

Context: Role of IPART

IPART is an independent, strategic agency of NSW Government, charged with regulating key markets and government services to ensure effective social, environmental and economic outcomes for the people of NSW. <https://www.ipart.nsw.gov.au/Home/About-IPART/Our-role>

Consequently, effective *environmental* outcomes for the people of NSW are fundamental to this review and economic outcomes do not take precedence over social and environmental responsibilities.

Specific comments on the Terms of reference

1. Monitor the performance of and competition within the biodiversity credit market, and make findings and recommendations with the aim of:

a. maintaining and promoting competition

Issues include:

The scheme was established to ensure no net loss of biodiversity, which is a finite resource. In basic economic terms markets form around supply and demand for goods and services with market equilibrium defined by the price mechanism. In other words, rare species or ecosystems will demand higher prices. Simple cost based pricing used in the BCT charge system is not how markets work and does not establish or promote competition.

Data underpinning the BCT charge system is obtained from management plans developed by assessors. These plans, and their associated costs, are untested and unlikely to provide robust and reliable data to support management decisions as circumstances change and in perpetuity. There is no contingency budget and no clear responsibility for outcomes if funding proves to be inadequate.

By definition, biodiversity conservation recognises the complex interrelationships between all species that exist within an ecosystem, and all ecosystems involve multiple species that rely on each other directly or indirectly. The credit market separates ecosystems into components that are sold individually, allowing traders to 'cherry pick' specific credits potentially leaving landholders bearing the cost of credits that may never sell.

BCT and DPIE have received substantial government funds which are used in the market. Purchase and acquittal of obligations at a loss by government agencies is a subsidy to developers, acquittal above the purchase price undermines the supplier.

BCT instruments and practices do not serve the interests of all parties equally. BCT activity distorts the market by effectively setting the maximum price for credits. Trading Groups offer buyers cheaper options, while the tender process actively pushes credit prices down. The spot price model is not supported with adequate data and does not reflect an open and competitive market.

In receiving income from developers BCT appears to operate in the interests of those developers and may not seek a fair price.

Although the calculator is no longer on public view it remains in use under the legislation, however, the assumptions underlying the calculator and BCTs approach to pricing have never been published.

BCT does not publish the prices they pay for credits under their tender processes even though they require landholder trades to be reported and published.

b. addressing the interests of existing and potential biodiversity market participants, and supporting fair trading

A list of inequities between participants:

Landholders carry most, if not all, of the risks associated with BSAs. They provide the land, pay consultants to assess its conservation value, support the administrative costs of the BCT, raise the funds necessary to underwrite a long term management plan and then implement that plan.

Landholders also carry the cost of unsold or low demand credits, including consultant costs, CGT and loss of productive land.

Landholders are subject to ATO requirements, DPIE and BCT have not clarified their status with regard to these requirements.

A landholder association or forum would generate interaction between landholders and with the department, provide a mechanism to resolve issues and reinstate respect and trust between parties.

Brokers and assessors receive information directly from the BCT which is not available to landholders. Recent research (*The Conversation*, link below) identifies two classes of landholder: those with access to information and others who are excluded, an information divide perpetuated by BCT. Information barriers create unequal opportunities across landholders.

Landholders disadvantaged through lack of information about credit buyers, actual sale prices, offset trading groups and other technical information are obliged to employ brokers to navigate the complexities of the scheme, adding to their cost burden.

Assessors are in a position to influence the scheme even though

- They are not an unbiased group of bystanders only interested in the science. Their business model requires ongoing contracts and their interests differ from those of the landholder or credit owner
- Accreditation is not a guarantee of knowledge and skills across all types of biodiversity
- Assessors are accredited for their expertise as ecologists and not market experts

- Accreditation is not an endorsement of expertise in econometrics, strategic planning, broking, taxation or business advice
- Assessors may have conflicts of interest by representing more than one client, or as credit owners themselves

c. identifying opportunities to improve market efficiency and address market failure

Although government involvement is justified in cases of market failure, BCT and DPIE processes perpetuate government involvement and there is no evidence that these agencies intend to leave the market. Transparency and market efficiency will be improved when buyers and sellers can meet directly through an online trading platform.

The obvious long term approach to the scheme is to set up an open and transparent, real time online marketplace for trading biodiversity credits and leave all trading activity to the market.

Relevant considerations

In undertaking this task, IPART is to have regard to:

1. The purpose and structure of the Scheme

The Issues Paper notes that the scheme's purpose is not explicitly stated in the Act. It is difficult to assess the scheme's structure or performance in the absence of this information.

