

**From:** [Charlie's Tree Service](#)  
**To:** [TPC Enquiry](#)  
**Subject:** KIPS 2015 - draft amendment PSA-2022-3 - Biodiversity Offset Policy Hearing 5 Sept 2023 - Charles Biggins  
**Date:** Tuesday, 3 October 2023 9:21:16 PM  
**Attachments:** [KIPS 2015 - draft amendment PSA-2022-3 - Biodiversity Offset Policy Hearing 5 Sept 2023 - Charles Biggins .pdf](#)

---

Dear TPC Delegates

I wish to thank you for the opportunity to exercise my final right of reply following the KIPS 2015 - draft amendment PSA-2022-3 hearing, 5th Sept 2023.

I note that Kingborough Councils has declined to address the serious issues that I raised regarding the inclusion of their amended documents into the interim planning scheme and also one of the opening question that the TPC delegation put to Kingborough Council regarding whether there was a threshold at which point a payment under the Policy ceased being an Offset and became a Tax.

I can only ask that if Kingborough Council is unwilling to seek legal advice and follow due process in the development of Policies that have far reaching financial and quality of life implications for many past, present and future landholders, then it would be prudent for the TPC to obtain said legal advice before making your final decision.

Please find attached a copy of the representation that I read at the hearing on the 5th Sept. I would like this copy to replace or be included with the earlier written letters that I have submitted to the hearing as it is the most comprehensive iteration of my earlier correspondence.

Regards

Charles Biggins  
Diploma ( Hort/Arboriculture )  
Director CTS Pty Ltd

PO Box 155, South Hobart, 7004

M: 0428 246 211

[www.charlietreeservice.com.au](http://www.charlietreeservice.com.au)



# KIPS 2015 - draft amendment PSA-2022-3

## Biodiversity Offset Policy Hearing - 5 Sept 2023

Hello,

Charles Biggins, Kingborough landholder for fifteen years and Greater Hobart small business owner/operator since 2002.

(A) In my representation today I'll be addressing the Preliminary Consideration matter identified by the Commission:

*“The Commission notes that section 20(2)(g) of the Land Use Planning and Approvals Act 1993 that applies in the Kingborough Municipality, enables documents to be applied, adopted or incorporated in the planning scheme which deal with the use, development, or protection of land. The hearing will focus on consideration of the policies in light of what is enabled by this provision and the effect of the application of the policies in the planning system in the Kingborough municipality”*

.... and making the case that the original Biodiversity Offset Policies development pathway didn't follow due process and this lack of Policy oversight led to the incorporation of a document that extends Councils powers into Federal and State government jurisdictions. Furthermore the incorporation of the Amended Policy would further enhance Councils extension of powers into State and Federal government affairs, government affairs that they have no business being in.

(B) To give some context to my claims it maybe beneficial to consider some other documents, Acts of parliament that are set to intersect with our Local Councils attempts in this area. The Federal Environmental Protection and Biodiversity Conservation Act 1999 (head of authority for the various Biodiversity Offset Credit Schemes operating in other States), Tasmania's Nature Conservation Act 2002 (head of authority for the Conservation Covenants class of Biodiversity Offsets in Kingborough). The Nature Repair Market Bill 2023 (proposed national Biodiversity Credit Trading Scheme). All of these Acts will define the value of Biodiversity in different ways and of course State Acts override Local Council policies and Federal Acts override State Acts.

(C) Kingborough's Biodiversity Offset Policy is just that a Policy, not a State or Federal Biodiversity Offset Credit Scheme but a municipal council policy that is predicated on the presumption that Local Council, not the State or Federal Government but a Local Council (body corporate) has a pecuniary interest in the vegetation growing on private land. We are being asked to accept the premise that the body corporate's pecuniary interest comes into existence whenever native vegetation starts to grow on private land and increases in value as the vegetation matures. However the same body corporate accepts no liability for losses associated with hosting the biodiversity asset, that remains solely a landowners responsibility. Council is clearly out of its depth here and can only manage a superficial imitation of a real Biodiversity Offset Trading Scheme, there are good reasons why Offset Schemes are run by State and Federal governments and not Local Councils.

