



NSW Minerals Council Submission - IPART Review of the Biodiversity Market 2023-24

1. Introduction

The NSW Minerals Council (NSWMC) represents the State's mining, exploration, mineral processing and mining services industries. The industry has a long history of providing biodiversity offsets for the impacts of projects in NSW, as well as rehabilitating former mine sites to a final conservation land use.

Our members were some of the earliest participants in the BioBanking Scheme. The industry owns and manages biodiversity offset sites throughout the NSW. NSWMC collects annual statistics for land use as part of the Upper Hunter Mining Dialogue. In 2024 approximately 45,000 hectares of offset land was owned and managed by our members in the Hunter Valley alone.¹

The NSW Minerals Council and our members have been active and constructive participants in the conversations around offsets for over two decades. During this time there has been considerable change in the regulation of offsets. Even the current BOS has evolved considerably from the intention when it became operational in 2017. The background section below seeks to capture the evolution of offsets and the involvement of our members in this process.

IPART's consistent view is that the availability of the Biodiversity Conservation Fund (BCF) is the key barrier to a mature private market. IPART's view that the BCF developer charge sets a price signal which undervalues credits, and sets a ceiling for credit prices that prices out private sellers, is not supported by the fact that the market has matured in regions where there is a high level of developer activity, landholders have greater confidence and are supported by third parties to broker a price for credits under the developer charge.

The biodiversity market in NSW is one created by regulation. From the outset there is a high level of government intervention. It cannot be assessed on simple supply and demand dynamics. Required to be applied but not strictly complied with.

¹ Upper Hunter Mining Dialogue, Rehabilitation Principles and Commitments Reporting 2024, <https://miningdialogue.com.au/project/2024>

Summary

- The biodiversity market in NSW is a market produced by regulation. Developers participating in the market do not have alternatives to the acquisition of biodiversity credits. Government intervention is required to promote supply of credits at a price which is reasonable for landholders but will not deter the development required to fulfil the Government's plans for social and economic progress of the state including housing, industrial and mineral development, the energy transition and other infrastructure.
- The developer charge model which provides for payment to the Biodiversity Credit Fund (BCF) produces prices for credits which are very high compared with the price of developing a credit.
- In areas where there is clear demand being driven by multiple major projects, there is a functioning market, and credits are being acquired by NSWMC members at significant discount to the developer charge.
- Outside of the Hunter Valley, to secure the type and number of credits required, mining companies are still largely producing their own credits at a significant discount to the developer charge.
- Price is not the most significant barrier to private landholders participating in the market. A lack of confidence in demand for credits, the impacts of capital gains tax (CGT) and uncertainty about how to set prices are much more significant barriers.
- To encourage developer owned offsets the Government would need to provide incentives including:
 - Providing for alternative financial assurance and the deferment of the Total Fund Deposit (TFD).
 - Increasing the discount rate for the TFD.
 - With the Australian Government, addressing the CGT treatment of conservation agreements, including how credits are valued, or exempting agreements from CGT.
- It is not clear what impact Government intervention through Strategic Offset Delivery Agreements (SODAs) will have on the market, but it is likely to impact price and supply of credits for developers in a region that do not have access to the SODA.
- IPART's 12-month review process is too short to provide meaningful insights into the development of the biodiversity market. A longer period of assessment and process which provides for a deeper analysis of stakeholder concerns is appropriate. This would include properly investigating concerns about pricing (and verifying concerns with relevant agencies).

2. Background to the development of the biodiversity market

Prior to 2014, offsets were largely provided by securing land and management actions through Voluntary Conservation Agreements. Mine site rehabilitation to ecological rehabilitation was included as part of the overall package, and frequently there was a small component of indirect offset provided through funding of programs for impacted entities. The development consent provided for the package of offsets and the subsequent Offsets Management Plan steered the implementation of the package. Financial assurance for mine owned offsets was provided through a conservation bond required by the development consent. Commitments to achieve biodiversity gains through mine site rehabilitation was covered by the rehabilitation security.

In 2014 the Government introduced the NSW Biodiversity Offsets Policy for Major Projects (the Policy), and accompanying methodology, the Framework for Biodiversity Assessment (the FBA). Application of the Policy and the FBA was mandated for major projects. The FBA was adapted from the BioBanking Assessment Methodology (BBAM) and was a forerunner to the Biodiversity Assessment Method (BAM). The FBA applied only to impact sites. Offset sites were assessed under the BBAM. The Policy required offset sites to be secured using a BioBanking Agreement. Although the Government initially sought to make this retrospective, it was eventually agreed that it would only apply where the BBAM had been used to assess the offset site.

