

Submission 15th September 2023 – Lynda Newnam [REDACTED]

IPART: Monitoring the Biodiversity Credits Market in NSW

<https://www.ipart.nsw.gov.au/Home/Industries/Other/Reviews/Monitoring-the-NSW-Biodiversity-Credits-Markets>

Thank you very much for allowing me to comment.

I attended the IPART Public Hearing on 12th September 2023 and found it very useful to listen to various contributors. Several speakers made reference to the importance of corridors not being considered and to the difficulty in combining sites. It was of particular concern to learn that Local Councils ‘suffer’ a discount of 15%. Local Councils are operating at the coalface with developers, existing and potential land stewards, and volunteer groups. Volunteer groups are often working with Council employees to maintain and improve biodiversity values on Council managed land. Every National Park is situated within a Council area and it would not be unreasonable, I think, for the general public to assume that there are effective collaborations between all landholders to achieve best practice conservation.

I’ve noted the following from the TOR:

- *The purpose and structure of the Scheme*
- *The roles and responsibilities of the Department of Planning and Environment, the BCT, and other participants*
- *Any other matter that IPART considers relevant*

And in the Issues Paper:

*One of the key elements of the Scheme is the establishment of a market for biodiversity credits to create a price signal of **the true cost of biodiversity loss from development.***

AVOID AND TRUE COST

I think IPART needs to keep asking ‘is this the true cost’ and also as I raised on Tuesday whether the first principle of Biodiversity Conservation – ‘to avoid’ is not being avoided. Is the scheme allowing for development when it could be avoided? If the ‘true cost’ is not established when assessing cost-benefit/BCR then there is a risk that subsequent ‘assessment’ will match the required outcome, eg. the case of Warragamba Dam Wall Raising SSI EIS and the challenging testimony of ecologist Rachel Musgrave at a Parliamentary Inquiry as outlined in The Guardian

<https://www.theguardian.com/environment/2021/nov/08/ecologist-so-troubled-by-warragamba-dam-wall-environmental-impact-statement-she-resigned>

I also note in the Issues paper reference to the 'Nature Positive Advisory Panel'. This was the only reference I could find to the Panel. It appears to have a chair, Mr John Pierce, but no members.

<https://www.environment.nsw.gov.au/topics/animals-and-plants/biodiversity/nature-positive-advisory-panel>

However, it is interesting that Mr Pierce is the Chair. He was NSW Treasury Secretary when the Draft Green Offsets Policy was developed by the NSW EPA

<https://www.environment.nsw.gov.au/resources/greenoffsets/offsets05259.pdf> . It was used for the Conditions of Consent for the Port Botany Expansion 13th October 2005. The Planning Minister 'overruled' the recommendations of the Commission of Inquiry and supported Treasury and the Sydney Ports Corporation preferred development. The Offset to support shorebirds protected under State and Federal legislation and International agreements has been a failure with no targets met.

<https://www.portauthoritynsw.com.au/sustainability/environment/penrhyn-estuary-rehabilitation/> The shorebird consultant who worked on the Offset Project recently suggested it was time for compensatory habitat. In the calculations, the 3.4ha of bird habitat at Penrhyn was valued at \$340,000; the 1.4ha of Saltmarsh at \$980,000 and the 6.5ha of Seagrass at \$900,000. I quote this as an example of predictable failure with Offsets being a minor penalty for the \$1billion development. This is no difference to the approach that corporations take to environmental service orders when they calculate the penalty is outweighed by the financial gain.

I recommend that IPART request a public register of Offsets and that there be a mechanism for identifying best and worst practice in expert advice.