(D) One effect of having this Policy incorporated into the Interim Planning Scheme along with a blanket Biodiversity Protection Overlay that covers some 80% of the municipality is that any loss of native vegetation on private land now needs to be compensated for and the beneficiary of that compensation is the Local Council's own Environment Fund or

alternatively Land holders are coerced into having a Conservation Covenant placed across their private land, a covenant that could potentially be harvested for Biodiversity Credits in the future. A Conservation Covenant that renders private land unusable for future development, adding to a private land Conservation Reserve stretching across an extreme fire risk municipality. Please show me the State or Federal legislation that grants our Local Council (body corporate) a pecuniary interest in the native vegetation growing on private land ?

(E) The trading of Biodiversity Offset Credits is not possible with Kingborough's Biodiversity Offset Policy because it wasn't set up as an Environmental Accounting scheme. Which raises an interesting legal question as to who owns the rights to retrospective "Biodiversity Credits" applied under the proposed National Repair Market Bill 2023, to private land that has already been placed in a Conservation Covenant as part of a Local Council "Biodiversity Offset" payment. Will Councils pecuniary interest in freehold biodiversity assets established through the incorporation of this Policy into the Planning Scheme be used as evidence of their right to harvest the Biodiversity Credits for their own Corporate profit or would it be the State Government who would be the beneficiary because it's actually the State that negotiates Kingborough's conservation covenants under the Nature Conservation Act. Either way it won't be the Landholder, they have just signed away their interest in the Biodiversity assets contained in the Conservation Covenant when they agreed to the terms of Kingborough's Biodiversity Offset but will they be seek compensation for the loss of potential earnings ?

(F) I was reminded by the General Manager Mr Gary Arnold, Kingborough Council Meeting Dec 2022 that ***"under the Local Government Act, all 29 Councils in Tasmania are entitled to charge fees or charges"*** and the Manager of Environmental Services then went on to say ***"Council is of the belief that the Policy dose not use taxes..... It is a fee that is set out by Council and that is how it is worded in the Policy."*** So what is the difference between a Fee or Charge and a Fine or Tax, dose the Policy set Fees and Charges or is it really applying Fines and Taxes ? For a Local Council (body corporate) to set a Fee or Charge there would need to be an exchange of goods or services whereas the Biodiversity Offset Policy doesn't even produce a Biodiversity Credit. Instead the Policy fines the Landholders for the loss of Biodiversity values on their property as if those Biodiversity values were protected by a Council By-Law, which they are not.

(G) Council is permitted under the Act to incorporate documents into the Interim Planning Scheme but were they permitted to create a Tax ? Did the incorporation of a document that specifically sets monetary payments and prescriptive title adjustments against the landholders, actually create a Biodiversity-Tax ? When a landholder's Development Application is withheld by Council Officers until the Landholder enters into a contractual agreement to the detriment of their own financial and property values, it is no longer a Fee or Charge for a service but a Biodiversity Tax. The Federal and State Governments can Levy Taxes and create Laws, in fact the ability to create laws and taxes is a defining feature of those two tiers of Government. Local Council is a Body Corporate created by the State to administer the Local Government Act 1993 and the Land Use Planning and Appeals Act 1993 and simply has no Constitutional authority to levy a Tax.

