, and Mr Barry Buffier met with Professor Niall Blair, Chair of BCT and Mr Paul Elton CEO, to review FAP's situation; and with Mr Elton again on 11 November 2021 but for FAP there were no satisfactory outcomes to the major issues.
- 1.19 In early October 2021 FAP briefed me Charles O'Neil FCI Arb on the overall circumstances of their investment in the BOS and the actions of the BCT and DPIE affecting their investment and advised that they were contemplating a claim for compensation for losses incurred due to those actions. On 7 October 2021, I accepted their appointment to provide this independent Opinion on the merits of their proposed compensation claim. In determining my Findings and Opinion, I have reviewed the 2016 Act and 2017 Regulations and carefully considered the documentation and details of events provided to me by FAP.

In the main body of my Opinion, Sections 2–9 comprise a summary of the information provided to me by FAP, but do not reflect my opinion on these matters; Section 10 refers to my credentials and appointment; and Sections 11 and 12 comprise my Findings and Opinion.

My principal Findings on matters relevant to the proposed FAP compensation claim are the following:

- a) The 2016 Act and the 2017 Regulations transferred the Ministerial powers and the obligations and rights of the parties to the original Scheme to the new Scheme without change, including FAP'S Agreement 393.
- b) The policy of 'Reasonable Equivalence' for assessments of Credits was introduced as a protection of the early investors under the 1995 Act, as well as to accommodate any future changes. I find that the term 'reasonable equivalence' includes reasonable financial equivalence as well as reasonable ecological equivalence and that there is no ambiguity or lack of clarity about the intent. Reasonable Equivalence is a legislated Regulation that imposes strict obligations on the BCT and the DPIE.
- c) FAP has not been given credible or acceptable explanations for the departmental actions and there has been a notable degree of obfuscation and inconsistency in the responses. The responses have shown a disregard by the BCT and the DPIE of their contractual obligations to the investor's financial protection under the Reasonable Equivalence provisions.



**My Independent Opinion on FAP's proposed compensation claim**

**d) I Find that the government has not complied with its own legislation and is in Breach of Contract in three respects:**

- A failure to competently and rigorously apply the provisions of Reasonable Equivalence to FAP's BBAM TJ Credits.
- The Act in Division 2, Section 6.9 (2) requires *"The Minister is to undertake public consultation in connection with the review of the biodiversity assessment method and give the public an opportunity to make submissions in relation to the method."* I Find that

FAP was not notified or made aware of any public consultation process in accordance with the Act in connection with the conversions of the BBAM TJ Credits to BAM TJ Credits and their subsequent values.

- The Act further requires in Division 2, Section 5.11 Biodiversity Stewardship Agreements *"The Minister must not agree to any variation of a biodiversity stewardship agreement unless satisfied that the variation does not have a negative impact on the biodiversity values protected by the agreement or that other measures required by the Minister have been taken by the owner of the biodiversity stewardship site to offset any such negative impact."*

The actions of the DPIE and the BCT did not comply with this requirement of the Act.

- e) The actions of the BCT and the DPIE have prevented the FAP Agreement being performed as contemplated,** by effectively destroying the free-market pricing and trading of the BBAM TJ Credits and reducing FAP's investment in the TJ Credits by 99.9% from the published SPI price of \$160, and at the same time eliminating the financial incentive to protect the BBAM TJ species.
- f) The primary cause of this was that the government ignored the financial and commercial aspects of the Reasonable Equivalence regulations.**
- g) In respect of FAP's proposed compensation claim, I Find that the evidence substantiates and justifies FAP's proposed claim for compensation and that the compensation should include the following sums, which are appropriate for breach of contract:**

An amount equivalent to FAP's total investment in the scheme of \$3,468,246 in order to restore them to the original position at the time of their initial investment.

An amount for damages that will compensate FAP for loss of profit that they would have expected to make if the free-market pricing mechanism had not been artificially interfered with. I find that FAP's claim based on a valuation of \$8,346,880 for 52,168 TJ Credits at \$160 each is justified, less FAP's original investment of \$3,468,246, leaving the sum for damages as \$4,878,634.

Interest on the original invested sum at the statutory rate, dating from 31 July 2018.

All legal and related costs for both parties to be paid by BCT.

2. Introduction and Background

In NSW "The Threatened Species Conservation Act 1995" created a Biobanking Scheme which included provision for private sector investment in Biobank Credits that could be on-sold to developers or government departments who required them to meet planning requirements.

This scheme was replaced with the Biodiversity Offsets Scheme (BOS) under the Biodiversity Conservation Act 2016 and the Biodiversity Conservation Regulation 2017. Information on the Scheme is available on

<https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme>

The BOS was initially managed by the Biodiversity Conservation Trust (BCT) and the Office of Environment and Heritage (OEH). In July 2019, OEH was dissolved and its functions were taken over by the newly formed Environment, Energy and Science Group (EES) of the NSW Dept of Planning, Industry and Environment (DPIE). The EES also support the BCT, which is a Statutory Authority within the portfolio of the Minister for Energy and Environment.

The Biobank Credits that existed under the original 1995 Biobanking Scheme were calculated according to the Biobanking Assessment Methodology and were termed "BBAM Credits". Under the new 2016-17 regulations they became subject to a reassessment using a new methodology, the Biodiversity Assessment Methodology and they were renamed as "BAM Credits".

The BAM Credits were then subjected to a further change in July 2020, when a new area assessment method was introduced for some species using algorithmic inputs of plant area as opposed to actual plant numbers.

The two methodology changes that have occurred since the 2016-17 Regulations came into effect have significantly reduced the numbers and values of some specific plant species for which Biobank BBAM Credits existed under the 1995 Act.

FAP Nominees Pty Ltd (FAP) was an investor in the original scheme for BBAM Credits and they assert that the two changes in methodology have caused them significant financial loss, leading to a claim for compensation by FAP against DPIE.

I, Charles O'Neil FCI Arb, was engaged by FAP on 7 October 2021 to review and assess the entire matter and to provide my independent Opinion on the merits or otherwise of FAP's proposed compensation claim. My credentials for this appointment are listed in the last section of this report.

FAP has provided me with the relevant documentation and sequence of events in support of their proposed claim, which I hereunder summarise and provide my Opinion on the legal merits of the proposed claim. Sections 1 – 8 are a summary of the information and documentation that FAP has provided me and Sections 9 – 11 cover my appointment, findings and Opinion.

3. Investment in the Biodiversity Offsets Scheme by FAP Nominees Pty Ltd

FAP has participated in the Biobanking scheme by converting land they purchased in the Lake Macquarie Council area. Their costs to date are \$3,468,246, including the land purchase and costs related to establishing their Biobank. They signed Biobanking Agreement Number 393 with OEH on 31 July 2018 (as attached) and received diverse BBAM Credits, with 95% of the value being an allocation of 52,168 *Tetratheca Juncea* (TJ) BBAM Credits *'determined in accordance with the BioBanking Assessment Methodology (and set out in Annexure B, entitled 'Biobanking Agreement Credit Report').'*

FAP has advised that they were encouraged to make this investment through its official promotion by the NSW Government and after they received a positive feasibility study from WSP Parsons Brinckerhoff, whom they commissioned. They also concluded that a scheme owned and managed by government should offer investor security.

The following extracts from clauses in Agreement 393 are relevant:

*Clause 6.3 (page 11): 'Biodiversity Credits': "At the commencement date, the landowner is entitled to receive \$5,844,709.17 excluding GST, to be satisfied in full by the creation of the biodiversity credits listed in Annexure B.*

*Note: \$5,844,709.17 is a best estimate of the market value of the biodiversity credits at the time of creation."*

*"The Minister does not warrant that the landowner will be able to sell biodiversity credits for the estimated market value."*

*"The sale price of each biodiversity credit will be negotiated between the landowners and the buyer and will be affected by supply and demand for each biodiversity credit."*

The 52,168 BBAM TJ Credits subsequently achieved a valuation in August 2020 of \$8.34m based on the BOS Spot Price Index (SPI) of \$160 each. The SPI was published by the BCT.

The background to FAP's decision to invest in the BOS is important. As stated above, it was based on the feasibility study from WSP Parsons Brinckerhoff (WSP), regarded as one of the leading consultants in this field in Australia. The key points arising from the feasibility study were:

- FAP based their decision on WSP's estimate of the number of Credits and their values as shown in the table below, particularly in regard to the TJ Credits.
- WSP predicted a likely high demand and low supply (see notes in the table).
- During the lengthy negotiating period between FAP and OEH culminating in Biobanking Agreement 393, the TJ numbers were reduced by OEH from 69,558 to 52,168. WSP disagreed and were adamant that they were correct, but OEH forced the change.
- In their feasibility study WSP valued the TJ Credits at \$150 each, for a total sum of \$7,825,200 for 52,168 Credits.
- The peak price for the TJ Credits was \$369 in August 2017 according to the BCT Trust fund baseline credit prices calculator- see attachment 2 in Letter to Ombudsman attached.

The following table shows the Credit numbers and values that WSP provided to FAP in their feasibility report dated 12 June 2014. Note their comments regarding the Tetratheca Juncture Credits being in high demand.