In 2017 the Biodiversity Conservation Act 2016 became operational. The Biodiversity Offset Scheme (BOS) commenced providing that biodiversity credit obligations could be met in any of the following ways:

1. Through retirement of biodiversity credits. Importantly there was never any distinction made about how these credits were obtained. There is no consideration in the BOS in relation to project proponents developing, owning and managing their own credits. NSWMC made numerous approaches to the Government to seek changes to the timing of the payment of the Total Fund Deposit for developer owned offsets that would encourage this practice to continue, without success.
2. By payment to the BCF. At the time the BCF was set up, it was proposed to remove the burden of obtaining credits from individual developers, and to provide an advantage for strategic conservation through consolidating credits in a central fund. The BCF had the benefit of scale, a five-year period to obtain the credits and access to variation rules that allowed the fund to make decisions outside the narrow rules of the Biodiversity Offset Scheme (BOS). The BCF has narrowed in focus to become a premium option, where prices are deliberately set high. Further there are proposals to limit circumstances where a payment can be made to the BCF being considered. The timeframe for the Biodiversity Conservation Trust to meet the obligation has been reduced to three years, meaning that the variation rules will need to be used more frequently and there will be less opportunities to aggregate hard to find credits and encourage the development of private offsets to meet those requirements.
3. Through mine site rehabilitation in accordance with the ancillary rules. The rules were never finalised and the Government intends to remove this avenue to create highly discounted credits through proposed amendments to the Biodiversity Conservation Regulation 2017. This is a clear disincentive to reach the very high levels of recognisability required for ecological rehabilitation to meet an offset standard.
4. Through the funding of biodiversity conservation actions in accordance with the ancillary rules. These are now limited and are the same cost as a payment to the BCF.

Since 2016, the means of meeting a credit obligation has significantly narrowed. The upfront capitalisation of management costs, the proposed removal of credit for mine site ecological rehabilitation and the neutralisation of indirect offsets have reduced the ways in which offsets can be provided by mining operations. Proposals to limit payment to the BCF will further curtail options. Outside some regional areas, the private biodiversity market has not matured to meet the demands of development.

3. IPART Review

Time period for meaningful analysis

The twelve-month review period does not allow for meaningful analysis of the development of the market. Decisions to create and purchase credits are driven by commercial and other factors which are likely to distort analysis of the market over a short period of time.

The IPART discussion paper proposes that the data from 2023-24 supports less valuable stewardship sites being approved, that an increase in hectares of approved stewardship sites has corresponded to a decrease in credits.

*“This occurred despite 18% more hectares of land being conserved through stewardship sites this year compared to last, indicating that while individual sites are larger this year compared to last, they are in potentially **less ecologically dense areas of NSW**, therefore generating fewer credits per hectare.”*

This sentence includes a misunderstanding of the way that credits are generated at stewardship sites. There is no concept of being ‘ecologically dense’ in the NSW system, but we assume this means sites with high biodiversity values. Sites with high biodiversity value and therefore limited room for gain will generate less credits than those with good potential for improvement of biodiversity values through management. Sites are improved through the offsetting, not simply preserved.

Concerns about information gathering and analysis

The review process which has been followed by IPART involves gathering primary information through stakeholder workshops. This consultation process is important to understand issues. However, experiences shared through the workshops should be subject to further analysis, including seeking feedback from DCCEEW on the veracity of claims. For instance, see comments about price below.

In addition, this process of public consultation with large groups of stakeholders around commercial issues is unlikely to encourage participation. Confidential surveys/interviews of participants in the market would provide better data which could be tested for veracity with DCCEEW and the BCT.

Recommendations

- The annual review period be reconsidered.
- The stakeholder workshop process should provide some guidance to IPART on issues that need to be considered and should guide more detailed consultation and analysis.

4. NSWMC member experiences in the market in 2023-24

Summary of NSWMC members experiences in 2022-23

NSWMC made a submission to IPART's 2022-23 review process. As part of that submission process, we interviewed members who were sourcing offsets in the period to understand what their experiences were and how they were obtaining the credits required for projects.

In summary we found that the private market for biodiversity credits was on two tracks. In the Hunter Valley, members were able to source credits on the market for a price that was less than the BCF price. The price was at a rate which was acceptable to those members, compared to developing the credits internally (i.e. not necessarily lower, but at an acceptable premium considering the advantages of a one-off transaction, compared with ongoing management of offsets over decades). The presence of other large projects in the region, which has attracted third parties to broker BSAs, appeared to be leading to market maturity in this region. The high cost of land in the Hunter Valley and the capitalisation of management costs through the payment of the TFD at the start of an operation has made development and ongoing management of offsets in the region less attractive to mine operators.