It was helpful to see at a glance the number of current and recent reviews:

Table 2.1 Current and recent reviews affecting the biodiversity credits market

Agency	Review name	Scope	Report date
Independent Panel	Independent review of the <i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth)	Whether Commonwealth environmental laws, which include environmental offsetting, are fit for purpose.	October 2022
Audit Office	Effectiveness of the Biodiversity Offsets Scheme	Whether the Department of Planning and Environment and Biodiversity Conservation Trust have effectively designed and implemented the Biodiversity Offsets Scheme to compensate for the loss of biodiversity due to development.	August 2022
Portfolio Committee no. 7 - Planning and Environment	Inquiry into the Integrity of the NSW Biodiversity Offsets Scheme	<ul style="list-style-type: none"> Effectiveness of Scheme to halt or reverse loss of biodiversity values. Role of Biodiversity Conservation Trust in administering the Scheme. The use of offsets by the NSW Government for major projects and strategic approvals. The impact of non-additional offsetting practices on biodiversity outcomes, offset prices and opportunities for private landowners to engage in the Scheme. 	November 2022 (Government response tabled February 2023)
Australian Government Department of Climate Change, Energy, the Environment and Water	Nature Positive Plan	In response to the independent review of the <i>Environment Protection and Biodiversity Conservation Act 1999</i> (Cth), the Australian Government released the Nature Positive Plan which commits to reform environmental offsetting requirements to achieve a nature positive outcome, among other things.	November 2022
Independent Panel	Review of the Biodiversity Conservation Act	Whether the policy objectives of the Biodiversity Conservation Act remain valid and any required changes to the Act to secure those objectives.	August 2023
Led by Local Land Services, supported by independent experts	Review of the native vegetation provisions of the Local Land Services Act	Whether the pathways for a landholder to clear native vegetation remain appropriate.	August 2023
Department of Planning and Environment	Review of the Biodiversity Assessment Method	Statutory 5-yearly review of the method. ^a	August 2023
NSW Nature Positive Advisory Panel		Will advise the NSW Government on how New South Wales can contribute to new national biodiversity commitments in a manner that: <ul style="list-style-type: none"> is equitable, science-based and cost effective optimises environmental, social, and economic benefits for New South Wales. 	November 2023
Australian Parliament Senate Environment and Communications Legislation Committee	Inquiry and report on Nature Repair Market Bill 2023	Inquiry and report on the Nature Repair Market Bill 2023, which seeks to provide a framework for a voluntary national market that delivers improved biodiversity outcomes.	August 2023

^a See *Biodiversity Conservation Act 2016*, s 5.9(1).

I think it would be useful to add the **Samuel EPBC Review** to the list above. From that review:

*“The current EPBC Act environmental offsets policy states that after all reasonable efforts are made to avoid impacts, remaining impacts should be mitigated to reduce the impacts on MNES, and any residual impact can be offset. However, this is not how it has been applied in practice. **Some proponents see offsets as something to be negotiated from the outset, rather than making a commitment to fulsome exploration (and exhaustion) of options to avoid or mitigate impacts.** Conditions of approval most often require proponents to protect areas of habitat similar to the area that has been destroyed or damaged by the project, **but compliance and enforcement of these conditions is ineffective.**”*

<https://epbcactreview.environment.gov.au/sites/default/files/2021-01/EPBC%20Act%20Review%20Final%20Report%20October%202020.pdf>

My submission to this Inquiry

<https://epbcactreview.environment.gov.au/sites/default/files/2021-03/ANON-K57V-XQQX-Y.pdf>

related to the treatment of 2 Eastern Suburbs Banksia Scrub (ESBS) sites at Prince Henry, Little Bay and another site with ESBS bordering Kamay Botany Bay National Park. ESBS is Critically Endangered under State and Federal legislation. In the case of the former, *“Landcom offered to pay the NSW National Parks and Wildlife Service \$100,000 over five years to destroy the 0.15-hectare stand in the way of the 800-dwelling development. The money is compensation and is to be spent on banksia scrub inside Botany Bay National Park. Landcom has also agreed to spend \$30,000 a year helping to manage the scrub at the site that is earmarked for protection.”* James Woodford 14th July 2003

<https://www.smh.com.au/environment/rare-banksia-facing-destruction-20030714-gdh3fr.html>

My submission was made in April 2020. For the latter development there have been Court hearings subsequent to November 2019 when Justice Tim Moore questioned the opposing ecologists. Corridors/connectivity with the National Park and Prince Henry Conservation Zone has been raised by volunteers but not once over the past 10 years of expensive court hearings has National Parks or other DPE staff appeared as environmental advocates. I mention this because it is characteristic of a system where Government staff appear to be restricted/reluctant to act as advocates. It is part of a culture which could be described as combative and this is not useful in ‘an all hands-on deck’ approach required to stem biodiversity loss. It does not align with what is said in Parliament nor what is written on Government webpages dedicated to ‘saving threatened species’.

