

25 November 2022

Independent Pricing and Regulatory Tribunal
PO Box K35
Haymarket Post Shop NSW 1240

By email: ipart@ipart.nsw.gov.au

Monitoring the NSW Biodiversity Credits Market: Draft Terms of Reference

Dear Sir or Madam,

The Urban Development Institute of Australia (UDIA) NSW is the state's leading industry body representing the interests of the urban development sector. We have over 450 member companies across the spectrum of the industry, including developers, planners, ecologists, councils and service providers. We bring an evidence-based, solutions-focused approach to our advocacy for the creation of liveable, affordable, and connected smart cities.

UDIA appreciates this opportunity to offer our comments on the draft Terms of Reference for IPART's work to monitor and report on the operation of the biodiversity offsets credits market (the market) within the Biodiversity Offsets Scheme (the Scheme) under the Biodiversity Conservation Act 2016.

UDIA welcomes IPART's involvement to monitor the market. We recommended IPART oversight during consultation with the Department of Planning and Environment and Biodiversity Conservation Trust (BCT)¹ over the past 18 months, as new pricing methodology was developed for payments into the Biodiversity Conservation Fund (BCF). We recommended that IPART evaluate the BCT's pricing methodology to determine whether it imposes unnecessary costs and reduces housing supply and affordability. The broader market and overall Scheme are also of great concern to UDIA.

UDIA does not believe the Scheme, including the market, is functioning effectively or efficiently at this time, largely due to its complexity and lack of supply incentives. The dysfunctional market is stifling development and consequently contributing to the NSW housing shortage. Our research² shows that over 60% of housing lots in the Hunter and Central Coast, and over 40% of lots in the Illawarra, currently are constrained due to biodiversity offsetting issues.

Last year, UDIA delivered an issues paper³ on the Scheme with the ecology firm EMM, which details our concerns and makes recommendations for improvement. Some of our recommendations have since been advanced by the NSW Government.

¹ UDIA NSW [Submission on Proposed BCF Charge System Method](#) (April 2022)

² UDIA NSW [Greenfield Land Supply Pipeline Report](#) (October 2022)

³ UDIA and EMM [Issues Paper on the NSW Biodiversity Offsets Scheme](#) (September 2021)

Our current recommendations are summarised in an attachment below, which can also be found at this link: [UDIA NSW Action Plan to Improve Outcomes for Biodiversity, Housing & Jobs](#).

We are hopeful these materials will assist in IPART’s work and that IPART will be able to make recommendations to improve the Scheme and the market’s functionality.

While UDIA supports the draft Terms of Reference for IPART’s task to monitor the market, we strongly encourage IPART to incorporate the following critical considerations in this important work:

1. Consult meaningfully with UDIA (the development sector) and other industry groups to fully appreciate the blockages and challenges for development presented by the current market.
2. Determine whether the offset credit trading market is currently functioning as an effective and efficient market.
3. Identify where timely market information is lacking.
4. Ascertain whether and how it would be possible to provide the necessary information for suppliers and purchasers at the appropriate time, to enable effective and efficient market decision-making.

UDIA would like to help by sharing examples and offering recommendations for consideration. UDIA looks forward to engaging with IPART over the course of its monitoring task.

Please contact [REDACTED] to arrange any consultation.

Kind Regards,

[REDACTED]

[REDACTED]
Chief Executive
UDIA NSW

Attachment: [UDIA Action Plan to Improve Outcomes for Biodiversity, Housing & Jobs](#) (below)

UDIA NSW ACTION PLAN TO IMPROVE OUTCOMES FOR BIODIVERSITY, HOUSING & JOBS

The Urban Development Institute of Australia (UDIA) NSW is the leading industry body representing the interests of the development sector and has over 450 member companies in NSW. UDIA NSW advocates for the creation of liveable, affordable, and connected smart cities.

UDIA and our members recognise and value the importance of biodiversity conservation, both for the liveability of our urban areas today as well as to achieve inter- and intra-generational equity for Australia's current and future residents.