Summary of Calculated Value of Proposed BioBank Site - Lot 4 DP 248860 and Lot 1 DP 426613, Cowlishaw Street, Redhead

Parameter	Threatened status (NSW)	BioBanking Credits	Likely demand	Potential Value Based on Current Sales (see below)
Banksia dry shrubland on coastal sands of the North Coast, (HU503)	-	100	Low - Medium	\$201,600 – 2,400,000
Broad-leaved Paperbark - Wallum Bottlebrush - sedge wet heath on sand, southern North Coast and northern Sydney Basin, (HU516)	-	84	Low - Medium	\$80,640 – 960,000
Coastal freshwater lagoons of the Sydney Basin and South East Corner, (HU533)	Endangered Ecological Community (TSC Act)	2	High	\$2,520 – 30,000
Fern-leaved Banksia - Melaleuca sieberi wallum heath on coastal sands, southern North Coast and northern Sydney Basin, (HU539)	-	92	Low - Medium	\$115,920 – 1,380,000
Swamp Mahogany swamp forest on coastal lowlands of the North Coast and northern Sydney Basin (HU633)	Endangered Ecological Community (TSC Act)	72	High	\$90,720 – 1,080,000
<i>Tetratheca juncea</i>	Vulnerable	69,558	High	\$10,433,700
Wallum Froglet	Vulnerable	102	High	\$15,300
Current Valuer – Generals valuation				\$1,200,000
TOTAL VALUE RANGE (including site management costs)				\$12,140,400 – \$17,499,000

Credit Demand

The high demand credits are likely to be the Endangered vegetation types. These vegetation types occur in areas subject to high development pressures and supply of these credits is likely to be low.

The other common heath communities for which the site generates most credits are fairly restricted in their distribution, however development on the coast in heath areas generally occurs less frequently due to numerous environmental and planning issues. These vegetation types are generally well protected due to these issues and / or they are common, and hence are generally likely to be in lower demand.

The *Tetratheca juncea* credits are likely to be in high demand. This species occurs in many high pressure urban growth areas in the Lake Macquarie and Wyong regions and the likelihood that a proponent will need high number of credits for this species is high.

Similarly, Wallum Froglet tend to occur in high pressure urban growth areas from Wyong to north of Port Stephens and it is considered that likely demand for these credits on the open BioBanking market is high.

Scanned with CamScanner

The comments re the TJ Credits being in high demand are very important in that it shows that there would be a very long-standing reason to expect that FAP could sell all its 52,168 Credits over the long haul and at a good price.

4. Subsequent changes to the Scheme and the impact on FAP's investment

On 28 February 2019 FAP received the following advice from OEH in regard to the transition to the Biodiversity Offset Scheme under the 2016 Act and 2017 Regulations:

*"You may be aware that as part of the transition to the Biodiversity Offset Scheme (BOS) there were provisions for the determination of reasonable equivalence of BioBanking credits to those that would be generated under the Biobanking Offsets Scheme."*

Subsequently FAP received a Biodiversity Credit Ownership Statement dated 26 June 2019 advising that their 52,168 BBAM TJ Credits were being replaced by 26,084 BAM TJ Credits, but there was no explanation provided for the method of calculation behind this change. FAP queried why the original number was halved but did not receive any explanation.

Then on 23 July 2020 FAP was advised that the 52,168 BBAM TJ Credits had been changed under a new area assessment method to an equivalent 66 BAM *Tetratheca Juncea* (TJ) Credits. FAP assert that they were not given any reference to any statutory regulation enabling this change. Subsequent to this re-allocation to 66 BAM Credits, FAP was advised by the BCT Biodiversity Offset Program team on the 27 August 2020 that 51 of these Credits were equivalent to 40,132 of their original BBAM Credits and that each BBAM Credit now had an assessed market value by BCT of \$0.18. This valued FAP's original holding of 52,168 BBAM TJ Credits to be only \$9,438, compared to the estimated market value of \$5,552,473 for the TJ Credits included in Biobanking Agreement Number 393 on 31 July 2018 at the instigation of OEH, or again at the instigation of of the DPIE, \$8.34m based on the Spot Price Index BOS of 30 August 2020.

The BCT correspondence to FAP states that the changes were necessary in order to efficiently manage the protection of the species, but gave no further explanation.

If the value for BBAM TJ equivalence, established as \$0.18 in the BCT email to FAP on 27 August 2020 had been in any way foreseen the total minimum value for all the Credits in the feasibility report would have been \$519,220 and FAP would not have considered proceeding with the formation of the Biobank. With Biobanking Agreement 393 the required TFD (Trust fund deposit) alone was \$432,358.

The protection of the FAP site, which contains the largest number of BBAM TJ Credits issued in NSW (over 50%), would have been completely uneconomic.

Direct impact on Credits trading of the revised processes

FAP advises that the new counting and assessment method has caused them the following significant problem with the trading of Credits.

In the attached email of 21 August 2020 from Mr , Ecosystem Programs Manager, he points out that developers who had been assessed as needing BBAM Credits in the original Biobanking scheme under the 'Threatened Species Act' are required to purchase BBAM Credits from suppliers such as FAP.

However, once all the developer's needs under the BBAM system have been met all transactions will have to be under the revised BAM credits Biodiversity Offsets Scheme (BOS). Under this scheme FAP has been equivalenced 66 Credits for its 52,168 BBAM Credits.

Because of this FAP has been forced into the following situation:

In 2021, Transport for NSW (TfNSW) recently sent out enquiries to buy 12,690 BBAM TJ Credits. This is for a new freeway in Newcastle. FAP's consultants WSP Parsons Brinckerhoff advised of this probable need for substantial quantities of BBAM TJ Credits 2 - 3 years ago. They also advised of a second Newcastle freeway project that would need large amounts of BBAM TJ Credits. This second project has not gone ahead at this date and it means that when it does it will be assessed under the BOS for BAM TJ Credits.

This means that FAP has only had this one enquiry for 12,690 BBAM TJ Credits as an opportunity to date to sell any reasonably large number of its BBAM TJ Credits.



FAP understood that if they did not sell these 12,690 BBAM TJ Credits then the balance of their 52,168 BBAM Credits would be equivalence to 66 BAM Credits, worth \$9,438 in total valued by the BOS calculator at \$143 each.

FAP decided to sell the 12,690 BBAM Credits and recoup some capital and set a tender price of \$34, for a total of \$431,460.

However, on the 8 November 2021 FAP was advised by TfNSW that they had been unsuccessful in selling the 12,690 TJ BBAM Credits as another party had bid a price significantly below them, said to be in the single digit range by TfNSW.

As there have been no other enquires at this time for TJ BBAM Credits, FAP has been forced into a position wherein the balance of its 52,168 BBAM Credits will be equivalenced to 66 BAM Credits, with an indicated total market value of \$9,438 for all of the 66 BAM TJ Credits in accordance with the BCT offer on 27 August 2021 of \$143 per BAM Credit.

Reference the email below from [redacted] to FAP on 27 August 2020, in which BCT advises FAP that "your bid has been successful", with the attached table showing 51 BAM Credits at \$143 each for a total sum of \$7,293 and the "equivalence" of 40,312.64 BBAM Credits at \$0.18. FAP declined to accept this 'offer' which would have meant them losing 40,312 of their BBAM Credits which represented 77% of their total TJ BBAM Credits.

Based on the government published Spot Price on 30 August 2020 for BBAM TJ Credits of \$160 (see pages 6 and 7 in the SPI link referenced following), the 12,690 BBAM Credits would have had a value of \$2.03 million at that time.

The Biobanking Spot Price Index (SPI) was put in place following the 2016 Act as a mechanism to assist the trading of Credits, with the spot market price being the price at which a Credit was bought and sold based on actual sales.

<https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Biodiversity/spot-price-index-bbam-biodiversity-credits-user-guide-free-190629.pdf>

There are various statements in this document that have not been subsequently applied. For example:

"The Biodiversity Offsets Scheme (BOS) is a market-based scheme that provides a consistent biodiversity assessment process for development, a rigorous and credible offsetting scheme."

"The principle is that creating a market in biodiversity credits gives incentives to protect biodiversity values for future generations."

"The SPI is one of a series of economic instruments the Department of Planning, Industry and Environment has developed to address issues in regards economic efficiency in the BOS, including the organisation of supply of biodiversity credits and the allocation of those credits among all market participants."





The prices in the above transaction for 12,690 BBAM Credits should be compared to the following range of values for TJ Credits since FAP first started investigating the BOS and subsequently investing in it.

- TJ BBAM – 52,168 Credits – price per Credit and total value
- June 2014 – \$150 – \$7,825,200 Parsons Brinckerhoff feasibility report
  - July 2018 – \$106 – \$5,552,473 BioBanking Agreement 393 issued by OEH
  - Aug 2020 – \$160 – \$8,346,880 Credits Spot Price index published by the BCT
- TJ BAM Credits – 66 Credits (designated equivalent to 52,168 TJ BBAM Credits)
- Aug 2020 – \$143 – \$9,438 Director of Conservation Programs, OEH

FAP's potential loss from this overall situation is substantial and they assert that have been forced into this position by the revised processes, which they believe are totally inequitable.



To put it all in perspective, FAP assert that the BCT offer of 27 August 2021, which was not accepted by FAP, has created enormous damage to the free-market trading of the Credits and caused a high degree of uncertainty and confusion amongst sellers and buyers of the TJ Credits. FAP assert that it has been the totally unacceptable and unjustified departmental actions which have stopped the market in its tracks.

★   aaaa.FAP Nominees August 27 2020 at 3:41 pm  Details 

Notification of successful bid - BCT 2020 Statewide Biodiversity Credit Tender - FAP Nominees Pty...  
To: Jerry Lees

Dear Jerry

I am pleased to inform you that your bid has been successful in the Biodiversity Conservation Trust's (BCT) 2020 Statewide Biodiversity Credit Tender. Section 1 of the table below (highlighted in blue) outlines the successful bids, including the credit type, number of credits the BCT seeks to purchase, and the total value of the purchase.

