

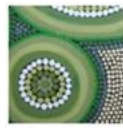
**Submission  
No 70**

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

**Organisation:** Darkinjung Local Aboriginal Land Council

**Date Received:** 31 August 2021

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31 August 2021

Portfolio Committee No. 7 – Planning and Environment  
Legislative Council  
NSW Parliament

Dear Chairperson,

**Submission – Parliamentary Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme**

I write on behalf of Darkinjung Local Aboriginal Land Council (**Darkinjung**).

I write to provide you with Darkinjung's submission to the NSW Legislative Council's Portfolio Committee No. 7 – Environment and Planning's 'Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme'.

Darkinjung consents to its submission being made available to the public.

**Who we are**

1. Darkinjung is a Local Aboriginal Land Council (**LALC**) constituted under the *Aboriginal Land Rights Act 1983* (NSW) (**ALRA**). LALCs are statutory bodies corporate whose objects and functions are set out in the ALRA.
2. Darkinjung's objects are set out in s 51 of the ALRA. These are:  
  
*to improve, protect and foster the best interests of all Aboriginal persons within the Council's area and other persons who are members of the Council.*
3. Darkinjung has the following functions in relation to the acquisition and management of land under section 52(2) and (3) of the ALRA:  
  
*(2) **Land acquisition** A Local Aboriginal Land Council has the following functions in relation to the acquisition of land and related matters—*  
  
*(a) in accordance with this Act and the regulations, to acquire land and to use, manage, control, hold or dispose of, or otherwise deal with, land vested in or acquired by the Council,*

(b) *functions relating to the acquisition of land and any other functions conferred on it by or under Part 4A of the NPW Act,*

...

(f) *to make claims to Crown lands or to enter into Aboriginal Land Agreements.*

(3) **Land use and management** *A Local Aboriginal Land Council has the following functions in relation to land use and management—*

...

(b) *to protect the interests of Aboriginal persons in its area in relation to the acquisition, management, use, control and disposal of its land.*

4. Darkinjung was constituted in 1984 and has been serving the interests of all Aboriginal people in its area and its members since then. Our members are those adult Aboriginal people listed on our membership roll. Our geographical area is constituted under the ALRA but can broadly be described as encompassing the NSW Central Coast, from the northern side of the Hawkesbury River to the southern side of Lake Macquarie, with our western boundary tracing Mangrove Creek.
5. Darkinjung, like all of NSW's Aboriginal Land Councils, has an active interest in the State's regulation of biodiversity conservation. Darkinjung is a significant private landholder on the NSW Central Coast. It may make claims to Crown lands under section 36 of the ALRA and is entitled to the transfer of those lands in fee simple where those lands or part of those lands are claimable Crown lands. Many land claims have taken years to determine and additional years to transfer where a claim has been successful. There is also a significant backlog of land under claim awaiting determination.
6. The statutory criteria for land to be claimable Crown lands are narrow. This has resulted in largely disused and underutilised Crown land, often on the fringes of towns and which is frequently constrained, being transferred to LALCs under the ALRA.

### **The Biodiversity Conservation Act 2016 (NSW)**

7. Constrained land is difficult to utilise. To compound the problem, in 2016 the NSW Parliament enacted the *Biodiversity Conservation Act 2016 (NSW)* (**BCA**) which required those wishing to develop land with biodiversity values to offset any clearing using formulas that commonly had the effect for Darkinjung of sterilising its land from development, including Darkinjung's land identified in *State Environmental Planning Policy (Aboriginal Land) 2019 (NSW)*. Unsurprisingly, constrained land is often heavily-vegetated and is a prime target for such sterilisation.

8. The land returned to Darkinjung under the ALRA was returned as compensation for the prior dispossession suffered by Aboriginal people in this State. In the ALRA's second reading speech, then Minister for Aboriginal Affairs, Frank Walker, noted that land rights have a 'dual purpose – cultural and economic' which would 'lay the basis for improving Aboriginal self-sufficiency and economic wellbeing.'<sup>1</sup> These dual purposes are reflected in the ALRA's preamble, which says that '[I]and is of spiritual, social, cultural and economic importance to Aboriginal persons'.
9. These purposes are undermined by measures which reduce the value of the compensation returned to Aboriginal people under the ALRA, such as higher taxes or costs associated with using and developing land returned under the ALRA. This includes the costs associated with meeting the requirements of the Biodiversity Offsets Scheme, which requires those impacting biodiversity values to either find and retire biodiversity credits or to pay a developer charge to the Biodiversity Conservation Fund (**BCF**) administered by the Biodiversity Conservation Trust (**BCT**), instead of retiring credits.
10. In Darkinjung's view, the costs associated with meeting the requirements of the Biodiversity Offsets Scheme operate as a tax on the compensation given to LALCs, where land transferred to LALCs under the ALRA is now significantly more expensive to utilise and develop following the introduction of the BCA. The cost of preparing a biodiversity assessment report alone, to understand the likely credit values on land owned by a LALC, can be cost-prohibitive for many LALCs to engage in the Scheme. In our view, it is likely that, collectively, LALCs are more seriously affected by the burden of the BCA than any other private landholder in the State, given the high proportion of formerly underutilised Crown land transferred to LALCs under the ALRA. This burden may be discriminatory and undermines the objectives of the ALRA.
11. After being dispossessed of their land once, the BCA has the effect of dispossessing NSW's Aboriginal people of their land again for less than fair value. NSW's Aboriginal people have already contributed to all land developed in the State, and now they are being asked to pay again for the benefit of the public and other developers by locking away land returned as compensation.
12. Darkinjung has actively engaged with both the Department of Planning, Industry and Environment (**Department**) and the BCT regarding the impact of the BCA on its operations, its aspirations, its land, and its lands under claim. Darkinjung has had numerous meetings and conversations with members of the Department and the BCT about these issues to try to find fair solutions.