UDIA is increasingly concerned that the current system regulating biodiversity conservation in NSW is overly complex and undermines government's strategic goals for conservation, housing and jobs because of the uncertainty built into it. The system is becoming a major constraint to delivering the jobs and housing expected by government, particularly in key regional NSW markets.

UDIA calls for immediate and meaningful changes to ensure the biodiversity regulatory system is efficient and equitable. We are seeking system changes that will achieve these key criteria:

- Improve biodiversity outcomes;
- Reduce the complexity of the system; and
- Increase certainty to meet governments' strategic goals for housing and jobs.

UDIA NSW's Action Plan to Improve Outcomes for Biodiversity, Housing and Jobs

- 1. Support the establishment of a viable biodiversity offset credit trading market through intervention and government investment.**
- 2. Add more certainty to the system by streamlining the approaches to the avoid/minimise/offset hierarchy (the avoid principle) and Serious and Irreversible Impacts (SAII) and eliminating unnecessary complexity.**
- 3. Begin immediate planning for strategic conservation planning (bio-certification) in high-growth regional areas, such as the Hunter and Central Coast.**

UDIA's Action Plan is supported by and references an issues paper UDIA commissioned from the ecology firm EMM: [*Issues Paper on the NSW Biodiversity Offsets Scheme*](#) (September 2021).

Problems and Solutions

The weaknesses of the Biodiversity Conservation Act 2016 (BC Act) have become more apparent as it is applied to more land. In past years, many projects in the residential and employment land development pipeline were approved under the previous legislation, the Threatened Species Conservation Act 1995, and had minimal or no interaction with the BC Act. However, those older projects are being completed and development proposals for new housing or employment land are encountering significant problems as they navigate the BC Act. The NSW Government is also experiencing the challenges of the BC Act as it endeavours to forecast and manage delivery of its major infrastructure projects.

At the same time, the structure of the BC Act is undermining ecological connectivity and is producing suboptimal outcomes for biodiversity conservation. Connectivity of conservation land is needed to support species resilience. The design of the NSW biodiversity conservation system embeds disincentives to establishing Biodiversity Stewardship Agreement (BSA) sites, and its reliance on site-by-site assessment and like-for-like offsetting is leading to a lack of connectivity for conservation land around urban areas. As a result, the BC Act produces suboptimal outcomes for biodiversity conservation.

Not enough land is being conserved by BSAs under the BC Act. Low participation by private landholders in establishing BSA sites translates into an undersupply of offset credits, equating to lower conservation overall. The undersupply of BSA sites/credits also leads to severe price volatility in the dysfunctional biodiversity offset credit trading market.

The Market is Not Working and Needs Intervention

Recommendation #1: Support the establishment of a viable offset credit trading market through intervention and government investment.

The Biodiversity Offsets Scheme (BOS) under the BC Act relies on a private trading market to encourage conservation and offset biodiversity impacts from development. Private landholders may decide to offer their land to this market to sell biodiversity credits that a developer can purchase to offset their biodiversity impact from the development project. However, offering credits to the market involves a complicated and costly undertaking to negotiate a Biodiversity Stewardship Agreement (BSA) with the NSW Government.

The incentives to supply the market are not in balance and therefore the market is undersupplied and does not function well. Key failures include:

- The market is too complex.

Under the “like-for-like” trading requirement, the current scheme is highly fractured with separate markets covering 1,600 vegetation credit types and approximately 850 threatened species credit types.

***Solution:** Amend the BC Act to reduce the number of biodiversity credit types within the offset trading groups and simplify the trading rules to allow greater flexibility with how offsets are acquired. (Recommendation 5, EMM)*

- The supply side needs intervention to help establish the market.

The NSW Government has been relying on a form of credit trading for the past 13 years between the former BioBanking scheme and the current Biodiversity Offsets Scheme which uses BSAs. Over those 13 years, less than 250 private landholdings have been set aside for credit trading and approximately 70,000 ecosystem credits have been traded. Today, credit demand is growing, yet the rate of supply is slowing (page 8, EMM). The EMM paper analysed the current ecosystem credit demand across the Hunter and Central Coast regions and shows the land that is currently zoned for residential development in one LGA alone (Lake Macquarie) carries an ecosystem credit burden of over 30,000, compared to the 70,000 credits traded state-wide over the last 13 years combined.