The total overall value of the offer is \$7,293.00 (excl. GST)

1. Successful bids								
BSA No.	Site name	Credit type	Credit ID	No. of BAM equivalent credits	Price per BAM credit (excl. GST)	No. of BBAM credits	Price per BBAM credit (excl. GST)	Total value (excl. GST)
393	Redhead	Tetratheca juncea (Black-eyed Susan)	735	51	\$143.00	40,312.64*	\$0.18	\$7,293.00
Total value of successful bids (Excl. GST)								\$7,293.00

\*These credit numbers have been calculated based on the Biodiversity Credit Ownership Report prepared by DPIE (rounded to two decimal places).  
BBAM credit numbers will be rounded to the nearest whole number during preparation of credit transfer forms if the purchase is accepted.  
Please note rounding may result in a slight variation between the final BBAM price per credit shown on the credit transfer form when compared with the figures above.

To proceed with the credit sale please reply to this email by 5pm Wednesday 9 September 2020 confirming your intention to proceed with the sale and enclosing the completed and signed Credit owner information form (attached).

Once we receive your response we will prepare a draft Credit Sale Agreement (CSA) for your consideration and signing. The BCT will then execute the signed CSA, make the associated payments and arrange for the credits to be transferred.

If you accept the BCT offer, it is important that you note the Credit ID and ensure that these credits are not offered for sale to another party. If the specified credits are not available, then the BCT cannot proceed with the sale.

You are not obliged to accept any offer by the BCT to purchase credits associated with the successful bid.

Please note that the information contained in this email and the CSA is commercial-in-confidence to the credit owner and the BCT.

If you would like to discuss any details of the proposed sale please do not hesitate to reply to [bopenders@bct.nsw.gov.au](mailto:bopenders@bct.nsw.gov.au).

Kind regards  
BCT Biodiversity Offset Program team

It should be noted that \$0.18 is an exact calculation as per the method approved by the DPIE. It is calculated as follows. The BOPC (Biodiversity Offset Public Calculator) managed by the DPIE produced a value for each TJ BAM Credit of \$143. FAP has been Equivalenced to 66 TJ BAM Credits and the total value of FAP's BAM Credits is thus \$9,438. Therefore, according to this methodology the value of FAP's 52,168 TJ BBAM Credits is  $\$9,438/52,168 = \$0.18$

FAP assert that there is no logic to this methodology and that it is totally counter-productive to the aim of preserving the TJ threatened species, because the costs involved in setting up the BioBank or Stewardship site far outweigh the value of the Credits and there is no financial incentive to protect them. And despite repeated requests, the DPIE and the BCT have provided no credible explanation for this method of calculation being adopted.

FAP state that at the time they entered into Biobanking Agreement 393, if there had been any contemplation of such government interference in the Credits numbers and the free-market pricing, then they certainly would not have proceeded with the investment.

5. Response to the Scheme changes by FAP and their request for explanations and justification

FAP advise that since August 2020 they have had considerable communication with BCT and DPIE in meetings and by email to lodge their objections and be provided with explanations for the changes to the scheme, which so dramatically affected their investment.

To assist them with this, FAP engaged Mr Barry Buffier AM in 2020 as expert adviser. Mr Buffier was Chair and CEO of the NSW Environment Protection Authority from 2012 to 2017.

FAP assert that the reduction to 66 BAM Credits and the revised estimate in values to \$143 each and \$9,438 in total were arbitrary decisions and that there was no prior discussion with landowners holding the Credits as required under the Act. They further state that they have not been provided with any credible explanations from departmental managers about the large financial equivalence disparity and that these changes have been an arbitrary abuse of authority.

FAP has provided considerable correspondence about this, with the following being typical examples.

5.1 Internal department review of the new area assessment method for TJ Credits

On 22 October 2020 FAP met with Ms Michelle Chung, Director of the Biodiversity Offsets Scheme, and her staff. FAP was represented by Mr Jerry Lees, Mr Barry Buffier, Lake Macquarie Council Environmental Planner, and of WSP Parsons Brinckerhoff.

FAP presented evidence that the new 'Area' method leads to erroneous results and is harmful to the TJ species. FAP then requested an urgent review of the new 'Area' method and proposed a reversion to the original method.

On 17 December 2020, Ms Chung advised FAP that the three experts who had recommended the use of the 'Area' method had reviewed FAP's evidence and decided to make no change.

FAP assert that it is totally unacceptable that the department had used the same three experts to review themselves instead of independent assessors and that this was very unprofessional as each of the reviewers was conflicted by their initial involvement.

5.2 Email on 21 August 2021 from , Manager, Ecosystem Programs, Biodiversity and Conservation Division, DPIE, which states in Point 7 "The equivalence is done on ecological basis only. No consideration of finances is included. This is to ensure the ecological offsets for development are met by the new scheme."

This attitude has effectively consigned the TJ species to oblivion.

The full email is attached.

5.3 FAP assert that BCT and DPIE have ignored the requirements in the Regulations for "Reasonable Equivalence" for BBAM and BAM Credits.

Refer to Section 6 below.

5.4 The email on 22 July 2020 from the Director of Conservation Programs, Office of the Environment and Heritage to FAP advising that their 52,168 BBAM TJ Credits were now assessed as being 66 BAM Credits. This was followed by a further email on 27 August 2020 advising that the assessed value of the 52,168 credits had been reduced to \$0.18 cents each, giving a total estimated value of \$9,438, with no word of explanation for either decision. This equates to the 66 BAM Credits being worth \$143 each. This value was produced by the BOPC (the public calculator for BAM Credits).

5.5 On 28 October 2021, Mr Barry Buffier and Mr Jerry Lees had a Zoom meeting with Professor Niall Blair, Chairperson of BCT and Mr Paul Elton, CEO of BCT to review FAP's situation:

FAP advised the following:



- They have received no satisfactory answers to their queries of DPIE as to how such changes could be made in what appears to have been an arbitrary fashion without Ministerial consultation as required by the Act, resulting in heavy financial loss for FAP.
- The relevant departments have consistently ignored their demands for explanations of their actions, with the result that FAP has made a submission to the State Ombudsman.
- FAP is proposing to claim compensation to recover their losses.
- FAP was treated unfairly by the BCT in their tender that concluded on 9 March 2020. The BCT tendered to buy 246 TJ BAM credits and instead bought 195 TJ BBAM credits for \$70 each from one supplier and offered to buy 51 TJ BAM credits from FAP equivalenced to 40,132.64 TJ BBAM credits (77 % of FAP's total TJ credits) at a price per credit of \$0.18 (see email page 8 above).

Professor Blair and Mr Elton responded with the following points:

- They said BCT is operating very well and they quoted figures to back that up.
- They said that FAP's problems were caused by DPIE processes.
- They defended BCT's actions in the tender of 9 March 2020 where Biobank 223 was treated more favourably than FAP. FAP disagreed.
- They agreed to revisit the details of these transactions and undertake an analysis and consider possible measures and solutions; to consult with FAP as this work progresses; and review the outcomes with FAP.
- They noted that FAP is the only supplier of Credits who has brought forward complaints this year. They advised that BCT had bought \$69 million of Credits in a large number of transactions and only FAP has protested.
- They admitted there were problems with the pricing calculator and with the calculations of Equivalence.
- The calculator has been managed by DPIE and BCT has been proposing to take control of it for the last two years because of its defective results.
- They knew that FAP had made a submission to the Ombudsman (see Section 6 below) and were aware of the Ombudsman's interactions with the DPIE.

On the 11 November 2021 Barry Buffier and Jerry Lees met with Paul Elton, CEO of the BCT. Because of their actions in running the tender Mr Elton proposed, subject to BCT approval, to offer to buy from FAP the total number of TJ BBAM Credits (246) required in the tender at the price paid to the other bidder (\$70). FAP indicated they would accept the BCT offer.

5.6 Extracts from an email from Julianne Smart, Senior Team Leader, Ecosystem Programs, Biodiversity and Conservation Division, DPIE on 4 August 2020

*"I also wanted to reaffirm that credit equivalence is designed to address the ecological equivalence between the Biobanking Assessment Method (BBAM) and the new Biodiversity Assessment Method (BAM) method.*

*While it is a matter for you - I understand from other credit owners that they have adjusted the price when selling equivalent credits - where the volumes have been reduced to ensure financial equivalence."*

This would mean the new BAM price for TJ would be more than \$126,000 per Credit. Paul Elton, CEO of the BCT, told FAP that the highest value Credit in NSW is around \$30,000.

FAP assert that a price greater than \$100,000 is not even remotely possible when the market price has been interfered with to such an extent.

5.7 FAP assert that BCT has ignored industry experts such as Lake Macquarie Environmental Planner, and the Leading BAM Assessors NSW who wrote to them. quotes *"There is a standardised method for survey/counting plant clumps - this comes from Payne R., Stevenson D. and Wellington R., 2002, A standardised method for*



counting Black-eyed Susan populations \*. This highly regarded expertise has been ignored by BCT.

