



Environmental Defenders Office

4 August 2023

Biodiversity Market Monitoring Review
Independent Pricing and Regulatory Tribunal
PO Box K35 Haymarket Post Shop
Sydney NSW 1240

Lodged online

Dear Sir/Madam,

Submission to Monitoring the Biodiversity Credits Market in NSW - Issues Paper

Environmental Defenders Office (**EDO**) is a community legal centre specialising in public interest environmental law. We welcome the opportunity to comment on the proposed monitoring of the biodiversity credits market in New South Wales (**NSW**) by the Independent Pricing and Regulatory Tribunal (**IPART**).

Our submission is made in the context of EDO's long-standing concerns about the NSW Biodiversity Offsets Scheme (**BOS**). We do not respond to the Issues Paper in detail - instead, our submission addresses the following points:

- Overarching comments on the BOS
- Response to the Issues Paper
 - What a well-functioning biodiversity credits market would look like?
 - What are some of the challenges facing the credits market?
- General key points for consideration

Overarching comments on the BOS

We are pleased to see IPART acknowledge that in monitoring of the Biodiversity Credit Market it will consider a wide range of matters including the purpose and structure of the BOS and recent reviews of the BOS. IPART also acknowledges that current reviews of the BC Act, Biodiversity Assessment Method (**BAM**) and native vegetation provisions of the *Local Land Services Act 2013* (**LLS Act**) may affect the Biodiversity Credit Market moving forward.

EDO has engaged as a key stakeholder in the development and implementation of the BC Act, BOS and native vegetation provisions of the *Local Land Services Act 2013*. We have long-recommended reform based on evidence confirming that the BOS does not align with best practice science-based biodiversity offsetting, permits an inappropriate level of variation, and does not contain the ecologically necessary limits to prevent extinctions.

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Our concerns are set out in more detail in the following EDO submissions and report:

- *Submission to the BCF Charge System - BCT Preliminary Design Approach: Issues Paper for stakeholder meetings* and attached expert comment, August 2021;¹
- *Submission to the inquiry into the integrity of the NSW Biodiversity Offsets Scheme*, September 2021;²
- *Defending the Unburnt: Offsetting our way to extinction*, November 2022;³
- *Submission to the Statutory Review of the Biodiversity Conservation Act 2016*, 21 April 2023; and⁴
- *Submission to the Statutory Review of the native vegetation provisions (Part 5A and Schedule 5A and Schedule 5B) of the Local Land Services Act 2013*, 19 December 2022.⁵

It is within the context of these broader concerns that we note our significant concerns about the Biodiversity Credits Market and its ability to deliver effective outcomes for biodiversity.

After providing an overarching response to the Issues Paper, we highlight a number of key matters for consideration, drawn from our previous submissions and reports, that are particularly relevant in the context of monitoring the Biodiversity Credits Market.

Response to the Issues Paper

What would a Well-Functioning Biodiversity Credits Market Look Like?

What contribution should the Biodiversity Credits Market make to achieving the Biodiversity Offsets Scheme's purpose?

It is interesting that the Issues Paper poses this particular question, despite suggesting that the purpose of the BOS "is not explicitly stated in the Biodiversity Conservation Act".⁶

In our view, the purpose of BOS is construed from the provisions of the *Biodiversity Conservation Act 2016 (BC Act)*, including the various purposes set out in section 3 of the Act, which include:

- (a) to conserve biodiversity at bioregional and State scales, and
- (b) to maintain the diversity and quality of ecosystems and enhance their capacity to adapt to change and provide for the needs of future generations, and
- ...
- (k) to establish a framework to avoid, minimise and offset the impacts of proposed development and land use change on biodiversity, and
- (l) to establish a scientific method for assessing the likely impacts on biodiversity values of proposed development and land use change, for calculating measures to offset those impacts and for assessing improvements in biodiversity values, and

¹ Submission: <https://www.parliament.nsw.gov.au/lcdocs/other/16536/Additional%20info%20-%20Environmental%20Defenders%20Office%20-%20Comment%20on%20BCT%20charge%20calculator%20-%20received%2023%20November%202021.pdf>

² See: <https://www.edo.org.au/publication/submission-to-the-inquiry-into-the-integrity-of-the-nsw-biodiversity-offsets-scheme/>

³ See: <https://www.edo.org.au/wp-content/uploads/2022/12/EDO-Offsetting-our-way-to-extinction.pdf>

⁴ See: See: <https://www.edo.org.au/wp-content/uploads/2023/04/230421-Biodiversity-Conservation-Act-Review-EDO-submission.pdf>

⁵ <https://www.edo.org.au/wp-content/uploads/2022/12/221219-LLS-Act-Review-EDO-submission.pdf>

⁶ IPART, *Monitoring the Biodiversity Credits Market in NSW Issues Paper*, July 2023, p 14.

(m) to establish market-based conservation mechanisms through which the biodiversity impacts of development and land use change can be offset at landscape and site scales,
...