Land zoned for other types of development (e.g., mining) or under consideration for rezoning increases this demand significantly. On historic levels, the current credit market would be unable to supply this demand for just one LGA, let alone the rest of NSW subject to the BC Act. Any species credits required (not analysed) would add further demand.

Unfortunately, the rate of credit supply is very slow because there is an imbalance in incentives that accrue against establishing BSAs. The system has inbuilt barriers. Offering credit supply to the market involves high upfront risk and complicated, lengthy and costly negotiation with government. There is also no market understanding of the potential demand within these various credit types and areas. Over 90% of credit types have had no trades at all, partly due to the dysfunction of the market. With no understanding of demand, and high barriers to entry, there is no market pull to supply.

Barriers to establish BSAs should be reduced, and incentives to enter the market should be increased.

UDIA welcomed the creation of the Credits Supply Fund and Taskforce in mid-2022 and supports their work. DPE has started work to analyse the credit demand; we stress that such work must include an analysis of land zoned for private development and should be updated on a rolling basis.

UDIA recommends Government also consider other ways to increase credit supply including:

- Offer bonus credits to establish BSAs within high-value conservation corridors. DPE has base mapping already. The corridor boundaries and any bonus credit generation levels should be clearly communicated to the sector.
- Intervene in the short term by investing in credit-generating offset land by expanding the *Biodiversity Conservation Investment Strategy 2018* to include high-growth regional areas and add credits to the offset trading market until the private market is better established.
- Offer credits from Crown land until the private market is better established.

Offset acquittal for proponents must be efficient. Under the three options available – setting up the proponent’s own BSA, finding credits on the market, or paying into the Biodiversity Conservation Fund (BCF) – the path of least resistance is to pay into the BCF, but it is expensive,

and this directly impacts housing affordability. Left on its own, the offset credit trading market is not functioning, and setting up BSAs is difficult. Proponents need the BCF alternative, and it must remain a valid and easily applied option.

Solution: These steps should be taken together to increase credit supply:

- *Remove obstacles for establishing BSAs (Recommendations 1, 2, 3, 4, EMM);*
- *Increase incentives to establish BSAs by 1) analysing and communicating the credit demand to landholders and 2) offering bonus credit generation for BSAs established in high-value conservation corridors (Recommendation 14, EMM); and*
- *Consider other government investment strategies to increase credit supply.*

More Certainty is Needed

Recommendation #2: Add more certainty to the system by streamlining the approaches to the avoid/minimise/offset hierarchy (the avoid principle) and Serious and Irreversible Impacts (SAII) and eliminating unnecessary complexity.

Government plans rely on expectations that zoned land will deliver the housing yield and/or jobs that it is zoned for. However, the design of the BC Act makes it almost impossible for the private sector to predict the impact biodiversity regulation will have on a development project. This adds time and cost, and constrains supply of housing and employment areas.

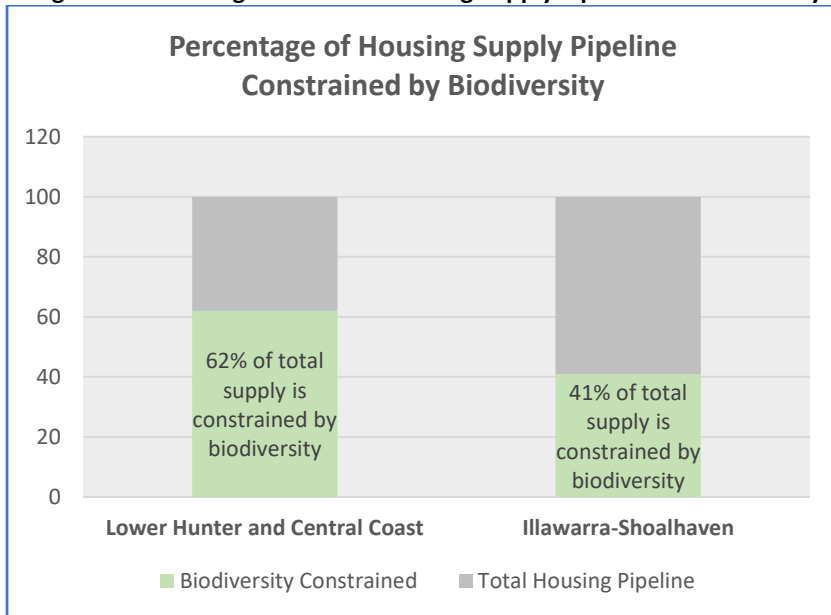
Before development can occur, land must be appropriately rezoned through a planning proposal process (which includes avoiding biodiversity impacts), and then individual development applications (DA) are assessed (which includes further avoiding of biodiversity). The risks and uncertainty built into the biodiversity conservation system can kill a development project at multiple points. The inefficiencies from the BC Act are undermining the delivery of adequate housing and jobs, especially in high-growth regional areas.

