

**INQUIRY INTO INTEGRITY OF THE NSW
BIODIVERSITY OFFSETS SCHEME**

Organisation: Landholder Biodiversity Interest Group

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Partially
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Submission to Legislative Council Portfolio Committee No.7 (Planning & Environment) Inquiry Integrity of the NSW Biodiversity Offsets Program

Key Points

- Intergenerational family-landholders can provide a practical landholder perspective on the biodiversity credits program from their commercial experience with proposals and agreements and based on their depth of biodiversity knowledge on their particular land.
- Effective biodiversity outcomes derive from the arrangements when properly implemented plus accruing other district/family socioeconomic benefits – the NSW Government is to be commended for the program, and the Federal government is also considering such programs.
- some blatant breaches by a few profit-takers turning a quick dollar - brings all into disrepute.
- Integrity and effectiveness of the offsets program is greatly affected by other policies and factors - e.g. taxation, compliance with native vegetation regulations, climate change etc.
- BCT administration is trying to find right balance - in client orientation/facilitation, ecological science v practical district experiences, devolution to accredited consultants or heavy handed regulation / over-engineered processes - IT systems & communication need some improvement and simple step-by-step guidance roadmaps to the process is badly needed.
- Scope for improvement to transparency and oversight – e.g. the perspective of landholder stakeholders reflected in governance, transparency over landholder trust equity, better BCT guidance to help overcome obstacles for landholders from apparent scheme complexity.
- Market Imperfections - Government infrastructure agencies manipulating the price down (e.g. seeking extensions of time or flexibility over veg types instead of meeting the market), developers being able to pay the BCT for credits as a cheaper option instead of buying credits themselves, Government considering change to exempt State-significant projects, etc.
- Other concerns over market operation – unregulated entry of vegetation brokers, inside trading by consultancy advisers reaping windfall gains, developers buying from BCT off-market too cheaply, with caps over credit prices set by a NSW government “calculator”
- Scope for additionality criteria to be relaxed in program design to provide extra impetus to biodiversity improvement - with carbon credit programs, on Code set asides etc.
- There may be opportunities with the potential emerging market of the pricing of ecosystem services. This would tie in nicely with Stewardship Conservation Agreements and adjoining farmland.
- Scope for NSW to seek Federal government review of the taxation of biodiversity credit programs.

Introduction

1. Our Landholder Biodiversity Interest Group (LBIG) is a recently formed, informal association of landholders involved in biodiversity stewardship under the NSW offsets program. Together our activity in the market for credits, represents experience in management of some dozen agreements and proposed sites – sites established both under the previous biobanking and also more recently under the current biodiversity stewardship arrangements.

2. Mainly intergenerational family farmers, we strongly support the objectives of the program and are committed to program integrity. But we do have some concern that as grass-roots stakeholders, our practical interests, perspectives and knowledge are sometimes not sufficiently considered in decision making and program management affecting sustainability on our land whether social, ecological and/or commercial.

3. Hence this joint submission against the following terms of reference to the Legislative Council's Environment & Planning Committee's Inquiry into the integrity of the program. We welcome the Council's interest in reviewing the integrity and effectiveness of the current arrangements.

4. We have seen the Scheme has positive benefits over and above simply conserving native ecosystems for both landholders and the broader community.

(1) the effectiveness of the scheme to halt or reverse the loss of biodiversity values, including threatened species and threatened habitat in New South Wales,

1.1 Our experience is that, when management actions are properly undertaken on conserved sites, the Scheme does very effectively halt and/or reverse the loss of biodiversity values. In addition biodiversity stewardship can offer a district and family farm other social and economic advantages.

1.2 Unfortunately there have been a minority of some “profit-takers” who have exploited the system and moved on but had no real interest in properly managing or improving their biodiversity sites. They have been allowed to use the scheme to make a "quick dollar" and have shown little interest in the necessary follow through required of owning and managing a Biobank. The end result has been a cloud of suspicion over all Biobank owners.

1.3 In the case of a small number of most blatant breaches there has been some failure of Government agencies to enforce agreements that some people and organisations have made. We see scope for compliance risk management through strong enforcement of egregious breaches, whilst retaining flexibility to manage the bulk of sites to achieve outcomes in a facilitative manner.