Further, in establishing the Biodiversity Assessment Method (**BAM**), which is a key element of the BOS, the Minister is to adopt a standard that will result in no net loss of biodiversity in NSW.

Therefore, the Biodiversity Credits Market must contribute to achieving no net loss, conserving biodiversity, and maintaining the diversity and quality of ecosystems and enhance their capacity to adapt to change and provide for the needs of future generation. Indeed, this is ultimately the primary purpose of the market, which operates solely in the context of the BC Act and the BOS.

Do the outcomes in Table 3.1 accurately depict a well-functioning Biodiversity Credits Market? What other factors should we consider?

Given that the purpose of the market is to deliver biodiversity outcomes consistent with the BC Act (see above), measures of success for the market must be less about whether it is operating effectively in the usual way markets may be assessed, but whether the market is operating to deliver those outcomes.

While the outcomes in Figure/Table 3.1 are useful indicators of a functioning market, in the case of the Biodiversity Credit Market, the key indicator that appears to be missing is whether the market is delivering the intended biodiversity outcomes. It is unclear if and how this will be considered as part of monitoring the market, or in considering whether the market is 'effective'.

What are some of the Challenges Facing the Credits Market?

What are the main challenges facing the credits market? What evidence is there that might suggest the market is not working as effectively as it should be?

One of the fundamental assumptions that has been made is that a market is a suitable mechanism for managing biodiversity impacts and achieving biodiversity outcomes. Many of the challenges facing the market (e.g. supply and demand issues, credit pricing, competition etc.) stem from this assumption.

The Issues Paper flags that one challenge for the Biodiversity Credits Market is balancing the growing demand for economic development with biodiversity conservation. We do not necessarily agree with this framing. We do not see the role of the market as balancing those demands; rather the market must operate within the parameters set by the BC Act and ensure that biodiversity is conserved.

In considering how to solve challenges and make the market more 'effective', it is important not to lose sight of the primary purpose of the market - which is to **deliver biodiversity outcomes**. We acknowledge that there is a significant tension between providing certainty for participants and achieving this purpose. However, any adjustments made to how the market operates must not be at the expense of ecological integrity and must not drive further decline in biodiversity.

General key points for consideration

Building on our response to the Issues Paper, we highlight a number of key points for consideration, drawn from our previous submissions and reports:

- The ability of the Biodiversity Credits Market to deliver environmental outcomes is highly dependent on whether the market conditions observe the limits of natural resources and genuinely price the costs of environmental harm.
- Government interventions in the market (e.g. the Biodiversity Credits Supply Taskforce; Biodiversity Conservation Fund (**BCF**) Charge System) must not undermine the key purpose of the BOS – to deliver biodiversity outcomes.
- The cost of offsets should be driven by the costs of delivering the necessary environmental outcomes, including a recognition of increased scarcity, irrespective of the cost this creates for developers.
- Turning biodiversity into a tradeable commodity without a comprehensive system of red-flags (ie, identifying things that cannot be offset) simply puts a price on extinction. The justification for creating a market for biodiversity credits is that as species and ecosystems become scarcer, it will become more expensive to purchase offset credits and therefore provide limits on the amount of clearing undertaken. However, the process of credit pricing under the NSW framework is fundamentally undermined by the failure to require true like-for-like offsets and the existence of the variation rules. These rules mean that it is possible to comply with offset requirements without actually protecting the populations or ecological communities at risk, thereby avoiding increased credit prices for rare species or ecosystems. The underlying formulation of the credit price also fails to adequately recognise scarcity.
- The ability for a proponent to meet their offset obligation by simply paying money to the BCT creates a lag between the ability to clear vegetation and habitat and the identification that there are no equivalent species or ecosystem offset areas available, i.e. like-for-like areas no longer exist.
- Offsetting credit requirements for approvals under the LLS Act or development under the *Environmental Planning & Assessment Act* can be reduced based on non-ecological considerations including the social and economic impacts of the proposed clearing or development.⁷ The relevant provisions vary depending on whether it is Part 4 local development, State significant development or State significant infrastructure, or a Part 5 activity.
- The presence of the BCT as a major purchaser of credits also risks further distorting the market, with anecdotal reports that landholders willing to create stewardship sites and sell offset credits are not able to obtain sufficient financial benefit from the process because their cost of management exceeds the estimates generated by the Biodiversity Offset Payment Calculator.⁸

Thank you for the opportunity to comment on the proposed monitoring of the biodiversity credits market in New South Wales (**NSW**) by the Independent Pricing and Regulatory Tribunal (**IPART**). For further information, please contact cerin.loane@edo.org.au.

Yours sincerely,

Environmental Defenders Office

Rachel Walmsley

Head of Policy & Law Reform

⁷ See section 60ZG(4) of the LLS Act and section 7.13(4) of the *Biodiversity Conservation Act 2016*.

⁸ The Offsets Payment Calculator is an interactive tool designed to determine how much a developer must pay into the Biodiversity Conservation Fund to satisfy an offset obligation, if they opt to do so instead of obtaining and retiring credits. The public tool provides an estimate of this price in advance of any formal negotiations with the BCT.