

INQUIRY INTO INTEGRITY OF THE NSW BIODIVERSITY OFFSETS SCHEME

Organisation: Environment Institute of Australia and New Zealand Inc.
Date Received: 14 September 2021



Environment Institute
of Australia and
New Zealand Inc.

13 / 9 / 2021

Portfolio Committee No. 7 - Environment and Planning,

Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme

Submission on behalf of the EIANZ Ecology Special Interest Section

To Portfolio Committee No. 7,

Introduction

This submission to the Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme is made by the Ecology Special Interest Section of the **Environment Institute of Australia and New Zealand** (EIANZ). The submission includes contributions from a group of experienced consultant ecologists that represent multiple large ecological consultancies and accredited assessors from NSW. The members are all Accredited Assessors (under the NSW BC Act) and have significant experience of the NSW Biodiversity Offsets Scheme (BOS) since its commencement in 2018, as well as the prior voluntary scheme (Biobanking) from 2006-2017, and assessment and ecology offset process prior to implementation of both schemes (negotiated outcomes on a case-by-case basis).

The contributors to this submission implement the BOS on a day-to-day basis, and together have unparalleled experience on how the scheme operates in real life. We provide below our submission with regards to the Committee's terms of reference.

a) the effectiveness of the scheme to halt or reverse the loss of biodiversity values, including threatened species and threatened habitat in New South Wales, the role of the Biodiversity Conservation Trust in administering the scheme and whether the Trust is subject to adequate transparency and oversight,

We support the BOS and believe it can be an effective tool for halting the loss of biodiversity values from development within NSW. The BOS prioritises avoidance of impacts wherever possible, mitigation of impacts, followed by compensation of remaining unavoidable impacts on biodiversity values (i.e. biodiversity offsets). In our view the provision of biodiversity offsets provides the following key benefits to biodiversity:

1. Providing financial incentive to avoid or reduce impacts for development proponents. This is achieved because:
 - a. clearing of greater areas of vegetation will incur a higher offset liability – this encourages proponents to reduce the development footprint and avoid vegetation clearance,
 - b. areas in high ecological condition require more credits than degraded areas – this encourages proponents to avoid high condition vegetation,
 - c. biodiversity values which are rarer tend to have a higher offset cost, which encourages proponents to avoid rarer vegetation and/or threatened species impacts.
2. The provision of positive in perpetuity biodiversity management over lands on Biodiversity Stewardship Sites (offset sites), and a system to provide for the in-perpetuity funding and ongoing management of these lands, overseen and audited by the Biodiversity Conservation trust (BCT).
3. Providing a scheme that is scientifically robust with a consistent methodology that is applied to both development and Stewardship (conservation) site assessments.

The above factors are significant and positive factors. The BOS is a pragmatic and robust system to quantify the biodiversity offsets required, and to quantify how to measure improvements at Stewardship sites. It is, in our view, a significant improvement on offsets that were negotiated on a case by case prior to the BAM and Biobanking schemes. We also note that there is significant regulatory review on both the impact and Stewardship (conservation) site assessments.

We also note that whilst we support the BOS, the BOS has a number of matters that require adjustment and that we will be seeking to work with the NSW government on improving these. In particular our view is that the scheme has become overly complicated, which leads to delays in approval of Stewardship sites and development assessments. We agree that the BOS needs to capture the complexity of the natural environment, but the significant (and evolving) technical complexity in the methodology erodes the transparency of the scheme. We recommend that a simpler scheme would provide better biodiversity outcomes and would facilitate transparency and understanding at all levels (proponents, Stewardship site landholders, government agencies, and consultants).

We note that there is variation with regards to entry into the BOS, depending on the approval pathway, with different entry requirements into the BOS between major projects (entry by default unless a waiver is granted), development assessments (biodiversity values map, clearing threshold and significant impact triggers), and smaller government agency projects assessed under a Review of Environmental Factors (BOS as an option if there is a significant impact). We recommend simpler and consistent triggers for the BOS across all types of approvals. This change, if enacted well, would help to deliver less complexity and greater consistency between projects.

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

We support major projects utilising the BOS as major projects generally have the greatest impacts on biodiversity values (despite their contribution to the economy of the state). As identified above, this encourages avoidance and minimisation of ecological impacts, as well as compensation for unavoidable impacts on terrestrial biodiversity values. We note that there are options under the legislation for major projects to have the biodiversity credit obligations varied, with the reasons published. In our experience to date this provision has rarely been utilised. Given this, we feel that these provisions are reasonable for use in a very limited set of projects.

For strategic assessments and/or biodiversity certification we believe that the use of the BOS is appropriate. Biodiversity conservation planning works best when considered early and at a landscape scale. The strategic assessment process lends itself to positive conservation outcomes by promoting this approach. The BOS provides a consistent methodology for assessing biodiversity at both development and conservation sites and across all types of development.

c) the impact of non-additional offsetting practices on biodiversity outcomes, offset prices and the opportunities for private landowners to engage in the scheme, and

Part of the intent of the original BioBanking scheme was to provide opportunities and incentives for private landowners with biodiversity values to conserve and manage the biodiversity values on their land in-perpetuity instead of the old practices whereby conservation outcomes were provided predominantly on public land. Ecological consultants, including contributors to this submission, have previously raised concerns with the NSW government with regards to the Biodiversity Offset Payment Calculator (BOPC).

We support pricing for developer charges going to the Biodiversity Conservation Trust (BCT), subject to robust governance processes to avoid potential conflicts of interest being developed prior to BCT taking on this role (as regulator for approval of Stewardship sites, purchasing credits to meet developer charge credit obligations, and also setting developer charge credit prices).

