

Biodiversity Market Monitoring Review
Independent Pricing and Regulatory Tribunal
PO Box K35
HAYMARKET POST SHOP SYDNEY NSW 1240

Our Ref: AD23/0101

Dear Chair and Tribunal members,

**NSW ICAC submission to the Independent Pricing and Regulatory Tribunal NSW:
*Monitoring the Biodiversity Credits Market in NSW: Issues Paper (July 2023)***

The Commission is providing this submission to the Independent Pricing and Regulatory Tribunal's (IPART) monitoring review of the biodiversity credits market to reduce the risk of corrupt conduct occurring and to promote the integrity and good repute of public administration. The Commission acknowledges it is not a participant with practical experience in the biodiversity offset market.

The Commission has no evidence to suggest corruption has occurred in the biodiversity offset market. Nonetheless, it considers that there are corruption risks associated with the operation of the Scheme based on complaints received and the issues discussed in the NSW Auditor General's report titled *Effectiveness of the Biodiversity Offsets Scheme* (August 2022) and the Legislative Council Portfolio Committee No. 7 - Environment and Planning's report titled *Integrity of the NSW Biodiversity Offsets Scheme* (November 2022).

Government intervention powers in the biodiversity offset market

The current market arrangements provide several opportunities for high-level intervention. These opportunities can distort the market and potentially undermine confidence that the purpose of the Scheme is being adhered to. Particular examples of discretionary decision making within the market include:

- the exercise of Ministerial discretion in determining offset credits for major projects and the extent of any discounting of credits
- the ability to reduce credit obligations at a local government level with the concurrence of the Department of Planning and Environment (DPE)
- proponent applications to vary like-for-like offsetting under the 'variation rules' and 'ancillary rules'.

Commission investigations, particularly those involving planning decisions, have found public officials with discretion to vary stated requirements are at risk of corrupt approaches. For instances, this may arise from credit buyers or their representatives engaging in improper lobbying practices, resulting in proponents receiving undue concessions. Achieving favourable outcomes via lobbying is incompatible with a properly functioning market.

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Additionally, the Auditor General has identified a lack of transparency and access to information in the biodiversity offset market. For example, the Commission understands there is a lack of publicly available information regarding the decisions to discount offsets for major projects and the reasons for such decisions, which may serve to conceal corrupt practices by public officials. More generally, poor transparency coupled with the discretion outlined above, has the potential to generate perceptions that NSW government intervention in the biodiversity offset market is improperly influenced.

An analogy can be drawn between intervention opportunities in the biodiversity offset market to vary or reduce offset obligations and the ability to vary development standards in the planning system. The Commission observed in the *Investigation into the conduct of councillors of the former Canterbury City Council and others* (March 2021) that planning decisions should only be made against publicly stated criteria that are clear, robust and verifiable.

Enforcement and compliance in the biodiversity offset market

All regulated markets require effective underpinnings. For the biodiversity offset market an effective compliance and enforcement regime is necessary to achieve the objectives of the *Biodiversity Conservation Act 2016* and to ensure confidence that offset obligations are enforced.

In this respect, it is important that there is transparency surrounding the Scheme's arrangements and accuracy of information. As noted above, the Commission understands that the public accessibility and searchability of information is poor. For example, the delivery of offsets and the linking of offsets to developments needs improvement.

Moreover, the DPE and the Biodiversity Conservation Trust (BCT) have numerous roles under the Scheme. The BCT is a market participant while also being responsible for ensuring credit sellers meet their obligations. At the same time, the BCT acts as a market intermediary by taking on biodiversity offset obligations from credit buyers. Similarly, the DPE acts as a market facilitator while also accrediting and overseeing private assessors who apply the biodiversity assessment method (BAM). In the Commission's experience, agencies experience difficulties, such as regulatory capture, when they have dual roles of facilitation and regulation and/or governance responsibilities.

The Commission's *Investigations into complaints of corruption in the management of Water in NSW and systematic non-compliance with the Water Management Act 2000* (operations Avon and Mezzo) highlighted problems with dual facilitation and regulation roles which led to regulatory failure and, through media reports, gave rise to public perceptions of corrupt conduct. Although the Commission did not make corrupt conduct findings in this investigation, it did find that there was a detrimental effect on the public's confidence in the management of NSW's water sources and the integrity and good reputation of public administration in the water market. Specifically, the Commission observed that the NSW Government:

- took less enforcement action when benchmarked against other jurisdictions within the Murray Darling Basing Authority Area
- lacked an effective compliance and enforcement regime for almost two decades with the effect that, even when detected, serious breaches of law went unpunished.

Following the operation Avon/Mezzo report, improvements were made to the relevant regulatory structure and procedures and the revamped Natural Resources Access Regulator may be worth consideration.

IPART may wish to consider the need for restructuring the roles of the BCT and DPE in overseeing the scheme or possibly establishing a dedicated or more independent regulator. Consistent with the Commission's findings in operations Avon/Mezzo, the reasons to support robust, independent regulation for the biodiversity offset market include:

- the complexity of the biodiversity offset market
- the challenges associated with monitoring and enforcing compliance within market rules
- the need for timely prosecutions within statutory time limits, especially where offences are difficult to investigate and prove.

Governance of accredited assessors

Accredited assessors have a central role in the biodiversity offset market through quantifying the number and type of credits needed to offset a development, and the number and type of credits that may be created on a stewardship site. As this role may be undertaken by private entities, competing obligations may arise between the commercial need to secure future work and the requirement to conduct an objective expert assessment.

There is no available information regarding:

- how often each accredited assessor has been used by the same developer to determine biodiversity offsets
- the frequency of both complaints to the DPE and investigations commenced by the DPE into accredited assessors.

This information may be of value in assessing whether fair trading has occurred and considering the relationships between accredited assessors and proponents.

In the course of their work accredited assessors might acquire information about aspects of the scheme (such as the supply of particular credits) that is not available to scheme participants or members of the public. It is important to ensure that assessors cannot personally benefit from having acquired 'inside' information.

There is also a risk that accredited assessors may be involved in assessing land belonging to close associates and family members, giving rise to a conflict of interest and partial conduct. The Commission is also aware that there is no current impediment to an accredited assessor participating in the Scheme as a landowner.

While the *Accredited BAM Assessor Code of Conduct* (the Code) advises accredited assessors they "Must not act in circumstances where there is actual, perceived or potential conflict of interest", no further information on the topic of conflicts of interest is contained within the document. The Code is also silent on the issue of competing commercial obligations and misuse of information. The integrity of the Scheme would be supported by more robust requirements in these areas. I understand DPE has previously considered introducing Guidelines for assessors under the Code to assist in clarifying requirements and supporting compliance.

Copies of the investigation reports referred to in this submission are available from the Commission's website (www.icac.nsw.gov.au). If there is any further information you require, please contact me at [REDACTED] or Antony Pedroza, Senior Corruption Prevention Officer (Planning) at [REDACTED]

Yours sincerely



Lewis Rangott
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4 August 2023

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