The other area where members were actively securing credits in that period, was the North West. In that region the evidence indicated that the market had not matured. Credits were either:

- Not available on the private market in the numbers and types required.
- Available but at a considerable premium to the BCF developer charge, and the costs of developing the offsets.
- The cost of developing and managing an offset remained considerably lower than the price of paying for credits through the fund, even when accounting for a premium for risk and convenience.

Mining operations seeking credits in a one-year period across a small number of regions in NSW provided some indication of how the private market was maturing. NSWMC suggested significant work IPART needed to investigate the two-speed nature of the biodiversity market before making recommendations for intervention.

NSWMC member experiences in 2023-24

NSWMC recently gathered information from our members about experiences in the market in the 2023-24 period. There were limited experiences in that period, reflecting the fact that a twelve-month review period does not provide useful insights into the market.

Experiences that our members report over the last two years are highly dependent on the region in which they are operating in:

- In the Hunter Valley members advise that they have been able to buy the bulk of credits required on the market, at a significant discount to the developer charge price. These credits have been largely sourced via third party brokers.
- In the New England North West, members continue to create most credits required on mine owned offsets, with smaller numbers of credits sourced on market, again at a discount to the developer charge price.
- In the Orana region of NSW, there is a very limited market for credits. Prices through the BCF are very high in comparison to the price of land. Members have continued to create their own credits, but the capital gains tax issues noted below are concerning especially for critical minerals projects going forward which do not have the levels of return associated with more traditional forms of mining for NSW, including coal mining.

5. Barriers to market participation

IPART's review of the biodiversity market has concentrated on the role of the BCF in relation to price as a major impediment to the development of the credit market. Our view is that the biodiversity market is created by regulation and requires intervention from Government to be functional and address inequity between suppliers and developers.

Credit prices

IPART has consistently stated that the barrier to private market development is the ceiling created by the BCF developer charge. Key findings of the 2022-23 report included:

- The Biodiversity Conservation Fund pay-in charge is too low, and it continues to prevent market clearing.
- The ability of prices to freely adjust is essential for the long-term sustainability of the credits market. There is evidence that credit prices are being prevented from rising to a level that reflects the inherent costs and risks of supplying credits.

IPART Report 2022-23 stated that:

*"The convenience and relative affordability of the Fund payment option has seen high demand from development proponents, with many using the Fund as a preference to generating their own credits or purchasing credits directly in the market."*²

In markets with maturity, the experience of our members is that credits are generally priced below the developer charge for the credit.

*"Many stakeholders agree with our finding in last year's report that the Biodiversity Conservation Fund pay-in option sets a price ceiling and disincentivises proponents from purchasing credits directly in the market"*³

Those quoted stakeholders are landholders participating in the IPART workshops, the EIANZ (consultants) and the EDO. These are the anecdotal views of parties with an interest in higher prices for credits. The view of our members is that credit prices produced by the charge are considerably more than the costs of developing a credit. Our members also advise that where the market has some maturity and sellers have a high level of confidence, they are able to buy credits on the market below the value of the developer charge.

The 2022-23 report analysis that finds prices are too low, based on the incapacity of the market to clear all credits required. This is too simplistic an analysis of a complex market. Offset site developers should be able to recoup management costs and make an acceptable level of profit. The developer charge model has been designed to provide for those outcomes and should provide an acceptable price signal. It is not in the public interest for a regulatory scheme to impose unreasonable prices on development, which will be passed to consumers, prevent development and make NSW commodities uncompetitive.

Retirement of credits is a mandatory requirement for many types of development. This regulatory intervention at the outset means that there will be an inequity between sellers and buyers. If there is no further government intervention to provide alternatives to purchase on the market, then that inequity will favour sellers for credits. The impact will be to:

- Prevent development from proceeding altogether.
- Increase the costs of development, including development of housing, energy and infrastructure.

² IPART 2022-23 Report, page 42

³ IPART 2022-23 Report, page 42

- Increase the costs for public projects including infrastructure and generation projects to support the energy transition. These costs imposed by Government regulation, will be passed onto consumers across NSW.

The developer charge cost structure tool is highly conservative and in addition it layers on margins that provide a further buffer on the actual costs of developing a credit. Consideration of the comments from last year's stakeholder workshops indicate that the developer charge model is not well understood. For instance, there were comments indicating that the opportunity costs of the land are not included. However those costs are included in the land value, which also attracts a further margin through the costs model.