Federal Government Response to Samuel EPBC Review

The Federal Government’s November 2022 response is listed above. In October 2022

Minister Plibersek published a list of 110 EPBC species of National Priority

<https://www.dccew.gov.au/sites/default/files/documents/110-priority-species-list.pdf> and

since then ‘Nature-Positive’ has appeared in relation to ‘offsets’. For example, at the time the list was published the Minister was considering the fate of 4 EPBC marine species to be

impacted by an SSI development (SSI-10049) for NSW National Parks – being delivered by Transport for NSW. This is a project funded by Federal and State Ministers for Environment (at the time Frydenberg/Upton). Two of the 4 species, Cauliflower Soft Coral and White’s Seahorse, were on the 110 Priority List. The Minister’s approval took from September 15, 2022 to March 16, 2023. ‘Nature-positive’ offsetting was approved for threatened seagrass and the seahorse and the other two species were deemed to be out of range of impacts. With increasing use of Apps such as iNaturalist it is becoming more difficult to avoid ‘seeing’ threatened species, however, methodology for determining survey boundaries is another matter. The final \$Offset figures which include ‘research’ are contained in the Marine Biodiversity Offset Strategy(MBOS), June 2023

<https://www.transport.nsw.gov.au/system/files/media/documents/2023/kamay-ferry-wharves-marine-biodiversity-offset-strategy-june-2023.pdf>

Table 6-4 Bank guarantee calculation 2023

Habitat	Offset size determination method	Approved Estimated maximum impact (m2)	Required offset size (m2)	Cost (per m2 impact area) 2:1	Full bank guarantee value
<i>Posidonia australis</i>	EPBC offset calculator	268	770*	\$82.73 ^a	\$48,302.10 ^a
<i>Posidonia australis</i> White’s Seahorse	EPBC offset calculator	Contained with <i>Posidonia australis</i>		\$82.73 ^a	\$48,302.10 ^a
Halophila/Zostera	2:1 requirement for KFH	6537	13,074	\$125.46	\$820,132.02
Rock, reef and rubble / macroalgae	2:1 requirement for KFH	2939	5878	\$125.46	\$368,726.94
Total monetary bond					\$1,285,463.16

***Area of offset calculated by EPBC offset calculator, the rate applied was from the DPI Fisheries Policy, a 1:1 rate was applied to the offset area as the offset area has satisfied DPI Fisheries 2:1 requirement**

Table 6-5 Offsetting cost estimate and reinvested bank guarantee contribution.