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<sup>1</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, 5089 (Frank Walker).

13. In April 2021, Darkinjung prepared a submission to the Department's consultation paper 'Strengthening the Biodiversity Offsets Scheme – A new approach to developer charges, March 2021'. That consultation paper attached an extract from a Technical Review of the Biodiversity Offset Payment Calculator prepared by EY Port Jackson Partners (**Technical Review**). Many of the issues raised in the Technical Review, including about the operation of the Biodiversity Offsets Scheme as a whole, had been raised by Darkinjung with the Department and the BCT in our discussions. These issues were addressed in our submission to the Department and are reiterated in this submission. We would encourage the Committee to consider the Technical Review.
14. Darkinjung's first preference to address the unfair burden placed on LALCs by the BCA is to exempt LALCs from the operation of the Biodiversity Offset Scheme and create a bespoke conservation regime for LALCs through legislative reform to the ALRA. This is discussed below.
15. Absent legislative reform, Darkinjung will continue to participate in consultations with the Department regarding the Biodiversity Offset Scheme in good faith; however, our position is that Ministerial conferment of strategic biodiversity certification under the BCA should occur more readily in relation to land owned by LALCs. Anything short of this will fail to achieve a fair and equitable balance between economic activation of Aboriginal lands under the ALRA and the biodiversity conservation objectives of the BCA. If this biodiversity approval pathway is not made available to LALCs under the BCA, Darkinjung sees little way in which the current NSW planning and biodiversity conservation system can enable Aboriginal people in this State to realise the fair value of their compensation under the ALRA.
16. Darkinjung believes the unique nature, objects and functions of LALCs should be recognised in determining the application of the BCA to us. We are not ordinary developers. LALCs pursue development opportunities only to the extent necessary to address systemic imbalances and deep-seated socio-economic inequalities between Aboriginal and non-Aboriginal people in this State. Aside from the pursuit of development to this end, i.e., greater self-determination and economic independence for Aboriginal people; as a peoples, we are custodians of all land and waters throughout this State. We take this role seriously. It goes to our very being and has done so far more than 60 millennia. We do not need legislative instruments to guide us on the preservation and conservation of Country. This is and always has been our core business.

#### **Issues with BOPC developer charge methodology and its impact on credit prices**

17. Despite our preference for LALCs to be carved-out of the BCA in recognition of our unique status and position, we also wish to comment on the effect of the Biodiversity Offsets Payment Calculator (**BOPC**) on the Biodiversity Offset Scheme, as presently legislated.

18. The developer charges estimated by the BOPC to be paid to the BCF instead of retiring credits are fundamental to the operation of the Biodiversity Offset Scheme as a whole. It sends a price signal to developers and landholders about the value of credits they can generate and retire.
19. The BCT's 2019-20 Annual Report notes on page 74, in the notes to its financial statements, that the \$16.698M of credit obligations carried by the BCT in developer charges, had been revalued using BOPC 2.0 at 30 June 2020 as \$28.191M of credit obligations. This was an increase of \$11.494M, equivalent to a 68.8% increase in the cost of credit obligations accepted by the BCT to 1 July 2020. Darkinjung presumes that, amongst other factors, this discrepancy may have prompted the Technical Review earlier this year, which is the third review of the BOPC pricing model in three years.
20. In our view, the econometric model used by the BOPC to estimate developer charges does not provide accurate estimates where there are insufficient trades in credit classes. Darkinjung also has concerns that the econometric model does not factor in the opportunity cost to landholders of establishing biodiversity stewardship sites (**BSAs**) on their land.
21. The Technical Review noted that, as a complement to the existing econometric model used, estimates for developer charges could be based on the following four components of landholder costs and margins:
  - (1) Total Fund Deposits can be estimated without historical trade data by understanding the necessary management action costs.
  - (2) Transaction and administration costs can be estimated and tend to be reasonably uniform.
  - (3) Opportunity costs can be modelled using land value or discounted future cash flows.
  - (4) Landholders' surplus margins (above the opportunity cost of the land) may be more difficult to predict but can be estimated through expert consultation.
22. The Technical Review also recommended that regular market soundings could complement the econometric and cost-structure models. The Technical Review suggested these alternatives after noting:
  - *The Biodiversity Offsets Scheme is made up of 1342 potential credit classes for species and ecosystem credits, of which 1262 have never been transacted [which is equal to 94%].*
  - *Of these credit classes, the BCT tends to accept developer charges for those with few or no transactions. 89% of developer charges accepted by the BCT have been for credit classes with five or fewer transactions since 2010.*