The BC Act does provide a pathway to certify land at the planning proposal (rezoning) stage, which satisfies the question of “avoidance” at rezoning. However, proponents do not often use the certification pathway due to challenges in navigating the approval process. In an example of where the BC Act and EP&A Act do not function well together, it is notable that DPE’s Planning Proposal (rezoning) Guideline does not mention certification. Instead, the certification and rezoning processes run in parallel with each other without any sensible engagement.

During development assessment, the application of the BC Act creates vast uncertainty, mostly surrounding the application of the avoid, minimise, offset hierarchy and serious and irreversible impact (SAII) clause. In UDIA’s [Greenfield Land Supply Pipeline Report](#), released in October 2022, we found that over 60% of new greenfield housing lots across the Hunter and Central Coast, and over 40% across the Illawarra-Shoalhaven, are currently held up due to biodiversity considerations.

See Figure 1.

Figure 1. Percentage of Current Housing Supply Pipeline Constrained by Biodiversity



Source: [UDIA NSW Greenfield Land Supply Pipeline Report \(2022\)](#).

If a residential development proposal makes it through the assessment stage, offsets are required on most sites. In the Hunter and Central Coast regions, EMM estimates that biodiversity costs (ecosystem credits) will add between \$9,202 and \$20,387 to the cost of each new housing lot where vegetation exists. For many sites, species credit offsets would add even more costs, but these are difficult to estimate.

Finding the credits is difficult (see commentary above on the dysfunction of the offset credit trading market), and the pricing both on the market and at the BCF has been highly volatile. UDIA welcomes the Biodiversity Conservation Trust’s (BCT) recent work to redesign the BCF’s developer charge pricing model to make it more reliable. We are grateful for the new option to obtain a BCF quote valid for 3 years (indexed), which will give proponents some much-needed certainty, at least for that offsetting option, to be able to price in the biodiversity component of their project’s feasibility. However, we are not certain the BCT have got the pricing methodology right and we will be closely monitoring its application over the next year.

Overall, the system’s problems are broad, and many changes are needed:

- The BC Act is designed for broad application and indeed, the Biodiversity Assessment Method (BAM) is triggered on most development sites. There is no predictability for how a consent authority will apply the “avoid and minimise” requirements, or whether a serious and irreversible impact (SAIL) may be found. The BC Act has added significant up-front costs to development through ecology studies, but those studies provide no real certainty. Indeed, the BAM requires an accredited assessor to prepare a Biodiversity Development Assessment Report (BDAR), but the consent authority is allowed to unilaterally override the accredited assessor’s professional judgement and reject the BDAR’s findings and recommendations.

The test of “avoiding” and then “minimising” biodiversity impacts from a development proposal is left to the interpretation of the consent authority, and interpretations vary considerably around the state and even among individuals within each consent authority. The BC Act allows for an authority to require “avoidance” at rezoning, and again at the development application (DA) stage. This ‘double bite at the cherry’ can kill the feasibility of a development proposal late in the process, and undermines the efficient use of zoned land, creating more pressure to rezone additional land to make up for the loss in expected yield. Consent authorities are also given broad latitude to decide whether a site contains a serious and irreversible impact (SAII) and if the proposal should be refused, again very late in the planning process after significant investment has been made toward the proposal. There has been little, and very poor, guidance from DPE on how to apply “avoid and minimise” and SAII. The ambiguity leaves these decisions to the subjective opinions of individual staff at the consent authority, making development even riskier and continuing to promote uncertainty for strategic planning.