Offset	Type and Benefit	Location	Estimated value (\$)	% of Impact offset for EPBC Act and FM Act Requirements
Rehabilitate and improve existing <i>Posidonia australis</i> habitat, including <ul style="list-style-type: none"> transplanting materials from the project area; and fragment collection and planting 	Directly improving existing habitat for the protected matter/ <i>Posidonia australis</i> KFH	Locations in identified in section 5.4 and Appendix 6	\$2,400,000	100% endangered <i>Posidonia australis</i> habitat listed under EPBC and FM Acts. 100% endangered White’s seahorse habitat listed under EPBC and FM Acts. Spend on direct offsets – 211.15%
Enhancement of the proposed wharves/artificial habitat to improve threatened species habitat (eg seahorse hotels for White’s seahorse).	Direct - improving habitat and reducing threats to a protected matters/ macroalgae KFH.	Botany Bay	\$450,000?	100% endangered White’s seahorse habitat listed under EPBC and FM Acts. Net gain of 59.45m2 of potential White’s seahorse habitat (Section 5.2) Spend of total direct offsets – 39.58%
Improve and protect existing <i>Posidonia australis</i> , <i>Zostera</i> , <i>Halophila</i> and macroalgae habitats	Installation of Environmentally Friendly Moorings	<i>Posidonia australis</i> seagrass meadows of the Manning-Hawkesbury ecoregion ecological community Botany Bay	To be determined as part of the detailed Implementation Plans	To be determined as part of the detailed Implementation Plans
Support important research and gains in knowledge and upskilling Gamay Rangers (e.g., seagrass transplanting and rehabilitation)	Indirect - enhancement of KFH through and/or threatened population through supporting important research	Proposed locations in section	Supporting important research is an indirect benefit of undertaking the MBOS with UNSW and Gamay Rangers	0% of original monetary bond requirement for KFH. However, undertaking activities described in the MBOS will provide opportunities for the research and development as proposed in Section 6
Total			\$2,850,000	Combine 250.73% of the monetary bond

It is claimed that the oldest plant in the world is *Posidonia australis* in Shark Bay, WA. <https://cosmosmagazine.com/nature/plants/oldest-biggest-plant/> Comparable research was not conducted on the bed at Kurnell before pulling it apart in June/July 2023 and translocating 13,000 'shoots'. The local Federal MP referred to the 'nature-positivity' of the project in Federal Parliament. The estimated cost from when the project was submitted for EPBC Referral in late 2020/early 2021 went from \$18million to \$78million (as stated Parliament 22/6/23). The purpose also changed.

I provided a submission

https://www.parliament.nsw.gov.au/lcdocs/submissions/78763/0104%20Lynda%20Newnam_REDACTED.pdf to the NSW Legislative Council Review on Offsets, referred to in list above, on the 7th May 2022. In that submission I outlined the 'tension' between Fisheries expert opinion vs the co-author of the MBOS, also a beneficiary of Offset \$. I referenced the MBOS, as it appeared in October 2021, and other material. At that point in time, according to a number of sources, the project was not going ahead. The cost then was around \$50 million and yet it did get the go-ahead mid 2022 and the new State Government elected 25th March decided to continue to construction (which began in July 2023) despite the cost being \$78 million. It begged the question, and such questions were raised at Budget Estimates, at what point is the project and associated destruction of Threatened Species deemed unsustainable. It appeared in this case it would go ahead at any cost. From Budget Estimates 26/10/22 (Deputy Secretary Transport Collins and CEO Infrastructure NSW, Draper):

HOWARD COLLINS: I think the life of this project, there have been times when people have been considering whether it should go forward or not. Obviously, the scope has changed significantly, the design, certainly material costs. But at the end of the day, Government decision was to progress this project, and we obviously facilitate that decision. I don't know whether Mr Draper would like to add any further comments.

SIMON DRAPER: No.

HOWARD COLLINS: But it is important recognising that we now have the funding, and work will start very soon.

<https://www.parliament.nsw.gov.au/lcdocs/transcripts/3065/Transcript%20-%20PC%206%20-%20Transport%20-%2026%20October%202022%20-%20CORRECTED.pdf>

I suggest that IPART recommends transparency around cost-benefit in assessing and progressing government projects. It is also a poor look for NSW National Parks to have a zero-extinction policy and then engage in a project requiring the destruction of Threatened Species.

From the recent review chaired by Ken Henry, listed above:

“The integrity of the Biodiversity Offsets Scheme is being compromised by payments being made into the Biodiversity Conservation Fund rather than credits being sourced directly. The balance standing in the fund is continually growing.”

<https://www.parliament.nsw.gov.au/tp/files/186428/Independent%20Review%20of%20the%20Biodiversity%20Conservation%20Act%202016-Final.pdf>

My own submission to the Review is a brief personal account of various developments, mostly involving Offsets, from the perspective of volunteer.