While the 2022-23 report notes anecdotal evidence through stakeholder workshops of sellers who state that they are unable to receive their costs at the developer charge prices, it is difficult to see how this issue can arise. Further analysis of that particular case would be necessary to understand whether the costs proposed by the landholder are acceptable. For instance, there is no incentive for landholders to ensure that TFDs represent the most efficient costs for management of the land. NSWMC members that own BSAs have found that there is little consistency between costs across the State for land management, in many instances costs for management options such as fencing are higher and are imposed more frequently than actually required.

When the Biodiversity Offsets Payment Calculator (BOPC) was abandoned the Government's view was that removing the BOPC calculator from the public would reduce reliance on the BCF price as a means to estimate prices for private landholders. Further the delay in publishing developer charges was meant to dissuade use of this information by sellers. Despite these measures sellers continue to look at the charge for a price signal. The make-up of the charge is complex and the public documents that explain it are difficult to understand. It would be useful to provide plain English explanations of how the prices are reached to assist sellers to understand what the price includes and whether it provides an appropriate guide to pricing their credits.

The 2022-23 report considers price in isolation from the other barriers to the development of the private market.

Confidence

IPART should investigate the lack of certainty and confidence for landholders that the credits created will match demand. The long timeframe between initiating an assessment and the eventual agreement and purchase of credits means that without a commitment to purchase credits there is a significant risk that the credits will not be required when the demand arises. Landholders without an agreement to purchase have no guarantee that the credits they create will be purchased.

Capital gains tax treatment

NSW Department of Climate Change, Energy, the Environment and Water (DCCEEW), has been seeking a class ruling(s) in relation to the capital gains tax treatment for Biodiversity Stewardship Agreements (BSAs) for over two years. NSWMC is not privy to the questions that DCCEEW has put to the ATO for clarification.

Establishment of a BSA and the subsequent retirement of credits lead to two CGT tax events:

- CGT Event D4: Establishing a BSA. The ATO considers BSAs to be conservation covenants, triggering CGT event D4 upon signing. This can result in a capital gain or loss, calculated based on capital proceeds (market value of credits at the time), the land's cost base, and its market value after the BSA. A formula is used to determine the portion of the cost base allocated to the covenant, which then reduces the land's cost base.
- CGT Event C2: Retiring Biodiversity Credits retiring biodiversity credits is a CGT event C2, as the ownership of the intangible CGT asset (the credits) ends. Even without monetary proceeds, market value substitution rules apply, meaning the taxpayer is deemed to have received the

market value of the credits. The cost base of the credits includes the value of rights given up (equivalent to the capital proceeds from the D4 event) and incidental costs like the TFD.

The possibility of a capital gain arising and leading to a tax liability prior to the sale of a credit is a significant disincentive for landholders. In addition, there is a lack of understanding generally around the CGT treatment of BSA's among tax advisors. This is the case even among tax advisors to the mining industry. CGT and developer owned offsets are discussed below.

Timeframes for assessment of BSAs

Credits are required to be retired prior to the commencement of development. In most cases there is a short time frame between the approval of the development and commencement. Time frames for assessment on stewardship sites have reduced but are still significant. The pressure to commence a development, included contractual commitments, can still drive developers to pay into the BCF, even where it is a more expensive option.

Recommendations:

- IPART should:
 - Undertake a quantitative assessment of whether landholder and other stakeholders concerns that the BCF charge is setting an inappropriately low-price signal are correct.
 - Assess why the market is maturing in some regions and whether this two-speed private market is likely to persist and require the BCF to continue to operate widely to allow development across the state to proceed.
 - Consider all the other barriers, including lack of confidence and certainty that credits will be sold, delays in the assessment and approval of BSAs, a lack of ATO guidance and tax advisor understanding about CGT treatment of BSAs.
- DCCEEW should:
 - Continue to pursue greater clarity from the ATO on tax treatment of BSA's for landholders.
 - Commission an independent review of the developer charge tool.
 - Provide better public information on how the developer charge is calculated to allow those using the charge as a price signal to understand the price produced in relation to their own credits.

6. Developer owned offsets

At the recent IPART buyer's consultation workshop, interest was expressed in increasing the participation of developers in the creation of offsets. While some representatives of large proponents indicated an interest in creating credits, this is unlikely to be a solution for most developers.

The development of the Biodiversity Offset Scheme has never sought to actively encourage or recognise developer owned offsets. While there are actions that could be taken to incentivise these offsets, this has never been a priority of the Government.