(H) When the TPC allowed a Local Council to incorporate a prescriptive document into the KIPS it helped create a de-facto tax, a Biodiversity-Tax and the State Parliament was effectively bypassed. If and when the Policy is transitioned into the Tasmanian Planning Scheme through the Specific Area Plan provisions, will the Tasmanian Parliament again

be circumvented in the evolution of the Bio-Tax, a Tax that could then be adopted by the 28 other municipal Councils of Tasmania through the same Specific Area Plan provisions ? A Body Corporate that calls itself Local Government but is actually a product of corporate law and not subject to the Separation Of Powers principle, the third principle of the Australian Constitution that underpins good governance. The Parliament, the Executive and the Judiciary's roles are clearly defined and the impartiality of each is there to protect the people from the excess's of government. Local Council has no such separation, in this instance Kingborough Council (body corporate) was able to write the Policy, pass the Policy, incorporate the Policy, enforce the Policy, collect Policy fees, adjudicate over the Policy and be the ultimate authority of the Policy, all without ever having to consult with the people, the Landholders of the Local Council (body corporate).

(I.) An alarming precedent has been set when a State Government controlled body corporate entity is allowed to create their own By-Laws and Bio-Taxes. A Policy that was written without any legal advice because as the Manager of Environmental Services stated, Council Meeting Dec 2022 "**We haven't sought legal input into the policy as Council hasn't believed that it was required**". I'll remind everyone that Kingborough Council regulated the removal of trees on private land through the Health and Environmental Services By-Law (2011), that By-Law was itself removed in 2022. After 11 years of bureaucratic overreach Council finally got some legal advice and ceased prosecuting landholders. The original Biodiversity Offset Policy 2016 was also not incorporated into the KIPS until 2020 after the Kingborough Ratepayers Association exposed the oversight in a submission to Kingborough Councils Audit Panel, June 2020, titled Oversight Governance and Accountability.

(J) "**In 2018 Council began the implementation of offset projects under the Kingborough Environmental Fund, which has received over \$1 million in financial offsets.**" (Council Report Aug '22) but as the Manager of Environmental Services stated (Council Meeting Dec '22) "**financial offsets are the absolute residual amount of the biodiversity offset**" therefore its safe to assume that private land with an estimated value of many millions of dollars has been removed from future development and placed in Conservation Covenants, all without the primary source document having actually been incorporated into the Planning Scheme. The potential still exists for legal action to be taken against Kingborough Council for the loss's incurred by Landholders and Developers during that four year period when the Biodiversity-Tax had no head of authority....

(K) In summary, I strongly disagree with the incorporation of the original Biodiversity Offset Policy 2016 and the amended Biodiversity Offset Policy into the Kingborough Interim Planning Scheme because:

1. The Policy creates and maintains a constitutional conflict between the Federal Government and our Local Council (body corporate's) ability to levy Taxes. If Council tries to do something they're not empowered to do, it's therefore repugnant to the Commonwealth Constitution and contravenes section 109 of the Constitution.
2. It also has the potential to generate ongoing legal action between the Landholders, Local Council and State Government regarding who holds the rights to the Biodiversity Credits that can be created from one of the many private properties with Conservation Covenants already applied as part of a Kingborough Biodiversity Offset payment during the last 13 years.

3. The Separation of Powers principle is absent from the good governance of Kingborough Councils developmental pathway for this Policy, the absence of any legal advice and public representation are reasons enough alone for the TPC to instruct Council to withdraw the Biodiversity Offset Policy 2016 from the KIPS 2015.
4. The withholding of Development Application approvals by Council Officers acting as the Planning Authority as a method of applying pressure on Landholders to enter into a Part 5 Agreement and to deter legal challenges of the Biodiversity Offset Policy needs to be investigated by the Local Government Ombudsman.
5. The Local Government Act 1993 legislative checks and balances have failed to protect the Landholders of Kingborough from what is clearly a bureaucratic abuse of power by their own Local Council (body corporate). I conclude that the administration of Kingborough Council is in need of Ministerial intervention.