2. The roles and responsibilities of the Department of Planning and Environment, the BCT, local government authorities and other participants

BCT and DPIE have competing and conflicting responsibilities. They oversee conservation management activity while sourcing income from developers, they may be tasked to source credits that can never be created, they hold an exclusive position with market information and distort the market by setting credit prices.

These agencies are also responsible for the success of the scheme. They could execute substandard agreements to meet outstanding credit obligations or seek lower prices to ensure its success.

BCT and DPIE duplicate each other's work, for example by issuing competing RFTs

The delineation of responsibilities between DPIE and BCT is confusing for participants. Requests can be transferred from DPIE to BCT and back again, and some functions and services lack a clear 'home'. Further complications arise when responsibilities are delegated to regional offices, raising concerns that policy is not applied evenly across NSW.

3. The incentives and impacts of the Scheme on existing and potential market participants, including developers, landholders and Biodiversity Stewardship Agreement holders, accredited assessors, local government authorities and other interested parties

Some issues for consideration are:

The scheme lacks protocols for ensuring adequate management actions and enforceable standards.

There is no 'cop on the beat'. BCT oversees site management but refers non-compliance to DPIE.

Conservation and biodiversity receive less attention than economic drivers.

The scheme is unstable and frequently subjected to changes.

4. The impact of government interventions, including the Biodiversity Credits Supply Fund and the BCF

In a free market the role of government is to manage the settings and focus on removing barriers to participation. By contrast, the NSW government has established a market based scheme for protecting biodiversity managed by an agency that manipulates and distorts the market.

Participation in tenders places a heavy compliance burden on landholders, compounded when both BCT and DPIE issue RFTs concurrently or when BCT unilaterally changes its requirements at short notice and without reason.

Management of tenders serves the interests of developers by squeezing credit holders down on price.

5. Whether there are gaps in data collected or reported on by participants in the market or the timing of making that data available that could help track performance of the market

Scheme participants outside the government flow of information cannot address this question since they are not fully apprised of the data and reports that have been collected. A case in point is a report by consultant Dr Karel Nolles. Its release was withheld despite numerous requests and only obtained after an approach through freedom of information channels. The report is attached.

There is considerable evidence that government processes are not transparent, data are not reported and the time lag between price negotiations and acquittal can be several years.

By calling for expressions of interest BCT gains exclusive information about the size and depth of the market, undermining the negotiating position of vendors

6. Recent reviews of the Scheme including the parliamentary inquiry into the integrity of the Biodiversity Offsets Scheme and Audit Office report on the effectiveness of the Biodiversity Offsets Scheme

Reports prepared by the Audit Office and parliamentary inquiry identify many significant issues arising from the scheme which have yet to be acted upon.

The number of reviews undertaken on a relatively recent scheme indicate that the scheme was not well conceived and suggests that government mechanisms for administering the scheme are confusing, flawed experiments that require constant revision. Requests for community input to reviews duplicates previous efforts and adds an unnecessary burden to participation in the scheme, exacerbated by the lack of action arising from earlier reviews.

The media has also played a role in highlighting problems with the integrity and effectiveness of the scheme and their work is relevant to this project.

A plethora of other reports and assessments are available that would assist IPART in its work. These are listed at appendix A.

7. Any other matter that IPART considers relevant

Further attention could be paid to actual and potential conflicts of interest.

Appendix A

Patrick O'Connor Landholder Interviews

<https://www.bct.nsw.gov.au/sites/default/files/2022-03/Landholder%20interview%20report%20%28O%27Connor%202021%29%20-%20BCF%20Charge%20System%20Consultation.pdf>

Dr Karel Nolles *Removing the BOPC from public view: Assessing the intended and unintended consequences* NSW Biodiversity Offsets Scheme 1 October 2020, attached.

[Strengthening the Biodiversity Offsets Scheme: A new approach to developer charges \(nsw.gov.au\)](#)

[Biodiversity Offset Payment Calculator Technical Review \[Extract\] \(nsw.gov.au\)](#)

[We asked landholders how they feel about biodiversity offsets — and the NSW government has a lot to learn \(theconversation.com\)](#)

[Environment officials questioned use of land government already owned as offset for western Sydney airport | Environment | The Guardian](#)

[‘Too many loopholes’: NSW inquiry to scrutinise use of environmental offsets | Sydney | The Guardian](#)

[Coalition must ‘urgently explain’ more than \\$30m it paid for western Sydney airport offsets, federal Labor says | Sydney | The Guardian](#)

[‘We need to change the scheme’: calls for multiple investigations into \\$40m gain from NSW environmental offsets | Sydney | The Guardian](#)