The NSW mining industry has largely continued to develop and manage its own offsets. It continues to do so because in most areas the costs of creating a credit are still significantly less than buying credits on the market or paying into the BCF. In the Hunter Valley, some members have recently been able to source credits on the market for less than the BCF pay-in price and at an acceptable premium to the price of creating the credits in house.

However, the mining industry has distinct advantages that other developers do not have, including:

- Mining operations own and manage large areas of land.
- Mining operations have land restoration expertise as part of their core business through the requirement to undertake mine site rehabilitation.
- Mining sites operate for decades after a development approval is granted. Many other forms of development do not have an ongoing operation.

While there is a social licence incentive for developers to manage offsets, currently this is outweighed by the disadvantages and risks of managing offsets in perpetuity:

- The discount rate for the TFD is low and does not reflect a commercial discount rate. Capitalisation of these costs is an inefficient use of capital where other forms of financial assurance could be applied.
- BSAs are at risk of a 'payment holiday' where owners will be required to undertake management actions without any payment.
- Land management is not the core business of most developers, imposing additional risk and costs.
- Legacy issues. At the end of the life of the development offsets need to be managed in perpetuity. This is potentially a significant risk for both NSW and the developer/offset owner.

Capitalisation of management costs

A key disincentive to developer owned offsets is the capitalisation of the management costs of the offset at the time the credits are retired through payment of the TFD. Those funds are then paid back to the developer/offset owner annually to manage the site. While payment of the TFD to a fund is necessary where developers and offset owners are at arm's length, it creates a significant and unnecessary burden for developer-offset owners at the outset of a project, without the benefits of a onetime payment to a private seller or to the BCF.

The NSW Government provides for other forms of financial assurance, including the mining rehabilitation security scheme, through the Protection of the Environment Operations Act 1997 and for infrastructure projects. Treasury Circular 14/01 provides for NSW Government agencies to accept financial assurance from financial institutions.

NSWMC has proposed to the Government on numerous occasions a process to defer the payment of the TFD for developer-owned offsets. Management costs would then be met directly by the developer-

offset owners annually as an operational cost. A bond would provide financial assurance for the offset and the TFD recalculated when the offset is transferred to a third party.

CGT treatment

Developers who own stewardship sites are subject to the same capital gains tax treatment as arm's length sellers of credits. Because there is no sale price for the credits, a valuation is required. The benefits of reducing costs of creating credits internally by developers are eroded by the calculation of CGT in the basis of a valuation of the credit. In many cases there will be no market for the credit, the only indication of value being the developer charge price which is many multiples of the cost of producing the credits. Payment of the CGT prior to any revenues of the project being earned is significant disincentive, particularly for new developments, including new critical mineral developments.

Recommendations:

- IPART should consider how to incentivise developers to own and manage offsets throughout the life of the operation of the development, including the deferral of the TFD with appropriate financial assurance in place.
- The NSW Government should approach the Commonwealth government to consider how taxation treatment of conservation agreements could be changed to incentivise investment in nature.

7. Other issues

Unknown impact of Strategic Offset Delivery Agreements

In 2025 the Government amended the Biodiversity Conservation Regulation 2017 to introduce Strategic Offset Delivery Agreements (SODAs).

These agreements are only available to the renewable energy industry, applying to:

- A priority transmission infrastructure project or renewable energy zone network infrastructure project within the meaning of the Electricity Infrastructure Investment Act 2020.
- A renewable energy generation, storage, network or related infrastructure project within a renewable energy zone.
- Infrastructure to which a long-term energy service agreement applies.

Under a SODA the proponent contracts with the NSW Government to deliver the offsets in accordance with a regional conservation strategy. There are no published guidelines on how the cost of the agreement is calculated.

It is not clear what impact the SODAs will have on the credit market, including the pricing of credits and availability of credits in the regions where they are entered into. It is likely that these agreements will have an impact price on credit supply for those developers outside of the SODA process in the region. Concerns include:

- The lack of disclosure of the price of SODAs. The price to enter must be lower than the price to offset via the BCF, or there is no incentive to enter the agreement. There is no published methodology for the calculation of prices.
- The purchasing power of the NSW Government compared to individual proponents in competition for the same credits.

The SODAs appear to be a clear indication that the private market for biodiversity credits is not well equipped to provide the numbers and types of credits to facilitate development in NSW which is necessary to achieve the Government's policy objectives in relation to energy, infrastructure, housing, jobs and growth, including in mining.