1.4 It is important to note also that the integrity and effectiveness of the biodiversity stewardship program incentives is crucially reliant on other government policy and regulatory interventions including for conservation incentive schemes, taxation and particularly, the effective enforcement at all levels of government of regulation for biodiversity conservation and protection. For example -

- a) the biodiversity offsets program is rendered less effective when unrestrained land development is able to extract significant windfall returns from destruction of adjoining habitat for high value production, commercial development or just land banking
- b) it is clear to us that unmanaged global climate change or pest incursions present significant uncertainty and uncontrollable risk to our effective stewardship.

(2) the role of the Biodiversity Conservation Trust in administering the scheme

2.1 In our view the proper role of the BCT is to facilitate an exchange between landholders and land developers in a way that assists and supports landholder biodiversity conservation and improvement and also protects the integrity of the arrangements.

2.2 There is some risk to effectiveness and uptake of the program if the BCT does not properly balance timely facilitation and practical support to accredited consulting ecologists and land holders, but gets too heavy-handed and cumbersome by over-engineering the exchange.

2.3 Similarly there is a need to balance the BCT’s client orientation and good communications with its stakeholders with its role as a regulator and administrator of program effectiveness. There are some indications that the BCT as a relatively new body is still to achieve the difficult balance.

2.4 The strength of the BCT as currently configured is to provide ecological oversight and back office administration of the arrangements. It is good that its personnel have formal training qualifications in ecological disciplines and some also crucial experience in longer term regional ecology issues. This supplements the work of accredited ecological consultants but in our view should not supplant or override their work in most circumstances.

2.5 It would be a significant problem if the BCT were to place greater weight on ecological training relative to the on-the-ground, often intergenerational, knowhow in a particular district that many landholders can bring. And as the offsets program expands into broadacre agricultural production areas it can be seen that there is still scope to properly balance existing conservation knowledge at farm level (agro-ecology) along with the economic and social imperatives of agricultural production.

2.6 Very often it is the accredited consultant that is best placed to broker the exchange and resolve differences of perspectives between landholders, developers and the BCT.

2.7 The original Biobanking Scheme was established under the Office of Environment and Heritage. Its purpose was to *"give landowners who may otherwise have considered subdividing or clearing their land a conservation alternative, offering them ongoing funds to conserve their bushland in perpetuity"*.

2.8 The original Scheme allowed generational landowners to retain and improve their landholdings and to value add through property improvements and to enable succession planning without subdivision and the impending threat of subdivision and/ development commercially. It also provides for increased local employment, support of local businesses and at the same time preserves the local amenity.

2.9 It seems to some that this "purpose" has been diminished over time and with the establishment of the BCT. Some of the concerns include-

- a) the Biodiversity Act 2016 has led to some over engineering over time and resulting in cumbersome and impractical arrangements - e.g. many more codes for ecosystem credits where one would quite often suffice;
- b) The BCT has a close relationship with the NSW Department of Planning and operates in concert with that Department. NSW Department of Planning retains control of the Biodiversity Offsets Payment Calculator (BOPC), dictating the prices set by the BCT to developers. So it follows that the BCT's administration of the scheme has lost its autonomy. Accountability is also difficult to determine between the BCT and DPIE;
- c) Communication with the BCT is difficult, and the Biodiversity Offsets Administration and Management System (BOAMS) is extremely clunky and limited as a user-friendly source of authoritative information for landholders.

2.10 We have seen some indications this year that the BCT is becoming more attuned to landholder stakeholders but this cultural change may take time. We are aware that many landholders struggle with the complexity of the Government program which can reduce interest and uptake. We suggest that a simplified roadmap to the process and with a guide as to timings may assist. Also accredited consultants are an important source of guidance to landholders.

Market for credits

2.11 It appears the BCT has become a trader/broker for the sale of credits and therefore mostly controls the "credit market" - Is this an appropriate role for a government agency? The credit price and trade market was operated as a free market prior to the establishment of the BCT. Biobankers and purchasers were put in touch with each other by the OEH to reach a credit sale/price agreement - e.g. We now have a State government agency setting a price per credit through its tender process rather than allowing a "free market".