C469/23-2022

## 9 QUESTIONS WITHOUT NOTICE FROM THE PUBLIC

---

**Mr Charles Biggins** asked the following question without notice:

### 9.1 Biodiversity Offsets

*What was the legal advice given to Council in 2004, and more recently with the formation of the Biodiversity Offset Scheme, that led to the belief that an environmental offset and now a biodiversity offset scheme could legally be administered by a local Council?*

#### **General Manager responds:**

Thank you for the question. My colleague, Ms Quinn, may wish to elaborate further on the response, but let me start by saying that under the Local Government Act all 29 Councils in Tasmania are entitled to charge fees or charges.

#### **Manager Environmental Services:**

In 2004, Council was part of a regional consultation in the southern region of Tasmania because there are a number of southern Councils who wanted to look at biodiversity offsetting in local government through that regional group, which was run through the Southern Tasmanian Councils Authority. The Councils went to the State Government which was DPIWE at the time and advocated for the department to take on biodiversity offsetting. At that time they weren't interested in doing that, they were interested in developing their own policy but were very happy for Council to develop theirs. We also worked with the forest practices authority at the time and they also had their own policy but were encouraging of Council to develop ours. Both of those organisations have had input into Council's policy, they are aware of it. The department, in the most recent



*As only the States and Commonwealth have the authority to levy new taxes and they make no claims that the biodiversity offsets are not a tax, how does Kingborough Council's offset payments differ from a State or Commonwealth tax?*

**Manager Environmental Services:**

Council is of the belief that our offset policy does not use taxes. A biodiversity offset, as you would be aware under the policy, is not a tax. It is a fee that is set by Council and that is how it is named in the policy. It appears we have a difference of opinion about whether the financial offset is a fee. I would also like to point out that financial offsets are the absolute residual amount of a biodiversity offset and the hierarchy in our policy sets out, as is most common in most biodiversity offset policies, that biodiversity offsets are best when they are on site, because they are supposed to match value for value, what is supposed to be very similar in value, like for like. A focus on the fee part, on the financial offset, seems interesting to me given that biodiversity offsetting in Kingborough is really about onsite offset, if not onsite, then off site and financial offsets are only used for that residual amount that is left over, and that is what our policy states must be the case, that they must be part of an offset package.

**Mr Biggins:**

*In the formation of the new Biodiversity Offset Policy, there is reference to consultation with experts in the field. Who are the experts that were consulted with the formation and content of the wording of the policy?*

**Manager Environmental Services:**

It is not a new policy, it was a review of the existing policy that occurred. Biodiversity, as you know, has been undertaken in Kingborough for a very long time, quite successfully. In the most recent review, Council consulted with technical experts in the field which were predominantly ecological specialists/consultants that work with the policy on a day to day basis with Council, and also the State Government and the Forest Practices Authority. I don't have the full list of who they were but if we can take that on notice we can potentially provide that to you.

**Mr Biggins:**

*Has any consideration been given to including bushfire mitigation works as a necessary stewardship expense that would need to be accounted for when protecting biodiversity assets for perpetuity? Are landholders hosting biodiversity offsets made aware of their liabilities under the Fire Act to mitigate the risk of fire on their property and from spreading to their neighbours?*

**Manager Environmental Services:**

One part of the biodiversity offset program in Kingborough is about private land conservation. It's about looking for properties in Kingborough and land holders who are interested in entering into a conservation covenant under the Nature Conservation Act. It is the State Government therefore who negotiates that conservation covenant and the plan that goes with it, so it would be within that conservation management plan, which is a statutory document, which would say whether fire and clearing could be used on that parcel. Generally conservation covenants, as you might know, are not places close to residential areas or don't generally have a dwelling in them. They are usually on a large property. As you would also know, fire is really important for native vegetation in Tasmania. We would encourage landowners to do low intensity burns if that was something that was required. Council is not against fuel reduction. Vegetation clearing, of course, would not be undertaken in a conservation covenant, but if it needed a fuel break for some reason, then that would be negotiated with the landowner, usually by the State Government at the time of the conservation covenant going on the title.

---