Darkinjung shares the Technical Review's concerns as to the fungibility of the credit market.

23. Darkinjung prefers a composite pricing model which includes the cost-structure model. Eventually, this model could be expected to derive the same or similar outcomes to the econometric model after sufficient credit trades and if the credit classes were less heterogenous.
24. Darkinjung has called for the opportunity costs to landholders of committing their land to an in-perpetuity BSA to be modelled and included in the BOPC's estimates for some time. Darkinjung called for these changes after discovering a wide discrepancy between the value and quantity of credits (according to the BOPC) it could generate on its land and the cost of retiring credits on that same land where it sought to impact on biodiversity values. This discrepancy was never explained to Darkinjung.
25. Darkinjung also called for these changes after noting the price ceiling set by the BOPC, which was conceded in both the Technical Review and the consultation paper. Darkinjung has been concerned that the prices developers have been willing to pay for credits has not reflected the true cost to landholders of committing their land to a BSA. This is a disincentive to private landholders establishing BSAs where the BOPC effectively caps the price of credits based on questionable modelling. In our view, the Auditor-General's revaluation of the likely cost to the BCT of acquitting its credit obligations justifies this concern.

#### **Removing the BOPC from public view**

26. The Department's consultation paper suggested removing the BOPC from public view as one option to address the price ceiling effect. In our view, this obfuscates the issue with the BOPC, and the BOPC's credit prices should remain available to both buyers and sellers of credits. Removing the BOPC from public view will create an information asymmetry between developers (who can receive a quote for a developer charge from the BCT), landholders (who will not have access to this), and most concerningly, the BCT itself. The ramifications of removing the BOPC from public view were not fully explored in either the Technical Review or the consultation paper.
27. The consultation paper said on page 7 that the 'Department recognises that many stakeholders find it difficult to obtain relevant information on various aspects of the BOS market, including credit prices and availability.' The paper goes on to say that a BAM Spot Price Index is being readied for release and suggests that a 'State of the Market' report or 'compare-the-market' service could be developed.
28. Darkinjung does not see how a 'compare-the-market' service or the BAM Spot Price Index are any different to the BOPC in their price signalling effect. Both services will anchor price expectations, albeit not to the charges levied on developers. They will have the same effect as the BOPC, once landholders and developers gather enough information to estimate the premium paid by developers to pay into the BCF instead of finding and retiring credits. For developers, this estimation may be a simple process where they have access to developer charge quotes from the BCT.

29. A more sensible approach would be to disclose how the BCT calculates the modest premium it charges to mitigate its risks associated with acquitting credit obligations after accepting developer charges. If the BOPC premium was transparently disclosed, then developers and landholders would be able to deduce the reasonable price range for the credits to be offset. If a developer could not, after taking reasonable steps, identify credits directly through a landholder, then the developer charge would still be available to them to offset their impacts, as a payment of last resort.
30. Ultimately, so long as developer charges are an option for developers to offset their impacts on biodiversity values, these charges will continue to send a price signal to the market. Delaying this price signal by up to five years (the time recommended in the Technical Review for the BCT to acquit its credit obligations) will remove useful information for buyers and sellers of credits to agree on a reasonable price for those credits. It is difficult to see how such a delay will attract either developers or those landholders with the potential to offer credits. It is also difficult to see how the absence of price signals to the market will achieve the intended environmental outcomes of the BCA.
31. Acquitting credit obligations at or shortly after the time when biodiversity values are impacted, will be preferable to the delay inherent in the BCT acquiring a credit obligation and sourcing credits (typically through assisting landholders to setup BSAs) to acquit those obligations. In our opinion, developers purchasing credits directly from landholders reduces the risk of the acquirer miscalculating the cost of the offset and creating an unfunded liability, which will ultimately be borne by the taxpayer, and possibly result in compromised environmental outcomes.<sup>2</sup>
32. To the extent that further changes to the Biodiversity Offset Scheme reduce transparency and add yet greater uncertainty for landholders, the less likely it is to attract potential credit vendors willing to take on the costs of having their lands assessed as the first step in entering the market. This will exacerbate the risk to both taxpayers and developers because of the market's failure to provide offsets, i.e., developers will be forced to pay into the BCT as the only option and the taxpayer must be confident that the BCT is accurately estimating the developer charge.