<https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Biodiversity/Biodiversity-Act-5-year-review-submissions/biodiversity-act-consult-submission-113-newman.pdf>

I think it is notable that there were only 2 ‘Academic’ submissions to the review, one from the Biodiversity Council and the other from the UNSW Centre for Ecosystem Science which I commend to IPART. The Centre suggested combining the Scientific Committees for Fisheries and a greater role for the Biodiversity Conservation Advisory Panel. I recognise this is outside your remit but is within the context providing another reminder of the need to reduce the compartmentalised approach to biodiversity conservation. The Centre also recommended greater applications of the Precautionary Principle and Serious and Irreversible Impact as well as an Ecosystem approach.

<https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Animals-and-plants/Biodiversity/Biodiversity-Act-5-year-review-submissions/biodiversity-act-consult-submission-127-unsw-centre-for-ecosystem-science.pdf>

I referred to the importance of the political landscape at Tuesday’s Hearing and to attending a briefing session on the scheme that took place at Mt Annan Botanic Gardens. That was in August 2018. From an email I wrote afterwards to a colleague. *“I attended the Biodiversity Trust information session held at Mt Annan last month. There were a number of staff from LLS and OEH and I sat next to a couple who lived in a city apartment and managed their rural land for conservation. Their primary concern was stewardship and how it could be encouraged. I listened to farmers who were seeking information on how to get the best from the scheme. It surely comes down to quality of assessment and who is checking? Paul Elton who heads the Trust and oversees the money to be spent when I questioned him about the potential for citizen science, said he wanted all farmers involved to be citizen scientists. Nice in theory. A few years ago, I was impressed by a case study from WA funded by Alcoa, but I think in that case it came down to a local culture of goodwill and very good work from the ecologists and researchers managing the project, in particular the lead. I did speak to her. People skills are essential, as is genuine collaboration, transparency and accountability. I don’t have good experience, generally, of OEH.”* Then I went onto to quote from a Budget Estimates exchange 7th September 2018:

Ms CATE FAEHRMANN: Why was the legislation proclaimed before the maps were ready?

Mr LEAN: The Government made clear its intention when it introduced the reforms that there would be a period of consultation around the maps before they came into force. As a result of that, the Act or the regulation has in place transitional provisions that define the two categories of land that you are talking about that ultimately will be reflected in the maps. It is a matter for landholders in consultation with Local Land Services to understand what are the controls that apply on the particular land they may seek to manage. These transitional provisions have been in operation for 12 months.

Ms CATE FAEHRMANN: Were the maps ready before the legislation was proclaimed—the maps with the categories? Has the department actually had those maps ready but you have not released them?

Mr LEAN: A draft of the maps was released for consultation during the last round of consultation on the regulations in March or April before the Act commenced. The commitment was that there would be a formal release of the map so each individual landholder could obtain a copy of their map and seek a review of that for which the fee would be waived.

Ms CATE FAEHRMANN: When will the maps be complete?

Mr LEAN: That is a matter that is being considered at the moment.

On Tuesday I did say something to the effect that it is a pity we continue to see politics driving policies/legislation/decisions that people have to then work around and IPART has to sort out. There was nothing wrong with seeking to incentivise/reward landholders for putting more into conservation and in then achieving more value from conservation over an alternative. But there wasn't the necessary data available at the beginning and it still isn't in place. There hasn't been the transparency and accountability required. ██████████ and ██████████ commented that it is too costly for small landholders. ██████████ enlightened me on the plight of Councils. That should not continue but what is equally disturbing is that it is generally unknown apart from those working in the area. From a developer's perspective transparency is just as important, as ██████████ confirmed, and that's something I remember being discussed at a breakfast forum at Parramatta on the Cumberland Plain Conservation Plan in a room of developers, landscape architects and Planning staff over 4 years ago. I recall general agreement in the room that it was being made up as they went along. I don't know whether there are ministerial directives to maintain secrecy and spin, but the truth comes out eventually and the consequences are then far more difficult to address.