FAP refers to the following email extract from [redacted] on 10 November 2020 to John Seidel (Manager, Ecosystem Assessment, Biodiversity a & Conservation, DPIE) which shows clearly the effects of the area counting method. One example she gives is the following for a potential Council Acquisition:

**Belmont North Site – Council Acquisition**

*The site that was the subject of a preliminary BAM assessment for Council to determine whether or not it would acquire was around 40 ha in total area. The proposed stewardship area was 26.4 hectares. It supported over 1,500 Tetratheca juncea plant (agreed by Michelle Chung (Director BOS) and all at the meeting of 29/09/20 as being a significant cluster of TJ plants) clumps with the whole proposed stewardship site area (ie all three PCTs present) being suitable habitat for Tetratheca juncea. The species polygon for Tetratheca juncea was 26.4 ha and this generated 32 species credits for Tetratheca juncea. Overall, the feasibility of recouping just the management costs for the site (excluding the purchase price) from the sale of all biodiversity credits generated was very very poor. (Detailed documentation relating to this is commercial and is not available).*

- 5.8 FAP refers to the assertions by BCT that the above changes were necessary in order to efficiently manage the protection of the species, but this is not credible because they have ignored the financial aspects of reasonable equivalence which provide investor protection and demonstrates a disregard for the principles of the Biobanking Agreements.

6. DPIE and BCT Policy of "Reasonable Equivalence" for BBAM and BAM Credits

<https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity-offsets-scheme/offset-obligations-and-credit-trading/assessment-of-reasonable-equivalence>

The above site contains the following information:

*An assessment of reasonable equivalence may be necessary if you own Biobanking credits or have a Biobanking credit obligation.*

*The Biodiversity Conservation Act 2016 together with the Biodiversity Conservation Regulation 2017 commenced on 25 August 2017. They replaced the Threatened Species Conservation Act 1995 (TSC Act) and associated regulation.*

*The TSC Act had previously provided the framework for creation of biodiversity credits and biodiversity credit obligations (also called offset obligations). These are also known as BioBanking credits after the name of the program.*

*The change in legislation also included a change in the method that was used to create biodiversity credits and to calculate offset obligations.*

*To ensure that credits and credit obligations created under the TSC Act could still be used or met within the newer credit market, the Biodiversity Conservation (Savings and Transitional) Regulation 2017 (Savings and Transitions Regulation) preserved these credits and credit obligations.*

*The Savings and Transitions Regulation also provided the power for the Environment Agency Head (EAH) to determine reasonable equivalence of these credits or credit obligations, that is, to determine reasonable equivalence for BioBanking credits or obligations to the new Biodiversity Offsets Scheme credit numbers and classes.*

7. FAP Submission to the NSW Ombudsman

As a result of the lack of cooperation and the provision of credible explanations by DPIE and BCT and related departments, FAP made a formal submission to the NSW Ombudsman on 11 January 2021, advising that they were proposing a claim for compensation covering their original investment and the loss of profit from the SPI free-market price ruling in August 2020 when BCT

and DPIE destroyed the market and requesting the Ombudsman to investigate the matter and make a recommendation in support of FAP's proposed compensation claim.

As of the date of this Opinion the Ombudsman is still undertaking investigations into this matter.

8. NSW Upper House Inquiry into the Biodiversity Offsets Scheme (BOS), June 2021

As a result of widespread concern by investors and users about the management of the BOS by BCT and DPIE, the NSW Upper House announced on 29<sup>th</sup> June 2021 that a parliamentary inquiry would be held to examine the integrity of the BOS, with submissions due by 31<sup>st</sup> August 2021.

<https://www.parliament.nsw.gov.au/lcdocs/other/15713/Media%20release%20-%20PC7%20-%20New%20Inquiry%20into%20the%20Biodiversity%20Offset%20Scheme.pdf>

FAP has lodged a confidential submission to the Inquiry. In summary, FAP is asserting that DPIE and BCT have made arbitrary changes to the structure of the BOS and mismanaged its operations, including tenders for the sale of Offset Credits, causing FAP to suffer large losses with their investment. FAP's submission at this stage has been lodged on a confidential basis to not jeopardise any negotiations through it becoming public knowledge.

On 10 July 2019, 63 NSW accredited assessors sent an open letter to the CEO of BCT expressing their concerns regarding a number of elements associated with BAM and BOS, stating that they have "difficulties recommending their clients enter into Biodiversity Stewardship Agreements (BSA) for the sole purpose of placing BAM credits on the 'open market' as it is often not a financially viable option under BOS." Further in the letter they state "We recognise a potential lack of consistency when completing a credit equivalence associated with converting BBAM credits to BAM credits."

The following extracts from the NSW government's recent submission No. 97, pages 13 and 14, in regard to the Biodiversity Offsets Scheme should be noted:

*"The Biodiversity Offsets Scheme creates opportunities for landholders to earn income by managing their land for conservation. The Scheme's market-based approach creates significant new conservation opportunities supported by private sector investment.*

*The Scheme does not guarantee a financial return for landholders selling credits. Establishment costs are recouped, management costs are met and profits are made through negotiating the sale of credits with buyers. The upfront establishment costs, including the cost of an accredited assessor preparing the biodiversity assessment and management plan, can be high and deter some landholders from establishing agreements.*

*The publicly available charges produced by the Biodiversity Offsets Payment Calculator may also influence landholders in deciding to enter an agreement by acting as a benchmark for biodiversity credit prices. .... Because credit buyers also have the option of transferring their credit obligation to the BCT, the Biodiversity Offsets Payment Calculator acts as a point of competition for credit sellers.*

*The NSW government is implementing improvements to make it easier for landholders to engage in the Scheme. In particular, the BCT provides comprehensive guides for landholders and has introduced a financial assistance scheme that provides financial assistance to cover upfront establishment costs in some circumstances. .... The BCT purchases credits directly from landholders."*

FAP advise that the government has actually removed the 'Calculator' from use as it was found to be a flawed method, but they are still officially espousing its use, as above.

Professor Blair and Mr Elton confirmed to FAP in the meeting with them on 28 October 2021 that there were problems with the pricing calculator; that it has been withdrawn from public use and that the BCT is lobbying the Minister to take control over this area.



9. Proposed Claim for Compensation by FAP Nominees Pty Ltd in respect of their TJ Credits

FAP assert that the actions of the DPIE have effectively reduced the value of FAP's TJ Credits by 99.9 % and FAP has been egregiously affected by the changes in the TJ BBAM Credits price, which fell from a published Spot Price of \$160 per Credit in August 2020 to \$0.18 per Credit, thereby reducing the total value of FAP's TJ BBAM Credits from \$8,340,000 to \$9,390.

FAP relied on the BOS, the BCT and the DPIE complying with their contractual obligations under the 2016 – 17 Act and Regulations, including the assessment of Reasonable Equivalence, which falls under the Act; as well as complying with the Terms and Conditions of Biobanking Agreement Number 393. FAP is proposing to claim compensation to recover their initial investment in the TJ Credits and to be compensated for their loss of profits for the reasons set out in this Opinion.

10. Charles O'Neil Appointment and Credentials

FAP engaged me on 7<sup>th</sup> October 2021 to provide them with my assessment of their proposed claim for compensation with an independent written Opinion on the merits or otherwise of the proposed claim. I have been briefed by FAP director Mr Jerry Lees and by Mr Barry Buffier, Chair/CEO NSW EPA 2012-2018, including the supply of a considerable volume of documentation.

My qualifications to provide this Opinion include the following:

- Fellow of the Chartered Institute of Arbitrators, recognised in more than 100 countries.
- Fellow of ACICA (Australian Centre for International Commercial Arbitration).
- Participation in more than 170 disputes in 8 countries, specialising in contract law, as an arbitrator, expert determiner, expert witness, neutral negotiator and party representative, with these disputes covering a range of commercial and infrastructure matters.
- My specialty area in dispute resolution is contract law, with the analysis and interpretation of the terms of contract for infrastructure and construction projects.
- Appointments have included international Dispute Adjudication Boards and Dispute Advisory Panels and university lecturing, e.g. I am guest lecturing at Melbourne University Law School on 9th December, for the third time.
- I am the author of two books published internationally – *Human Dynamics in Construction Risk Management (2014)* and *Global Construction Success (2019)*.
- Recently I wrote a 1,900-word review for the International Construction Law Review on a new book by Dr Donald Charrett of Melbourne, titled "*Contracts for Construction and Engineering Projects*", to be published in November 2021.

11. My Findings on matters relevant to the FAP compensation claim

I have been provided with extensive documentation on FAP's investment in the original Biobanking Scheme under "The Threatened Species Conservation Act 1995", which was replaced by the Biodiversity Offsets Scheme (BOS) under "The Biodiversity Conservation Act 2016" and "The Biodiversity Conservation Regulation 2017", at which time the 1995 Act was repealed, and of subsequent events affecting FAP's investment since the 2016 Act and 2017 Regulations came into force.

I have carefully reviewed the two Acts and the 2017 Regulations; all the documentation provided relating to FAP's investment; the departmental management of both Schemes; and I have submitted numerous questions to Mr Lees and Mr Buffier, which they have answered.

This Opinion is focused on the key points relevant to the compensation claim. I have attached several key documents that provide supporting information to my Opinion.

Before addressing the legal aspects of FAP's proposed compensation claim I herein set out the following observations and conclusions that I believe are relevant to consideration of the claim.



11.1 The 1995 Act was straightforward and understandable for potential investors and was supported by indicative market valuations and spot prices that were viable and attractive.

11.2 When the 1995 Act was repealed and replaced by the 2016 Act and the 2017 Regulations, all the Ministerial powers and the obligations and rights of the parties to the original Scheme were transferred to the new Scheme, including FAP'S Agreement 393, with one important difference.

The 2017 Regulations include the provision for assessments of Credits to be in accordance with the policy of 'Reasonable Equivalence', as described in Section 6 above, and this was clearly put in place for the protection of the early investors under the 1995 Act, as well as to accommodate any future changes. On a careful reading of the related documentation, I find that the term 'reasonable equivalence' equates to reasonable financial equivalence as well as reasonable ecological equivalence and that there is no ambiguity or lack of clarity about the intent.