2.12 All credits wanted were listed on a publicly available website under the OEH. The current practice appears to be an arrangement between assessors and Government Agencies, they are working to reach sale agreements without a transparent notification to all credit holders of the credits required - particularly for State infrastructure. State Government Bureaucrats have enabled this and some controls should be put in place to ensure transparency and opportunity for all Biobank/Stewardship landholders. eg. an actual credits wanted register that reflects all current requirements.

2.13 Another indicator of potential concern over operation of the market for offset credits is the recent entry of commercial offset brokers. It is not clear whether this is being driven by market failure or whether the risks and opportunities arising from the developments is adequately understood and regulated. It probably does indicate some lack of transparency in the scheme.

Inevitably small or unsophisticated landholders; like family farmers will be the ones disadvantaged if risks eventuate.

2.14 Whilst brokers could possibly have a place in the offset credit market it would need to be closely monitored. There have been instances recently of a total lack of transparency where consultants have taken advantage of their close relationships with, in particular, State government agencies and have used their professional knowledge and relationships to their own advantage in land dealing. The BCT and Government Legislation should protect against this risk of "insider trading" (see below) and provide the opportunity and encouragement to all interested landholders to participate in any potential offset credit trade through disclosure on a public register.

2.15 On the other hand the method of the landholder commissioning the biodiversity assessment and creating credits then looking for a buyer is problematic for some landholders. It means they have to find money upfront and manage market and sovereign risks in the process. They have to reveal sensitive vegetation parameters on a public register in a way that could reduce their flexibility to deal with their private land in other ways (e.g. use of land management codes). This reduced interest and program uptake. For these landholders close cooperation with a potential purchaser or broker to coordinate assessment and private sale assists the program's uptake and effectiveness.

Prior to any complete assessment being conducted (at a fairly high cost to the landowner) , a "desktop" assessment can be conducted at a much reduced cost to help a landowner decide if "biobanking" is a viable option for them to proceed before credits and vegetation types/codes are published on a public register.

(3) "whether the Trust is subject to adequate transparency and oversight,

Transparency

3.1 One major issue we have with the BCT is that under its legislation the Part A monies paid into the Trust are not allocated separately to each Biobank/Stewardship site. The Biodiversity Conservation Trust is the Fund Manager in respect of the Biodiversity Stewardship Payments Fund." Under the OEH we received Annual Statements setting out the status of Trust Fund contributions for our site. The Biodiversity Conservation Act 2016 apparently alters the status of our Trust Funds.-We enquired of the BCT regarding this change in "transparency" and were told that the Trust Fund monies were not considered to be our funds. We believe there needs to be some clarity brought to this - we, as landholders have paid GST on these funds with our sale of credits. We are charged GST on the funds with the Annual RCTI invoices and payments generated by the BCT. Additionally, if the property was to be sold we are in effect transferring the Trust Funds to the Purchaser. We believe we are entitled to an annual accounting of the status of those Trust Funds which must be held in our name.

3.2 Also, there have been some well publicised allegations about insider trading by ecological advisers and accredited consultants gaining control of scarce land with sought after biodiversity credits. There is no evidence that Government infrastructure developers who would have been well aware of these ploys acted appropriately to manage risks to operation of the markets and of the Government offset arrangements.

3.3 We are aware of apparent sharp practice by commercial developers landbanking and developing high value land parcels, but then monetising the need for offsets by leaving the BCT holding a bag of money from a share of the developers profits that did not fully cover the cost and effort needed for the BCT to acquire the necessary biodiversity offsets in the market.

3.4 We are advised also of government infrastructure developers who are seeking the government help in undercutting the commercial market for offsets from land owners by gaining

permission for adjustment to the terms of the exchange – more time to acquire the offset credits or more flexibility as to vegetation types.