A key issue for some time has been the biodiversity offset payment calculator (BOPC) (or developer contribution) pricing. We note that:

1. Data currently used to create current BOPC prices is flawed, as (a) some trades are not included and (b) many trades have been based on only the Part A component of the credit price (i.e. not the full credit price) leading to very skewed pricing. We recommend that a comprehensive data audit is conducted whilst the total volume of trades is still relatively low, and that the registers track the trades that are based on Part A and Part B prices respectively.

2. Detail needs to be developed and provided regarding under which circumstances econometric or other models will be used for developer contribution credit pricing. In our view this needs to be a transparent process. At the time of the preparation of this submission the BCT was going through a consultation process regarding developer charges.
3. All models appear to be looking at past trades, rather than changes which are yet to flow through to credit pricing, including: the change to the Total Fund Deposit (TFD) discount rate, requirement for additional active management and monitoring under the BAM, Stewardship site management standards being raised by the BCT and the equivalency of credit generation rates. All these factors cumulatively increase the TFD at Stewardship sites (and thus the base level cost of credits), but which are yet to flow through to BOPC credit prices.
4. When the BCT discharge their obligation via purchase of credit trades that this is added into relevant credit trade registers.

The above factors have led to many landholders being unable to compete in the biodiversity credit market, due to the BOPC creating an artificial cap on the market prices of biodiversity credits and not recognising various changes in the BOS that affect credit pricing, though noting this effect is variable between regions and biodiversity credit types. In our view resolving this is a crucial factor to allow the BOS to effectively function as a biodiversity credit market based on the underlying market forces of supply and demand. We note that this does not necessarily require new or additional resourcing, instead it requires careful consideration of the operation of the Biodiversity Conservation Fund, and how this influences the market. We strongly endorse effective consultation on this critical topic, in particular with ecological consultants who understand the operation of the biodiversity credit market. We do not believe that simply removing the BOPC from public view will resolve this issue as, regardless of the mechanism for receiving a developer contribution quote, this price will influence the credit market price unless it becomes forward facing and reflects the true cost of biodiversity stewardship.

With regards to opportunities for private landowners to participate, we note that there is a lack of clear advice on the capital gains tax implications associated with the establishment of a Stewardship site. A capital gains tax event, and associated tax liability, occur when a Stewardship site is established and it can be complicated to understand, and can have up front tax implications which is a disincentive to participation by landowners.

To the best of our knowledge the last formal ruling from the **Australian Taxation Office is from 2009** and before the first biobank agreement was signed in 2010, and well before any credit trades. However, there have since been significant changes to the scheme, and we believe greater clarity is required. Taxation can have significant implications for private landholders as a capital gains tax event can be realised in the financial year that the credits are granted, but it may be many years before enough credits are sold to cover the capital gains liability, or enough credits

may never be sold to cover this liability. This tax liability can deter private landowners from entering into a Stewardship site agreement. Whilst taxation is a Commonwealth government matter, we strongly recommend both parties that they re-consider this ruling regarding capital gains for credit generation and then provide clearer advice and to participants of the Scheme. In this respect, we would encourage the NSW government to engage with the Commonwealth government in seeking to achieve a favourable outcome with regards to taxation treatment of credit generation on Stewardship sites so as to encourage more private land conservation.

d) any other related matters.

We believe that it would be desirable to have greater flexibility within the scheme to allow application of judgement or innovative practices in some situations, noting that these will be the exception rather than the norm. For example, in some limited instances, a more effective outcome for a threatened species could be a broad-scale pest or predator control program, rather than management on a specific site.

A change that we feel would be beneficial for biodiversity certification approvals would be to have a clearly defined process for minor amendments to development or conservation boundaries. This is because strategic assessments and/or biodiversity certification will be based on the information at the time, and situations can arise during the detailed design process wherein minor boundary changes may be required. A clear, transparent and simple process for such amendments would be a desirable amendment.

We recognise that there is the potential for real or perceived conflicts of interest to occur in the Biodiversity Offsets Scheme. While the Regulations define a fit and proper person to enter into and fulfil the obligations imposed by a proposed biodiversity stewardship agreement, the regulations do not provide an adequate basis for managing potential conflicts of interest that might arise in the biodiversity offsets process for environmental practitioners.

The biodiversity offsets process requires the involvement of appropriately qualified environmental practitioners for its effective operation. The process needs to ensure that the professional integrity of practitioners can be demonstrated in relation to the commercial transactions in the process. This is needed to protect practitioners, government and the public interest.

We note that there is a code of conduct which accredited assessors must sign up to. EIANZ also has a **Code of Ethics and Professional Conduct** and would be interested in discussing with the NSW government the development of rules or guidelines to help provide clarity to situations considered to be potential conflicts of interest, and appropriate mechanisms to deal with such situations.

Closing

The EIANZ Ecology Special Interest Section submission can be summarised as follows:

- We support and endorse the BOS. Based on our experience of ecological assessment outcomes within the BOS compared to the previous impact assessment processes without an offset protocol, the BOS results in superior biodiversity outcomes. Specifically, the BOS system provides an effective financial incentive to avoid or reduce impacts for development proponents; provides for positive in-perpetuity biodiversity management over Stewardship sites; and has a scientifically robust methodology applied on both impact and conservation sites.
- The BOS has become unnecessarily complex and it is recommended that this complexity is reduced.
- We have concerns with regards to the BOPC pricing for the use of the Biodiversity Conservation Fund, but are encouraged to see consultation occurring with regards to proposed changes to move to a 'developer charge' model.
- We encourage government to review the current tax ruling with respect to the generation of biodiversity credits and provide clear advice to landholders on tax implications of establishing a Stewardship site.

On behalf of the EIANZ Ecology Special Interest Section.

Signed

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