11.3 There has been considerable correspondence and several meetings between FAP and BCT and with departments that fall under the auspices of the DPIE that have been involved in the Biodiversity Offsets Scheme.

11.4 In regard to the repeated requests by FAP since July 2020 for explanations and justification of the processes and of the basis of calculations and values, I find that with the responses from the different departments there has been a notable degree of confusion and inconsistency in these responses, which demonstrates a significant lack of administrative understanding across the departments of how the processes and valuations should be applied and managed.

I find that the responses and answers provided to FAP have been unacceptable, because they have been full of obfuscation and apportioning of responsibility to other involved departments. They have not provided credible, acceptable and reasoned justification in any way, as shown in the examples provided in Section 5 above.

I find that these examples demonstrate an inexplicable disregard by the DPIE and its subsidiary departments of their contractual obligations to the investor's financial protection under the Reasonable Equivalence provisions and a further confirmation of this were the actions surrounding the reduction of FAP's BAM TJ Credits to 66 from 52,168 BBAM TJ Credits and the advice that their estimated value was effectively reduced to \$9,390, followed by the lack of acceptable explanations thereafter.

I have reviewed the 2016 Act in light of the above events and it is clear that the Minister has the power to review and amend the biodiversity assessment method, but subject to Division 2, Section 6.9 (2), which states:

*"The Minister is to undertake public consultation in connection with the review of the biodiversity assessment method and give the public an opportunity to make submissions in relation to the method."*

I find that FAP was not notified or made aware of any public consultation process in accordance with the Act in connection with the conversions of the BBAM TJ Credits to BAM TJ Credits and their subsequent values.

And subject to Division 2, Section 5.11 Biodiversity Stewardship Agreements, which states:

*"The Minister must not agree to any variation of a biodiversity stewardship agreement unless satisfied that the variation does not have a negative impact on the biodiversity values protected by the agreement or that other measures required by the Minister have been taken by the owner of the biodiversity stewardship site to offset any such negative impact."*

I find that the actions of the DPIE and the BCT did not comply with this requirement of the Act.

11.5 I find that the market for TJ Credits has been severely impacted by the following two significant changes made by the BCT and the DPIE since the 2016 Act and the 2017 Regulations came into force:

- Changes to the relative numbers of TJ BAM Credits imposed on FAP against their original BBAM holding – 66:52,168 or 1:790.
- The Credits price offered by BCT immediately after the above change of \$0.18 for the original 52,168 Credits, totalling \$9,438, which equates to \$143 for each of the 66 BAM Credits.

This can be compared to the range of BBAM TJ Credits prices before the above changes of \$106 to \$160, with the latter being the last price showing on the Spot Price Index in August 2020, before the changes.

From my overall review, it is also notable that the level of communication from the departments to FAP and between the departments falls well below an acceptable standard for efficient government departments. Three standout examples are:

- FAP's tender on 11<sup>th</sup> December 2018 for the sale of 195 TJ Credits, for which FAP could obtain no follow-up information despite repeated requests until 9<sup>th</sup> September 2020.
- The email on 22 July 2020 from the Director of Conservation Programs, Office of the Environment and Heritage to FAP advising that their 52,168 BBAM TJ Credits were now assessed as being 66 BAM Credits. This was followed by a further email advice that the assessed value of the 52,168 Credits had been reduced to \$0.18 cents, giving a total estimated value of \$9,390.
- BCT advised FAP that the changes were necessary in order to efficiently manage the protection of the species, but gave no further explanation.

The significance of these three communications was that they contained no credible explanation for the changed numbers and values, including the logic of the methodology, and none has been forthcoming since from any of the involved departments despite repeated requests by FAP. I find that the simple reference to a changed methodology of plant assessments and that it was necessary for efficient management falls well short of an acceptable explanation of decisions that had such a negative effect on FAP's investment.

11.6 Internal review of the new area assessment method for *Tetratheca Juncea* credits

I refer to Section 5.1 above describing the situation of experts checking themselves and from that information I find that the way this was handled reflects poorly on the credibility and integrity of the management processes.

11.7 NSW Upper House Inquiry into the Biodiversity Offsets Scheme (BOS), June 2021

I refer Section 8 above and the extracts from the recent NSW government submission to the Inquiry and in particular to the following two points:

- *"The Scheme does not guarantee a financial return for landholders selling credits."*  
The statement is correct in itself and FAP accepted that risks existed when they entered into the Scheme. However, I find that from the evidence presented the subsequent management actions have interfered with and undermined the market price for the TJ Credits to a very significant degree.
- The government is continuing to officially advocate the use of the Biodiversity Offsets Payment Calculator as shown in their submission to the Inquiry, even though it is no longer in use. I find that is an example of the government attempting to make its operations look efficient in the eyes of the Inquiry, which is quite misleading on the facts.



#### 11.8 The application of reasonable equivalence

I refer to Section 5.2 above and the extract from email of 21 August 2021, "7. *The equivalence is done on ecological basis only. No consideration of finances is included. This is to ensure the ecological offsets for development are met by the new scheme.*"

And to Section 5.6 and the extracts from an email from Julianne Smart on 4 August 2020,

*"I also wanted to reaffirm that credit equivalence is designed to address the ecological equivalence between the Biobanking Assessment Method (BBAM) and the new Biodiversity Assessment Method (BAM) method.*

*While it is a matter for you - I understand from other credit owners that they have adjusted the price when selling equivalent credits – where the volumes have been reduced to ensure financial equivalence."*

I find that that the equivalence on this basis is not in accordance with the requirements, which require financial equivalence as well as ecological equivalence.

I further find that because of the extremely low financial value being proposed by DPIE and BCT on the BAM Credits, this effectively nullifies any protection of the TJ species. The changes made to the TJ Credits in particular have had a very negative impact on their ecological value as the Credits are so cheap that there is no incentive for a private landholder to protect them or for potential investors to show any interest in them.

There would never be enough financial reward to justify entering into a TJ Biodiversity Stewardship Agreement.

#### 11.9 Investment risk of the biodiversity investors

I find it necessary to comment on the following extract from the government's submission to the Inquiry and other related comments and actions of the DPIE and its biodiversity departments that have adversely affected the investment position of FAP.

*"The Scheme does not guarantee a financial return for landholders selling credits."*

It is all very well to make this statement, which is appropriate in the right context, but disclaimers about investor's risk certainly do not apply to a situation when the rules are arbitrarily changed after you invest causing heavy losses. In the private sector this may well amount to fraud or misleading and deceptive conduct, so why are no hard questions asked when a government department directly causes private sector investors to suffer substantial losses from a government instituted investment scheme.

I find that there has been a blatant disregard of FAP's investment position, resulting in substantial loss. It does not really matter whether it was incompetency or intentional or fraudulent. It does not appear to be fraudulent in that no one on the government side appears to have personally gained. However, in the case of Transport for NSW tendering to purchase 12,690 TJ BBAM Credits (see Section 4 above) FAP state that TfNSW advised them that they were able to purchase them for less than \$126,900 in total (i.e., less than \$10 each) whereas they were valued at \$160 each or a total of \$2.03m by the Spot Price Index in August 2020.

It is clear therefore that TfNSW, a government entity, benefited significantly from the change of rules at the expense of investors such as FAP.

#### 11.10 Breach of contract

In Australia, a cause of action for breach of contract arises where one party fails to perform its obligations under a contract. This may occur by way of non-performance or defective performance. If one party has breached a contract, they must compensate the other party to ensure that they are in the same position as if the breach had never occurred. This can include damages for a lost opportunity to profit or gain that a party

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could have expected to receive if the other party had performed their obligations under the contract.

I have examined all the documentation and actions between DPIE, BCT and other departments involved with FAP's Biobanking Agreement Number 393 and have identified two clear breaches of contract in the departmental management of this Agreement, as

**12. My Independent Opinion on the Compensation Claim by FAP Nominees**

12.1 **I FIND THAT** Biobanking Agreement Number 393 that was executed on 31 July 2018 by FAP and OEH was a valid contract between the parties with clearly understood and unambiguous terms and conditions in respect of the rights and obligations of both parties. When this Agreement was transferred to the control of BCT as a division of DPIE, these rights and obligations were transferred without change and the legislated policy of "Reasonable Equivalence" was introduced to protect the interests of investors for both the numbers and values of the Credits. The intent and purpose of introducing Reasonable Equivalence is absolutely clear in that it applies to both the ecological and financial areas and it imposes a contractual obligation on the government to apply its provisions strictly.

12.2 Having carefully reviewed all the evidence,

**I FIND THAT** the government has not complied with its own legislation and is in Breach of Contract in three respects:

12.2.1 A failure to competently and rigorously apply the provisions of Reasonable Equivalence to FAP's biodiversity credits.

12.2.2 A failure to comply with the provision of The Biodiversity Conservation Act 2016, Division 2, Section 6.9 (2), which states:  
*"The Minister is to undertake public consultation in connection with the review of the biodiversity assessment method and give the public an opportunity to make submissions in relation to the method."*

12.2.3 A failure to comply with the provision of The Biodiversity Conservation Act 2016, Division 2, Section 5.11 Biodiversity Stewardship Agreements, which states:  
*"The Minister must not agree to any variation of a biodiversity stewardship agreement unless satisfied that the variation does not have a negative impact on the biodiversity values protected by the agreement or that other measures required by the Minister have been taken by the owner of the biodiversity stewardship site to offset any such negative impact."*

12.3 In respect of the integrity of management actions, communications and notifications given by the BCT and the DPIE and its subsidiary departments responsible for the Biodiversity Offsets Scheme, in relation to FAP:

**I FIND THAT** the actions of the BCT and the DPIE since the 2016 Act and the 2017 Regulations came into force have severely impacted the free-market pricing and trading of the TJ Credits to the extent that FAP's investment in the TJ Credits has been reduced by 99.9% from the SPI price of \$160 in August 2020, which is still showing as current on the BCT SPI website at the date of this Opinion.