Oversight

3.5 In view of the factors raised above we consider it would be advisable that landholder perspectives should be adequately represented on BCT's governing board of management. This has not been the case in the first years of the standing up of the program. We would recommend a representative of biodiversity Landholder participants be appointed to the board of management or an advisory body to bring practical knowledge and experience to operations and perspectives of any proposed changes. Biodiversity landholders have a wealth and years of experience and knowledge of what does and does not work and a useful perspective from experience in the offsets market. They have a strong vested interest in making the program work effectively for all.

(4) the use of offsets by the NSW Government for major projects and strategic approvals,

4.1 The biodiversity offsets program is intended to encourage developers who destroy biodiversity habitat to recompense landholders for the cost of conserving and improving offsetting biodiversity habitat. We note public pressure from some quarters of the Government not to require offsets for significant public projects such as dingo fences or dam raising.

- a) This may appear a complex policy issue – for example where the Government may use the public purse and acquisition powers to acquire land that it intends to develop at market value, but then seeks a privilege of not also having to fund offsets for resultant biodiversity loss.
- b) From our perspective we would ask for example if any other person bought some bushland on the open market that they intend to clear for agricultural production, on what basis would they be eligible for seeking an exemption from offsetting requirements?

(5) The impact of non-additional offsetting practices on biodiversity outcomes,

5.1 Additionality in respect of the offsets program is understood as deriving from improvement to biodiversity habitat. We consider that additionality needs to be seen from the perspective of good biodiversity conservation and improvement outcomes. Landholders should be dealt with fairly in program design. For example

- a) We understand that some government-owned reserves are eligible for biodiversity offsets to improve their biodiversity values, even though they are reserves that are not available for other uses. Yet private landholders, for example family farmers that set country aside in perpetuity (say under NSW Land Management Codes), are not allowed to avail the sites for biodiversity offset credits in order to fund improvement to their biodiversity value.
- b) At present it is not possible for landholders to obtain dual benefits under carbon credits schemes when entering into new biodiversity offset arrangements, even though they may be able to demonstrate additionality under both programs. We do not understand why the NSW Government would seek to disentitle landholders from entering into agreements on their land that benefit both program objectives. We understand the Federal Government is considering scope for both entitlements from the Emission Reduction Fund end.

5.2 These anomalies in our view misinterpret additionality criteria in program design and under a mantra of no “double dipping” so tilt the playing field away from legitimate environmental incentives and better biodiversity and other outcomes on our private land.

(6) Offset prices and the opportunities for private landowners to engage in the scheme

6.1 From our experience the biodiversity stewardship incentives for landholders as stewards are currently small relative to the public value they provide. In our view after transaction costs and Federal taxes (see below), the returns we receive on our stewardship efforts are marginal at best.

6.2 The major benefit from our perspective is that we can realise the market value of our land containing the biodiversity site while we continue to own it and carry on the family business and connection to the bush. For example 'Part B' payments may enable us to pay off debt or to enact intergenerational family business succession without subdivision - in line with objectives of the original Biobanking Scheme. This contributes to the program effectiveness such as maintaining bush landscapes in urban fringes like the Sydney basin.

6.3 Artificial manipulation of credit prices through ceilings set by the Biodiversity Offset Pricing Calculator (BOPC) have also led to restrictions to what should be a free market process. In the past negotiations between buyers and sellers were informed by the OEH credit register and credit sale history. At the moment all prices are dictated by the price set by the BOPC, a market price determined through an obscure process. Whilst it has been repeatedly noted that the BOPC price is not intended to dictate market price, there is no scenario where it would not.

(7) Any other related matters

7.1 Some attention should be given to the Capital Gains accrued at the date of execution of a Biodiversity Stewardship Agreement.