In this context, I would urge IPART to go back to review the stated purpose of the legislation and the issues that were not addressed then. Lake Macquarie MP, Greg Piper, in speaking against the Bill (16/11/2016) stated: *"I acknowledge that the Government has engaged widely with the community in a bid to find a balance between key stakeholders, the competing demands of a modern world and the needs of our natural environment. However, I do not believe this bill achieves that balance. It does not reflect the substantial amount of*

advice and feedback the Government received during the public engagement process. I would go as far as to say that while the Government consulted it did not listen to a great deal of the advice and feedback it got.

<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardFull.aspx#/DateDisplay/HANSARD-1323879322-95280/HANSARD-1323879322-95331>

The legislation was passed in the last sitting days of the 2016 Parliament – the LC on 9/11/16 and 15/11/16 and the LA on 16/11/16 and final vote on the last day 17/11/16. By late January 2017 there was a new Premier, new Planning Minister and new Environment Minister.

Primary Industries Minister, Niall Blair, on 9/11/16 stated: *“What I have just outlined is a comprehensive framework for the future of land management and biodiversity conservation in New South Wales. **In close consultation with the independent panel** and key stakeholders, including NSW Farmers, the Government has worked hard to develop an integrated and holistic package of reforms. The Government is confident it has got the balance right. We are committed to continuing our collaborative approach during implementation.”*

<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardFull.aspx#/DateDisplay/HANSARD-1820781676-71888/HANSARD-1820781676-71910>

However, one highly respected member of the Independent Panel disagreed and his resignation letter was tabled by the current Environment Minister, Penny Sharpe, on the 15/11/16, the day John Barilaro, the MP for Monaro became leader of the NSW Nationals and Deputy Premier:

Sunday, 30 October 2016

Dear Mr Baird, Premier of NSW,

*I was a member of the four-person **Independent Biodiversity Legislation Review Panel** chaired by Neil Byron that reported to your government on December 18 2014. Since then I have been providing ongoing advice to your government.*

A few weeks ago, it became clear to me that my advice was being ignored, and as a consequence I resigned my position on the panel and as an advisor. More importantly, the principles of the original panel report that your government endorsed, were not being followed.

The review panel charted a path forward for NSW biodiversity legislation reform that would be win-win—a win for land managers in terms of providing flexibility in farm operation and a win for biodiversity and the environment. The panel report is built on several principles: providing flexibility for land managers through risk-based and

proportionate legislation, equity for farmers relative to other land-users, maintaining or increasing the quality and extent of native vegetation in every region, and using the mitigation hierarchy and biodiversity offsetting as mechanisms to deliver win-win outcomes. A key intent of the report is that broad scale land-clearing would only be possible through the biodiversity offsetting process. Biodiversity offsetting, by definition, means no net decrease in the quality and quantity of native vegetation.

Your government agreed to adopt and implement all the recommendations of our review panel. Despite that, your government has introduced components to the legislation that are not consistent with the review panel's recommendations. In particular there are a series of "codes", such as "the equity code", that will enable broad-scale clearing of 100s of hectares of native vegetation on individual farms without offsetting. These codes are not consistent with biodiversity offsetting. Codes in native vegetation legislation are normally intended to facilitate minor clearing to make farming profitable—for example, clearing for fences and buildings. These should amount to the odd hectare here and there, not hundreds of hectares of clearing which leads to the degradation of soil, water and biodiversity.

I ask your government to change the legislation so that it both delivers no-net loss of native vegetation at a regional scale and facilitates increased agricultural productivity. Such a suite of legislative changes has been outlined by the Wentworth Group, of which I am a member.

In a short time, I will make the contents of this letter publicly available. I am free to discuss this letter any time, working hours or otherwise, on [REDACTED]

*Professor Hugh Possingham DPhil (Oxon) FAA FNAS (USA)
Member of the Wentworth Group of Concerned Scientists*

Cc: Minister Speakman, Minister Blair, Minister Stokes

<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardFull.aspx#/DateDisplay/HANSARD-1820781676-72003/HANSARD-1820781676-72015>