These processes require urgent changes.

Solution:

- *Streamline the applications of “avoidance” and SAII to increase the efficient use of land. Limit consideration of “avoidance” to only once on a parcel of land, ideally at rezoning. Once land is zoned for development, it should be maximised for that development use and biodiversity considerations limited to offsetting. Maximising the efficient use of land for its zoned purpose is an important tool to achieve ecologically sustainable development and reduce pressure to rezone more land. (Recommendation 7, EMM).*
 - *Implement a process to provide guidance on SAII prior to the rezoning of new sites or DA lodgment for sites already zoned. Educate councils on the role of ‘Important Area’ mapping as a trigger to investigate SAII, as opposed to a mandatory refusal. These would reduce complexity and provide greater certainty during the assessment process. (Recommendations 8 and 9, EMM).*
- The biodiversity regulatory system creates unnecessary complications. Simple changes would increase efficiency in the system.

Solution: *Improve interactions with the EP&A Act and eliminate unnecessary payment constraints and duplication of effort.*

- *Work through the planning proposal process to determine ecologically sustainable development outcomes for the land under consideration;*
- *Offer time stamping of credit obligations at rezoning and allow payment at the DA stage, so that costs can be planned for and managed through the life of a project; and*
- *Increase efficiency by synchronising assessments across multiple regulatory requirements including the BC Act, Koala SEPP and Water Management Act.*

Lock in the Future for Conservation, Housing and Jobs

Recommendation #3: Begin immediate planning for strategic conservation planning (bio-certification) in high-growth regional areas such as the Hunter and Central Coast.

Although major improvements can be made to the biodiversity regulatory system in NSW, the BC Act will always present challenges and uncertainties for the efficient growth of NSW. Fundamentally, the

BC Act can be considered an obstacle to meeting the housing and jobs targets of governments' strategic plans, due to its structure relying on site-by-site assessment and like-for-like offsetting.

More certainty for ecologically sustainable development is needed and strategic conservation planning also allows for more efficient harmonisation with Federal EPBC requirements as part of the same process.

***Solution:** Invest in strategic conservation planning for high-growth regional areas such as the Hunter and Central Coast. The NSW government understands the value of taking a strategic approach to land use planning. The concept of biodiversity certification for a parcel of land has broad support across governments, conservation communities and the private sector. Bio-certification has been applied on a larger scale through strategic conservation planning in the Sydney Growth Centres, the Cumberland Plain in Western Sydney and has been investigated for the Central Coast. UDIA strongly supports those endeavours and urges the NSW government to undertake strategic conservation planning for other high-growth areas, such as the Hunter and finalise a plan for the Central Coast.*

Conclusion

The property industry is one of the largest users of the assessment and approvals pathways under biodiversity regulations in Australia. As the peak industry body representing the leading participants in urban development, UDIA NSW and our members recognise and value the importance of biodiversity conservation, both for the liveability of our urban areas today, as well as to achieve inter- and intra-generational equity for current and future generations. We support the principles of ecologically sustainable development (ESD) which endeavour to deliver the best outcomes for combined environmental, economic, and social objectives.

The NSW government has acknowledged that the current Biodiversity Offsets Scheme should be improved to bring more certainty, and UDIA has been consulting with government on the proposed changes. Whilst we are hopeful some improvements can be found, there are many challenges in the overall biodiversity system that must also be addressed to increase private land conservation and its connectivity, and to increase certainty to deliver new jobs and housing supply.

UDIA welcomes discussion and engagement with all levels of government, landholders, and the conservation community to find solutions that deliver positive environmental, economic, and social objectives and outcomes, including jobs and housing supply in NSW.