### **Competition in the credit market**

33. Darkinjung is very concerned by the BCT's position in the credit market. The BCT acts as both the market operator/clearing house and a market participant in the credit market. If the changes proposed in the consultation paper were made, then the BCT would also likely become the market participant with access to the best pricing information of any participant.

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<sup>2</sup> Marian Weber, 'Experimental Economic Evaluation of Offset Design Options for Alberta: A Summary of Results and Policy Recommendations, November 2011', prepared for the Alberta Land Use Secretariat, p 24.



34. The BCT, on behalf of the State (who otherwise bears the burden of miscalculations in developer charges and acquittal costs), has an incentive to acquit credit obligations paid for in developer charges for less than the charges taken. If the BOPC is not available to the public, the BCT will likely have the most accurate information available to it of any participant in the credit market. This can lead to the perception that the market can be manipulated and that the environmental outcomes are not being achieved. This issue was expressly raised on page 28 of the Technical Review which said:

*The Department has raised concerns that the BCT may use its access to privileged information about developer charges to obtain a financial advantage when purchasing credits. It could charge developers a price which far exceeds the likely price of purchasing the required credits.*

35. The Technical Review suggested the BCT share its information with the Department to alleviate this issue. We do not see how the BCT only sharing information with the Department about the value of payments to the BCF and the cost of acquitting the related obligations assists other market participants to be satisfied that they are receiving a fair price for their credits or credit obligations. Those parties will be entirely reliant on the Department to hold the BCT to account. No explanation was given in either the Technical Review or the consultation paper as to how the Department would do this, or what measures the Department proposed to take to ensure the credit market is not manipulated.
36. Darkinjung would like the BCT and the Department to publicly disclose the advice they have received regarding the risks of the BCT misusing its market power, including any communications with the Australian Competition and Consumer Commission, the steps taken to mitigate those risks, and whether the BCT is required to obtain an Australian Financial Services Licence or other financial services or market operator licence to operate the credit market and offer credits for sale and purchase. We respectfully request that this issue be thoroughly explored by the Committee.

### **Options for reform**

37. If the issues with the BOPC and the Biodiversity Offset Scheme are unresolved, then the economically rational thing for many LALCs to do where they cannot obtain fair value or use for their land because of the BCA and other unfair planning controls is to sell that land, parcel by parcel, and to reinvest the funds in lands that can provide tangible benefits to their members and the local Aboriginal community. This is not an optimal outcome for either the LALCs or anyone seeking strategic management of high value conservation lands where ownership of those lands is likely to fragment.
38. In Darkinjung's view, legislative reform is likely to be the best solution to relieving the unfair burden placed on LALCs by the BCA. Darkinjung believes that this reform should be made to the ALRA, to recognise the unique position of LALCs and their ability to contribute fairly to the preservation and conservation of biodiversity values in this State.

39. The ALRA already contains provisions for LALCs to prepare community, land and business plans, which set out their strategic goals over a 5-year period. With reform, a mechanism to develop separate statutory plans identifying the uses of a LALC's lands could be added. These plans could divide lands owned by a LALC into development or other income-producing uses and lands to be conserved for their high biodiversity values or cultural values. Both types of uses of land benefit the public, who will see the objects of the ALRA and biodiversity conservation legislation achieved together.
40. Land identified for development or other economic uses in such a plan would be exempt from the Biodiversity Offsets Scheme requirements of the BCA. In effect, the plans would offer Aboriginal people and the State an opportunity to strategically plan for which of a LALCs' lands would be used for economic and conservation purposes and to strike a fair balance between these uses. Darkinjung suggests that these plans be made by the Minister for Aboriginal Affairs, with the concurrence of the Minister for Planning and Minister for the Environment, and that they have the status of subregional plans in the hierarchy of plans established by the *Environmental Planning and Assessment Act 1979* (NSW).
41. Darkinjung would welcome further discussions with the Committee and the Department on these proposed reforms.
42. If amendments to the ALRA are not supported, then Darkinjung believes a bespoke amendment to the BCA should be made to exempt LALCs from its operation. This would put LALCs on the same level as those developers who had the benefit of profiting from the development of the State prior to the introduction of the BCA.

Thank you for the opportunity to make a submission.

If you have any questions about this submission, please contact me on .

Yours faithfully,

Blake Cansdale  
Chief Operations Officer