

# KIPS 2015 - draft amendment PSA-2022-3 - Biodiversity Offset Policy Hearing 5 Sept 2023 - Charles Biggins

To give some context to my Representation today regarding the inclusion of Kingborough's "amended" Biodiversity Offset Policy 2016 into their Interim Planning Scheme 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 (the head of authority for the various Biodiversity Offset Credit Schemes operated by other States) and Tasmania's Nature Conservation Act 2002 (the source of the Conservation Covenants agreements and onsite Biodiversity Offsets in Kingborough). The Nature Repair Market Bill 2023 is set to create a National Biodiversity Credit Trading Scheme which will also have its own rules and values assigned to Biodiversity hosted on private land that will likely clash with those contained within Kingborough's Biodiversity Offset Policy.

To explain this mess we have to go back to 2004 and I quote ***"The Councils went to the the State Government which was DPIWE at the time and advocated for the department to take on biodiversity offsetting. At the 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"*** (Ms Quinn, Manager of Environmental Services, Kingborough Council Meeting, 5 December 2022. Why the DPIWE officers gave that advice in the first place we may never know but Kingborough Council has been on a collision course with State and Federal government jurisdictions ever since.

Kingborough's Biodiversity Offset Policy is just that a Policy, not a State or Federal Biodiversity Offset 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.

The trading of Biodiversity Offset Credits is not possible with Kingborough's Biodiversity Offset Policy because. Which raises the interesting legal question as to who owns the rights to create retrospective "Biodiversity Credits" under the proposed National Repair Market Bill 2023, from private land that has already been placed in a Conservation Covenant as part of a "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 who would be the beneficiary as indicated by Ms Liz Quinn, Manager of Environmental Services, Kingborough Council Meeting, 5 December 2022 ***"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"***

Another 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 not too distant 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 property ?

I was reminded by the General Manager Mr Gary Arnold, Kingborough Council Meeting 5 December 2022 that ***"under the Local Government Act, all 29 Councils in Tasmania are entitled to change fees or charges"***. Yes that is correct but shouldn't that also read Fees and Charges for Goods or Services, after all that is the definition of commerce for a Corporation and please don't try and claim that Council is providing some kind of Environmental Service here, there are no Goods or Services involved in the Biodiversity Offset Policy, not even a Biodiversity Credit. Instead the Landholders Development Application is withheld by Council Officers until the terms of the Policy are met, is that really how we do commerce, because it sounds a lot like extortion to me ?

Council was permitted under the Act to incorporate documents into the Interim Planning Scheme but were they permitted to create a de facto Tax ? Did the incorporation of a document that specifically set monetary payments and prescriptive title adjustments against the landholder actually create a Biodiversity-Tax ? When a landowner's Development Application is withheld by Council Officers until the Landowner enters into a contractual agreement to the detriment of their own financial and property values, it is no longer a Fee or Charge but is it in fact 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.

When the TPC allowed a Local Council to incorporate a prescriptive document into the KIPS it helped create a de facto 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 29 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, be the ultimate authority of the Policy, all without ever having to consult with the people, the landholders of the Local Council (body corporate).

An alarming precedent has been set when a State controlled body corporate entity is allowed to create their own By-Laws and de facto Taxes. A Policy that was written without any legal advice because as Ms Liz Quinn stated Kingborough Council Meeting 5 December 2022 ***“We haven’t sought legal input into the policy as Council hasn’t believed that it was required”***. I’ll also remind everyone that Kingborough Council also regulated the removal of trees on private land through a The Health and Environmental Services By-Law 3 (2011), that regulated the removal of trees and was itself removed in 2022, after eleven years of bureaucratic overreach Council finally got legal advice and ceased prosecuting landowners under that By-Law. 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 report to Council.

***“In 2018 Council began the implementation of offset projects under the Kingborough Environmental Fund, which has received over \$1 million in financial offsets.”*** (Kingborough Council Report August 2022) but as Ms Liz Quinn stated (Kingborough Council Meeting 5 December 2022) ***“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. The potential still exists for legal action to be taken against Kingborough Council for the loss's incurred by Landowners and Developers during that four year period when the Bio-Tax had no head of authority.

The Separation of Powers principle is absent from the governance of Kingborough Council and the developmental pathway of this Policy is a clear example of what happens when good governance principles are not adhered to. The Local Government Act 1993 legislative checks and balances have failed to protect the people from what is clearly a bureaucratic abuse of power. The withholding of Development Application approvals by Council Officers acting as the Planning Authority as a method of applying pressure on Landowners to enter into a Part 5 Agreement and to deter legal challenges of the Biodiversity Offset Policy needs to be investigated. 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 it creates and maintains a constitutional conflict between the State and Federal Governments and our Local Council (body Corporate) ability to levy Taxes and establish Biodiversity Credits.

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 DPIPW 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

review of the policy, had input into the policy and provided feedback on it. We haven't sought legal input into the policy as Council hasn't believed that it was required.

**Mr Biggins:**

*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.