These actions have effectively destroyed not only the free-market pricing of the TJ BBAM and the TJ BAM Credits but also the protection of the TJ species by removing the incentives for landholders to protect them and for investors to finance the trading.

12.4 In respect of FAP's proposed compensation claim,

I FIND THAT the evidence substantiates and justifies FAP's proposed claim for compensation and that the compensation should include the following sums, which are appropriate for breach of contract:

An amount equivalent to FAP's total investment in the scheme of \$3,468,246 in order to restore them to the original position at the time of their initial investment.

An amount for damages that will compensate FAP for the loss of profit that they would have expected to make if the free-market pricing mechanism had not been artificially interfered with. I find that FAP's claim based on a valuation of \$8,346,880 for 52,168 TJ Credits at \$160 each is justified, less FAP's original investment of \$3,468,246, leaving the sum for damages as \$4,878,634.

Interest on the original invested sum at the statutory rate, dating from 31 July 2018.

All legal and related costs for both parties to be paid by BCT.

13. Appendices

- 13.1 FAP Letter to NSW Ombudsman\_11 Jan 2021
- 13.2 Attachment 1\_BioBanking Agreement 393 – FAP & OEH – 31 July 2018
- 13.3 Attachment 2\_TJ Credits \$369.93 August 2017, BCT Trust fund baseline credit prices
- 13.4 Attachment 5\_FAP Credits Ownership Statement\_BA393\_66 BAM Equ\_23 July 2020
- 13.5 Attachment 6\_BBAM TJ Credits valued at \$0.18 – 27 August 2020
- 13.6 Attachment 7\_TJ Spot price \$160\_August 2020
- 13.7 Attachment 8\_Assessors BAM letter to BCT\_10 July 2019
- 13.8 Email from Julianne Smart to FAP – 4 August 2020
- 13.9 Email from \_\_\_\_\_ to FAP – 21 August 2020

Signature:

Charles O'Neil FCI Arb

Dated: 30 November 2021

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The NSW Ombudsman

Attention Mr Paul Miller

Dear Sir,

1. We, FAP Nominees Pty Ltd (FAP), owners of BioBank 393, are lodging a complaint regarding the administration of the Biodiversity Offsets Scheme (BOS) in NSW by the Biodiversity Conservation Trust (BCT) and the Office of Environment and Heritage (OEH).
2. The BOS was established under the Biodiversity Conservation Act 2016 and the Biodiversity Conservation Regulation 2017. This new scheme replaced the Biobanking Scheme that existed under the Threatened Species Conservation Act 1995. Consequently, credits calculated using the former BioBanking Assessment Methodology (BBAM) are now calculated using the Biodiversity Assessment Methodology (BAM), which uses a different algorithm and with some species uses inputs of plant area as opposed to actual plant numbers.
3. FAP has been egregiously impacted by these changes in respect of serious financial loss and despite continuous engagement with both BCT and OEH we have had no relief or been provided with any credible justification by BCT and OEH for their arbitrary actions causing this situation.
4. In 2018 FAP was granted BioBank 393 (Attachment 1). We were allotted 52,168 BBAM credits of the threatened species *Tetralthea Juncea* [Black Eyed Susan] under the Threatened Species Conservation Act. The BCT published the "Trust Fund Credit Price" for *Tetralthea Juncea* as being \$369.93 per credit in August 2017 (Attachment 2). This valued our 52,168 BBAM credits at \$19.3 million.
5. On 28/06/2019 we were advised that under the new 2016 Act our 52,168 BBAM credits were being replaced by 26,084 BAM credits (Attachment 3). There was no explanation provided for this calculation or reference to any statutory regulation permitting this change. We query whether the original number was simply halved and if so, why?
6. Then on 22/07/2020 we were told that these 26,084 BAM credits had been changed under a new area assessment method to an equivalent 66 BAM *Tetralthea Juncea* credits (Attachment 4 and Attachment 5). We were not given any reference to any statutory regulation enabling this change. Subsequent to this re-allocation to 66 BAM *Tetralthea Juncea* credits, we were advised by the

BCT Biodiversity Offset Program team on the 27/08/20 that 51 of these credits were equivalent to 40,132 of our original BBAM *Tetratheca Juncea* credits and now each credit had an assessed market value by them of \$ 0.18 ([Attachment 6](#)). This valued our original holding of 52,168 BBAM *Tetratheca Juncea* to be only \$ 9,390.

7. **On 27/08/20 our original 52,168 BBAM *Tetratheca Juncea* were valued by the BOS spot price index at \$160 each ([Attachment 7](#)), equating to a total value of \$8.34 million dollars. Therefore, the BCT was undervaluing our investment by approximately \$8.33 million.**
8. The independent valuation range we received from 'Parsons Brinkerhoff' for our BBAM *Tetratheca Juncea* credits in 2014 was \$10.43 million causing FAP to invest in the scheme in good faith.
9. The above changes in the types and numbers of *Tetratheca Juncea* species credits issued and in their valuations are totally unacceptable in the manner in which they have been arbitrarily imposed without justification or regulatory reference and with extreme detriment to the valuations of investors, who were originally encouraged to invest in the scheme by both the BOS and the local Lake Macquarie council.
10. In essence what we are being told is that these administrative changes are responsible for a capital loss of more than \$ 8 million. incurred by FAP.
11. This is despite numerous references on the department website (see link below) to the application of reasonable equivalence of BAM for existing BBAM credits. Investors have been relying totally on the monetary intent of "reasonable equivalence".

<https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/transitional-arrangements/reasonable-equivalence-of-biodiversity-credits-existing-biobanking-credits>

12. In addition to the loss that we have suffered, there is the issue of the Government continuing to promote what is clearly a scheme which puts investors in the environment in a high-risk precarious position. This has been formally brought to the attention of the BCT in 2019 with an open letter by key assessors appointed under the legislation ([Attachment 8](#)). This letter points out that the new scheme is counterproductive to the objective of protecting threatened species.
13. We are therefore asking you to undertake a full review of our situation and the loss that we have incurred and recommend to Government that we receive full restitution of the value of our credits of not less than \$8.34 million, on the basis that the scheme that we originally invested in no longer bears any resemblance to what it has now been arbitrarily replaced with.



In addition, we request that you undertake a full review of the scheme and the unintended consequences of the way in which the legislation is being operated.

14. ***The following are the described actions, emails, and communications between FAP Nominees and representatives of the BCT, given to illustrate specific information that we believe is relevant to our complaint.***
15. In 2005 the operator of our superannuation fund put \$2.65 million of my and my fellow members money into a loan to a diverse company. Following the 2008 global financial crisis the company went into liquidation and the only asset left was a second mortgage on a large block of land at Redhead near Newcastle.
16. Prior to our involvement, this block was the subject of a legal case as to whether a housing development could be built. The proponents lost and the Industrial zoned land was changed to Environmental. FAP Nominees went to Lake Macquarie Council and the Council Environmental Planner, \_\_\_\_\_, convinced us to apply to have the land turned into a BioBank.
17. Three Environmental Engineering firms tendered for the feasibility and we chose 'Parsons Brinckerhoff'. They provided a comprehensive report and a credit valuation range of between \$12.14 million and \$17.50 million dollars for all our potential BioBank BBAM credits in June 2014. This encouraged us to proceed and we spent a further \$ 0.82 million making the total investment \$ 3.47 million. We formed FAP Nominees Pty Ltd (FAP) and most of the land was designated 'BioBank 393' in July 2018 ([Attachment 1](#)).
18. By email dated 28/2/19 FAP was invited to obtain the 'Equivalent' number of BAM credits their BBAM credits were entitled to under the new Biodiversity Offsets Scheme (BOS) of the BCT. We did so and on 28/6/19 by email we received a Biodiversity Credit Ownership Report informing us that our 52,168 *Tetratheca Juncea* BBAM credits were equivalent to 26,084 *Tetratheca Juncea* BAM Credits ([Attachment 3](#)), with no explanation being provided as to how this was calculated.
19. On 22/7/20 we received an email from \_\_\_\_\_, senior project officer, ecosystem programs, advising us that we would receive an amended Biodiversity Credit Ownership Report shortly. This report by email arrived the next day and reduced our 26,084 *Tetratheca Juncea* BAM credits to 66 *Tetratheca Juncea* BAM credits. We were informed this was because of the new area counting method ([Attachment 4 and Attachment 5](#)) but again no explanation was provided as to how these 66 credits were calculated.
20. We have notified the BCT in numerous interactions that we believe the method the BCT has adopted to generate the BAM *Tetratheca Juncea* credits is grossly inequitable to our investment



and not at all fulfilling the objective of protecting this species. **In fact, it is harmful.**

the Lake Macquarie Environmental Planner, shows that inconsistent results are not only produced by using the area method but also that sites that are deemed "Significant" (more than 1500 *Tetratheca Juncea* plant clumps) under the BioBanking act are rendered uneconomical to protect under the BOS area method ([Attachment 9](#) and [Attachment 10](#)).