7.2 As commercial primary producers, we draw attention of the NSW legislature to accommodations reached with the ATO for the old NSW biobanking scheme to subject landholders to large capital gains tax consequences of entering into agreements to better look after their biodiversity - to "create" and at some future time to sell the credits. In our opinion the imposed Federal capital gains tax regime is highly contrived, uncertain, too big and can have a deterrent effect or severely washout the benefits that should be available under the NSW offsets program. For example

- a) Under ATO rulings and regulations abetted by NSW, capital gains is being assessed on the notional transfer of assets (which we still continue to own) that are only notionally newly "created" (despite the subject vegetation and land being held by the family over many generations)
- b) The capital value of the assets being assessed is determined by reference to large capital sums that the landholder never sees, but that is paid into a Biodiversity Trust Fund that the NSW Government considers we do not own (see 3.1 above). Income flows from Trust funds are drip fed over the years - but to earn them we have to incur significant expenses and then pay income tax on any surplus. The assessed value of the credits is therefore seriously overstated.
- c) Purported "gains" on "creation" of the credits are accrued prior to the sale of any of the credits. These gains cannot be offset if a landholder sells only a portion of their credit holding - generally these proceeds are absorbed into the Trust Fund. So, a landholder may become liable for a huge Capital Gains Tax long before any funds are received by the taxpayer. The Legislation seems to assume that all Offset Credits will be sold immediately. The tax situation is complex and murky.

7.4 Further complicating the situation the Commonwealth Treasury points to the availability of concessions on some of these capital gains taxes. However in some cases there are lifetime limits pertaining to those concessions and so farmers may be disadvantaged later e.g. if they need to transfer the family farm or liquidate other assets off-farm.

7.5 The contrived nature of the tax consequences is such that tax payers and even many high-end tax advisers do not fully understand what the extent of them is. This capital gains taxation potential can be a significant stumbling block for landholders who might express interest in entering the Scheme.

7.6 It is doubtful that the Federal Treasury can justify the regime. The mining industry lobby would never have let the Federal government have got away with this treatment of "capital gain", for example where minerals are discovered on land that gives rise to a license to mine it.

7.7 We would suggest that the NSW Government seek a review of the Federal taxation regime on their offset arrangements. The Capital Gains Tax could be removed or assessed "pro-rata" with each sale of credits.

7.8 Consideration could also be given to incorporation of landholder stewardship income into the taxation of primary production income rather than its treatment as "off-farm income" such as for purposes of NSW industry support programs or Federal income tax.

Summary conclusions

- The biodiversity stewardship program is generally working well to produce genuine gains to biodiversity in districts across NSW. The Parliamentary enquiry is welcome in its focus to protect the program integrity and to consider and highlight some indications of some risks to program integrity and effectiveness.
- Given the location of the administration of the scheme within the Environment Portfolio and in close relationship with the NSW Planning Department, we see scope to address current significant imbalance in administrative understanding of NSW land use for private enterprise primary production and the perspective of family land managers
- We don't think public sector developers should be treated favourably to the detriment of the free market operation of the Scheme. This would only add to a growing trend of public sector infrastructure developers having undue influence over the price of credits rather than participating at arms length in an open market.
- Given the potential value of the scheme for the future of family farming and agro-ecology in NSW regions, the state of biodiversity loss in NSW, current national consideration of biodiversity arrangements by the Federal Government, we see there is potential for NSW enunciating a broad program evaluation plan to look at all aspects over time and to consolidate on program design, external policy settings and administrative effectiveness.
- With large tracts of ecologically important ecosystems being held on private properties State-wide the current offsetting scheme is the only market-based mechanism in place that can secure the funding required to see positive management and regeneration of these areas. Given what landholders are contributing in the exchange it is important to retain a high financial incentive to enter into the offset program.
- The original (pre 2016) scheme, whilst not compulsory, operated in a free market manner with transparency achieved through the OEH administered credit register. With the creation of the BCT, the dissolution of the OEH and the introduction of the BOPC, along with the public register no longer being regularly updated, the scheme has become less transparent.

6.4 From our perspective the integrity of the arrangements in perpetuity and the sustainability of the stewardship into the future relies on the free market pricing the total value of the credits to allow sufficient returns on ongoing landholder efforts. In our view the Part A payment in commercial farming districts would need to include a margin for this as well as providing for biodiversity maintenance. In this way the land value would hold up with district values generally. This would help avoid the risk of future contract failure and consequential calls on the Government purse.

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Landholders reference sites:

North-west NSW

Sydney Basin

Photos - Prior to Biobanking in a grazing area



The same areas showing regeneration after Biobanking conservation - with fence removed



A Weeping Myall in Moree