21. Barry Buffier, (Parsons Brinckerhoff now WSP), and I met with Michelle Chung (Director Biodiversity Offsets Scheme) and her staff on 22/10/20. We presented the above evidence that the 'Area' method leads to erroneous results and is harmful to the *Tetratheca Juncea* species. FAP requested that an urgent review of the erroneous new method be undertaken with the aim of reverting to the original method. On the 17/12/20 Michelle advised us that the three experts who had recommended the use of the 'Area' method had reviewed our evidence and decided to make no change to the use of the method. We expressed shock that the department had used these same experts to review themselves instead of independent assessors and that this was very unprofessional and we strongly object to their finding.
22. FAP strongly objects to the arbitrary manner in which the credits were twice changed in number and also with the conduct of the Tender of 9th March 2020. We believe the actions taken by the BCT with this tender mean that they are in breach of specific and implied terms of contract and that they have made inaccurate and negligent representations. We provide examples of how their Tender and Auction management has been grossly inefficient and lacking openness ([Attachment 11](#)); and we strongly assert that their actions in regard to FAP are inequitable under Australian law and there is a clear case for restitution.

For and On Behalf of  
FAP Nominees Pty Ltd

---

Jeremy J Lees  
Director and Shareholder



**BioBanking agreement  
ID number: 393**

**Under the  
Threatened Species Conservation Act 1995**

**for**

**FAP Nominees Pty Ltd**

**for**

**Lot 4 DP 248860 & Lot 1 DP 42613 Cowlshaw Street,  
Redhead Biobank Site**

**Lot 4 in Deposited Plan number 248860  
Lot 1 in Deposited Plan number 42613**



**Office of  
Environment  
& Heritage**

A handwritten signature in black ink, located in the bottom right corner of the page.





Charles O'Neill Opinion Appendices 133  
Submission to Ombudsman letter attachment 2

**Ecosystem credits for plant communities types (PCT), ecological communities & threatened species habitat**

IBRA sub region	PCT common name	Baseline price per credit	Dynamic coefficient	Market coefficient	Risk premium	Administrative cost	Price per credit	No. of ecosystem credits	Methodology adjustment factor	Final credits price
Wyong	1230 - Swamp Mahogany swamp forest on coastal lowlands of the NSW North Coast Bioregion and northern Sydney Basin Bioregion <i>Note: This PCT has trades recorded</i>	\$2,300.00	0.5358332	3.230729	21.00%	\$20.00	\$1,957.31	1	1.0000	\$1,957.31
Wyong	781 - Coastal freshwater lagoons of the Sydney Basin Bioregion and South East Corner Bioregion <i>Warning: This PCT has NO trades recorded in Wyong</i>	\$4,559.74	0.3658967	5.824203	25.00%	\$20.00	\$9,248.33	1	1.0000	\$9,248.33
Wyong	1231 - Swamp Mahogany swamp sclerophyll forest on coastal lowlands of the Sydney Basin Bioregion and South East Corner Bioregion <i>Warning: This PCT has NO trades recorded in Wyong</i>	\$2,528.41	0.3658967	5.824203	25.00%	\$20.00	\$7,457.38	1	1.0000	\$7,457.38

Subtotal (excl. GST) \$18,663.02

GST \$1,866.30

Total ecosystem credits (incl. GST) \$20,529.32

**Species credits for threatened species**

**Text**

Species profile ID	Species	Price per credit	Risk premium	Administrative cost	No. of species credits	Final credits price
10799	<i>Tetralochea juncea</i> (Black-eyed Susan)	\$282.20	24.00%	\$20.00	1	\$369.93
10183	<i>Crinia tinnula</i> (Walkum Froglet)	\$2,822.05	24.00%	\$20.00	1	\$3,519.34

Subtotal (excl. GST) \$3,889.27

GST \$388.93

Total species credits (incl. GST) \$4,278.20

Grand total \$24,807.52

System version has been updated and the current payment version is invalid now! Please take the assessment again. System log version: 1 - Payment log version: 1

Bottom of Form

Team Manager, Environment, Hunter Region

wsp

August 2017.



# 1.SPECIES CREDITS

## CREDITS OWNED

Biodiversity credits created under <i>Threatened Species Conservation Act 1995</i> - Biodiversity Banking and Offsets Scheme			
Credit ID	Common Name	Scientific Name	Number of credits
735	Black-eyed Susan	<i>Tetratheca juncea</i>	52,168
736	Wallum Froglet	<i>Crinia tinnula</i>	49

## DETERMINATION OF REASONABLE EQUIVALENCE

Table 6

Equivalent species credits under <i>Biodiversity Conservation Act 2016</i> – Biodiversity Offset Scheme				
Source Agreement ID	Credit ID	Common Name	Scientific Name	Number of credits
393	735	Black-eyed Susan	<i>Tetratheca juncea</i>	66



Table 7

Equivalent species credits under <i>Biodiversity Conservation Act 2016</i> – Biodiversity Offset Scheme				
Source Agreement ID	Credit ID	Common Name	Scientific Name	Number of credits
393	736	Wallum Froglet	<i>Crinia tinnula</i>	52

**AUTHORISATION**

This ownership report was issued on 23 July 2020

Authorised by: \_\_\_\_\_

Director of Conservation Programs  
Office of the Environment and Heritage  
Delegate of the Environment Agency Head



aaaa.FAP Nominees August 27 2020 at 3:41 pm



Notification of successful bid - BCT 2020 Statewide Biodiversity Credit Tender - FAP Nominees Pty...

Details

To: Jerry Lees

Charles O'Neil Opinion Appendices 13.5  
Submission to Ombudsman attachment 6

Dear Jerry

I am pleased to inform you that your bid has been successful in the Biodiversity Conservation Trust's (BCT) 2020 Statewide Biodiversity Credit Tender. Section 1 of the table below (highlighted in blue) outlines the successful bids, including the credit type, number of credits the BCT seeks to purchase, and the total value of the purchase.

The total overall value of the offer is \$7,293.00 (excl. GST)

1. Successful bids								
BSA No.	Site name	Credit type	Credit ID	No. of BAM equivalent credits	Price per BAM credit (excl. GST)	No. of BBAM credits	Price per BBAM credit (excl. GST)	Total value (excl. GST)
393	Redhead	Tetradlea juncea (Black-eyed Susan)	735	51	\$143.00	40,312.64*	\$0.18	\$7,293.00
Total value of successful bids (Excl. GST)								\$7,293.00
*These credit numbers have been calculated based on the Biodiversity Credit Ownership Report prepared by DPIE (rounded to two decimal places). BBAM credit numbers will be rounded to the nearest whole number during preparation of credit transfer forms if the purchase is accepted. Please note rounding may result in a slight variation between the final BBAM price per credit shown on the credit transfer form when compared with the figures above.								

To proceed with the credit sale please reply to this email by 5pm Wednesday 9 September 2020 confirming your intention to proceed with the sale and enclosing the completed and signed Credit owner information form (attached).

Once we receive your response we will prepare a draft Credit Sale Agreement (CSA) for your consideration and signing. The BCT will then execute the signed CSA, make the associated payments and arrange for the credits to be transferred.

If you accept the BCT offer, it is important that you note the Credit ID and ensure that these credits are not offered for sale to another party. If the specified credits are not available, then the BCT cannot proceed with the sale.

You are not obliged to accept any offer by the BCT to purchase credits associated with the successful bid.

Please note that the information contained in this email and the CSA is ~~commercial-in-confidence~~ to the credit owner and the BCT.

If you would like to discuss any details of the proposed sale please do not hesitate to reply to [boptenders@bct.nsw.gov.au](mailto:boptenders@bct.nsw.gov.au).

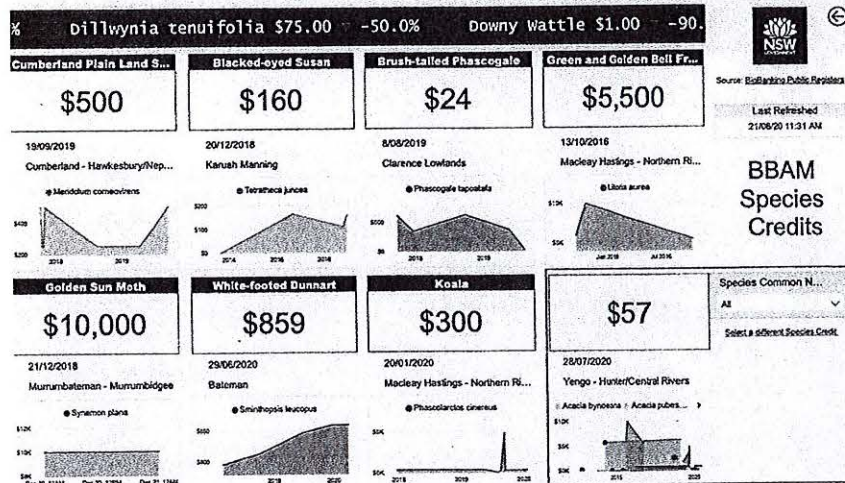
Kind regards  
BCT Biodiversity Offset Program team





Charles O'Neil Opinion appendices 13.6  
Submission to Ombudsman attachment 7

FROM BIRANKING  
SPOT PRICE INDEX PAGE 3  
30/8/20





Charles O'Neil Opinion appendices 13.7  
Submission to Ombudsman attachment 8

10 July 2019

Paul Elton  
Executive Director and Chief Executive  
Biodiversity Conservation Trust  
59-61 Goulburn Street  
Sydney NSW 2000

Dear Paul

**'Open letter' – Leading BAM Assessors NSW**

**Our concerns regarding the BAM, BOS and BOPC**

**1 Introduction**

This letter has been prepared by a group of experienced accredited Biodiversity Assessment Method (BAM) assessors in NSW. Collectively we have many years' experience in the private ecological consulting and the implementation of biodiversity offsets schemes in NSW.

The signatories to this letter wish to advise we have concerns regarding a number of elements associated with the BAM and Biodiversity Offsets Scheme (BOS). As a result, our companies are having difficulties recommending that their clients enter into a Biodiversity Stewardship Agreement (BSA) for the sole purpose of placing BAM credits on the 'open market' as, in the opinion of the signatories, it is often not a financially viable option under the BOS. Changes to the methodology and tools which support the scheme are required to make BSAs financially viable. In addition we have reservations regarding the application and use of the Biodiversity Conservation Fund (BCF) and associated Biodiversity Offsets Payments Calculator (BOPC).

Our organisations and our lead assessors are critical to the effective implementation of the BOS. The success of the BOS is largely contingent on us as private consultants and specialists working with our clients to adopt and implement the scheme as intended. This means developers adequately assessing and offsetting their biodiversity impacts and conservation landowners generating a fair return on their investment in an 'open market' environment. This is not the case since the BAM and BOS replaced the previous BioBanking Scheme. Our concerns are summarised below.

**2 Concerns**

The primary concerns held by this group of companies and their assessors relate to the following points:

- The impact of the BOPC on the viability of the biodiversity credits market. This tool is being used as a price indicator based on BioBanking Assessment Methodology (BBAM) credit sales and is being used to set credits prices for BAM credits. This is having the biggest impact on the economic viability of entering into Stewardship Agreements. The NSW Office of Environment and Heritage (OEH) have repeatedly stated this is not the intent however this is exactly how it is being interpreted by the market as it effectively set a 'ceiling price'. Ecosystem pricing estimates need to account for changes in credit generation rates under the BAM immediately. Species credit pricing







From: Julianne Smart  
Subject: Credit equivalence - *Tetratheca juncea*  
Date: 4 August 2020 at 3:44 pm  
To:

Dear Mr Lees

I am writing to acknowledge your email of 30<sup>th</sup> July with regard to an updated Biodiversity Credit Equivalence and Biodiversity Credit report.

I understand that [redacted] has also contacted you to discuss your email and I wished to both acknowledge your concerns and to stress a few matters.

First to identify that you still own your original volume of BBAM credits- nothing in the credit equivalence process changes that fact. You may still trade these as you have done so in the past.

I also wanted to reaffirm that credit equivalence is designed to address the ecological equivalence between the Biobanking Assessment Method (BBAM) and the new Biodiversity Assessment Method (BAM) method. The update we undertook was in line with a process undertaken for all other holders of credit equivalence for *Tetratheca juncea* credits. It was undertaken to ensure parity amongst credit holders of BAM-equivalent BBAM credits. It resulted from the requirement to account for the change of the unit of measure for the species from count (where the stems are counted) (used under the *Threatened Species Conservation Act*) to an assessment of the area of the species (used under the *Biodiversity Conservation Act*). The number of equivalent credits for all *Tetratheca juncea* credit holders is less than in the original BBAM credits. While it is a matter for you- I understand from other credit owners that they have adjusted the price when selling equivalent credits – where the volumes have been reduced to ensure financial equivalence.

I hope this is of some assistance.

Yours sincerely

Julianne Smart

**Julianne Smart**  
**A/ Senior Team Leader, Ecosystem Programs**  
Biodiversity and Conservation Division | Department of Planning, Industry and Environment  
T (02) [redacted] | E [redacted]  
Level 7, 4 Parramatta Square, Sydney NSW  
[www.dpie.nsw.gov.au](http://www.dpie.nsw.gov.au)

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From:  
 Subject: [Sensitive] *Tetralitha juncea* species credits  
 Date: 21 August 2020 at 5:04 pm  
 To: Jerry Lees



Dear Mr Lees,

Thank you for talking to me this week on Tuesday 18/8/2020.

I appreciate you taking the time to explain to me the history of the site, your biobanking agreement, and your concerns with the updated credit equivalence for the *Tetralitha juncea* (TJ) species credits.

As agreed, I have provided information in this email based on what we discussed. We willing to discuss further once you had had an opportunity to review the information.

We discussed a range of information which I have summarised.

Please feel free to share with this information the other owners.

First we would like to again apologise that you are concerned about the change in BOS equivalence for your TJ credits. We apologise for providing a simple equivalence last year, and then updating it this year. It was the best we could at the time. We now use electronic mapping for the process of the credit equivalence for TJ to get an accurate calculation.

You and the other owners are early adopters of this new form of conservation and investment. We want to support you and answer your questions.

I can clarify that:

1. You keep all your existing BioBanking species credits for TJ. BioBanking is the name for the previous scheme. They can still be traded as normal.
2. As you are an early adopter, the Parliament via legislation, also allows you to trade your old credits in the new scheme. The new scheme is called the Biodiversity Offsets Scheme (BOS).
3. This trading in both the old and new scheme is only available to BioBanking credits owners such as yourselves.
4. For you to trade your old credits in the new scheme, a credit equivalence using the new assessment system is calculated.
5. Under the new scheme TJ credits are no longer calculated via count of plants. Instead is calculated by area covered by the plants.
6. Your updated equivalence was prepared by one of our own accredited assessors, and then reviewed by Mr , who is familiar with your agreement.
7. The equivalence is done on ecological basis only. No consideration of finances is included. This is to ensure the ecological offsets for development are met by the new scheme.
8. The credit equivalence is an official note that is alongside your BioBanking credits, with a guaranteed ecological exchange rate. You still have the BioBanking credits. They still appear in the registers and can be traded. Additionally we can add the equivalent credits to the new BOS registers to assist in advertising these to buyers.
9. Any trades that occur, even for BOS credits, are done BioBanking credits with the official note showing what the equivalence BOS credits are, if required.
10. In your case the equivalence TJ was approx. 52,000 to 66. This is an



approximately 1000:1 ratio

11. All biobanking credit owners with TJ credits have had their credit equivalence calculated using the same formula as yours. Also any new agreements will only use the new calculation. The BOS credit price may adjust over time to reflect this change.
12. There are a few other plant species that change from count to area calculations. These are treated the same way. Some biobanking species credits no longer exist in the new BOS (Rosenberg's goanna) however these still remain as credits in the BioBanking scheme.
13. The new TJ ratio has not yet been provide to the economics team who work on the Biodiversity Offsets Payment calculator (BOPC). This is for BOS credits. We will provide the team with the new ratio.
14. The BOPC price may change given the new ratio, however we can't comment on or guarantee any future prices. The BOPC prices update quarterly.
15. For however long that there are old TJ credits that haven't been used (retired), developers who request a equivalence for their old credit obligations are given a ratio of 1:1. Credit obligations can be thought of as negative credits.
16. This is done to encourage developers who need TJ credits to buy the existing BioBanking TJ credits rather than use the new scheme. This is deliberate decision of the Environment Agency Head.
17. Some large project can take several years to get through the system. They are still able to use old credits for their obligations or get an equivalence at 1:1 if there are still old TJ credits available. These projects may require 1000s of TJ credits as they effectively are forced to use the old calculation. They also have to use the old calculation if they choose to pay these credits to BCT (1:1 ratio). The BCT then tries to purchase these "payed out" credits from owner such as yourself.
18. As discussed any new agreements or developments will use the new BOS with the new TJ calculation. The prices over time may adjust to reflect these lower numbers of credits.
19. We usually don't recommend using the BOPC for pricing as this just for developers who choose to pay out their BOS credits obligations.
20. The recommended site for BioBanking credits prices can be found here:  
[Biobanking SPI](#)  
See page 3 of 6 for species credits
21. As similar website for BOS credits will be released when more BOS credit trades occur.
22. As mentioned, we are unable to comment on the Biodiversity Conservation Trust (BCT) tender bids or processes but I can confirm the BCT are aware of the new ratio for TJ. The BCT is separate from our Department. It was the BCT who first raised this matter with us.
23. We are also unable to comment on purchase negotiations of TransportNSW and their decision not to cover transfer fees. I've noted it.
24. I've included the new ecological process for calculating BOS TJ credits below. Our accredited assessors can provide more information if required.
25. As I mentioned credits in both the old and new scheme for agreements are calculated and provided on the basis of the predicted increase of credits on the site. That is, the difference between the starting credits and a predicted number based on active conservation of the site. This means some medium quality sites may actually have more credits that high quality sites. It's the change in credits number that can be traded not the absolute values.

### **Ecological method for TJ in the new BOS**

1. TJ is one of the species where the unit of measurement has changed from count to area (old Biobanking to new BOS).
2. Where TJ has been recorded in mapped points, these are buffered by 30m and added together to calculate area of habitat.
3. The credit equivalence for flora species assessed by area is basically: habitat area x predicted gain in habitat value
4. If the species occurs across multiple vegetation zones, then each zone is calculated separately, and then added together to get a total.
5. No financial considerations.

As mentioned we are willing to discuss further once you had had an opportunity to review the information.

Yours sincerely,

### **Manager, Ecosystem Programs**

Biodiversity and Conservation Division | Department of Planning, Industry and Environment

T | M | E

Level 4, 26 Honeysuckle Drive NEWCASTLE NSW 2300

[www.dpie.nsw.gov.au](http://www.dpie.nsw.gov.au)



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Environment**

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*The Department of Planning, Industry and Environment acknowledges that it stands on Aboriginal land. We acknowledge the traditional custodians of the land and we show our respect for elders past, present and emerging through thoughtful and collaborative approaches to our work, seeking to demonstrate our ongoing commitment to providing places in which Aboriginal people are included socially, culturally and economically.*

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