

Chapter 5

Monitoring and evaluation of environmental offsets

5.1 This chapter considers the adequacy of monitoring and evaluation of environmental offsets, focussing on offsets issued as conditions of approval under the EPBC Act.

5.2 Principle 8 of the EPBC Act Offsets Policy states that suitable offsets must 'have transparent governance arrangements including being able to be readily measured, monitored, audited and enforced'.¹ Submitters and witnesses generally endorsed this principle, but many queried whether this was occurring in practice. The key issues raised by submitters and witnesses include:

- inadequate monitoring of compliance;
- difficulties in evaluating the success of offsets;
- the need for a public register of offsets;
- security and enforceability of offsets; and
- overall accountability and oversight of offsets.

Monitoring and compliance issues

5.3 Many submitters and witnesses were concerned that there is insufficient monitoring of compliance with offsets conditions.² For example, Friends of Grasslands submitted that the Department of the Environment's (department) compliance audit process:

...only targets a handful of the several hundred referrals considered each year. Many of these audits find instances of non-compliance (although in some cases these are administrative or minor rather than impacting on conservation values). However, it does indicate that non-compliance with EPBC approvals is occurring and that perhaps resources need to be made available for more auditing to occur.³

1 EPBC Act Offsets Policy, p. 6; see also p. 24.

2 See, for example, Lock the Gate Alliance, *Submission 20*, p. 1; Ms Beverley Smiles, Secretary, Central West Environment Council, *Committee Hansard*, 5 May 2014, p. 12; Mr Philip Spark, President, Northern Inland Council for the Environment, *Committee Hansard*, 5 May 2014, p. 51; Queensland Seafood Industry Association, *Submission 48*, p. 2; Conservation Council ACT Region, *Submission 78*, p. 3; Friends of the Earth Australia, *Submission 58*, p. 8; The Wilderness Society Inc., *Submission 84*, p. 4.

3 Friends of Grasslands, *Submission 13*, pp 2–3.

5.4 Ms Beverley Smiles of the Central West Environment Council expressed concern that there is general lack of oversight of offsets and, in particular, inadequate on the ground monitoring by the federal government under the EPBC Act.⁴

5.5 In this context, there was discussion of the need for government departments to have sufficient staffing and resources for monitoring and compliance.⁵ As the Environmental Decisions Group submitted:

Monitoring and evaluation of environmental offsetting is crucial to determine whether the anticipated environmental outcomes from an offset proposal are actually realised on the ground...It is crucial that the Department of the Environment has the resources and capacity to evaluate the effectiveness of environmental offsetting policy.⁶

5.6 Some submitters and witnesses suggested that the costs of monitoring and reporting should be 'borne by proponents as an integral part of delivering the offset'.⁷ For example, Friends of Grasslands submitted that:

Offset sites need to be monitored for a long enough period to ensure compliance and attainment of the required gains. This takes resources, which should be part of the offset package (and cost of the development).⁸

5.7 Another suggestion was that the reporting requirements for offsets could be improved.⁹ The EPBC Act Offsets Policy states that:

Proponents, or their contractors, must report on the success of offsets...Annual reports will be required by the department and, where possible, will be made publicly available.¹⁰

5.8 However, Friends of the Earth Australia noted that they had been 'unable to find any offsets reports, either from the department or proponents, and suggested that all offsets should be required to 'have standardised reporting requirements'.¹¹

4 Ms Beverley Smiles, Secretary, Central West Environment Council, *Committee Hansard*, 5 May 2014, p. 12.

5 See, for example, Greenpeace, *Submission 61*, p. 11; Mrs Patricia Julien, Research Analyst, Mackay Conservation Group, *Committee Hansard*, 7 May 2014, p. 31; see also Mr Des Boyland, Policies and Campaigns Manager and Secretary, Wildlife Preservation Society of Queensland, *Committee Hansard*, 7 May 2014, p. 19; Nature Conservation Society of South Australia, *Submission 89*, pp 1, 4.

6 Environmental Decisions Group, *Submission 50*, p. 2.

7 Dr Anita Foerster and Professor Jan McDonald, *Submission 23*, p. 6; see also Friends of the Earth Australia, *Submission 58*, p. 10.

8 Friends of Grasslands, *Submission 13*, p. 3.

9 See, for example, Friends of the Earth Australia, *Submission 58*, pp 7–8; Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, p. 19; NELA, *Submission 31*, p. 10; Dr Su Wild-River, *Submission 38*, p. 6; Dr Yung En Chee, *Submission 57*, p. 11.

10 EPBC Offsets Policy, p. 24.

11 Friends of the Earth Australia, *Submission 58*, pp 7–8.

5.9 NELA agreed that 'project approvals must contain mechanisms to support long term monitoring, administrative and evaluation of offset sites and activities'. NELA noted that the Curtis LNG project (outlined at Appendix 5) 'contained no conditions relating to offset monitoring requirements'.¹²

5.10 In this context, some submitters and witnesses contrasted the EPBC Act offsetting system with the carbon offsets system. For example, Dr Su Wild-River submitted that 'the monitoring and evaluation of EPBC offsets is less stringent than those applied to NCOS carbon offsets'.¹³ Ms Pethybridge of the Indigenous Land Corporation agreed that the carbon-farming initiative is a good example of a 'verified offsetting system that enables offsets to be clearly quantified and audited'.¹⁴

5.11 The department advised that their EPBC monitoring and audit program 'aims to measure and improve an approval holder's compliance with the relevant instrument of decision, and ensure projects and required offsets are implemented as planned'. The department further advised that this compliance monitoring is carried out in a number of ways, including:

...through periodic desktop reviews; as a result of receipt of an allegation of non-compliance; or prompted by submission of a plan for approval or an annual compliance report or certificate, which are common conditional requirements.¹⁵

5.12 The department also submitted that its compliance audits usually take 'the form of a desktop document review followed by a site inspection, if necessary'.¹⁶ A departmental representative acknowledged that 'as with most regulators, there is room for improvement' in the way in which the department undertakes compliance activities.¹⁷

5.13 The department informed the committee that since July 2006, audits have been undertaken on 33 projects that include environmental offsets. The department's compliance audit reports are available on the department's website.¹⁸ In addition, the department advised that:

...other independent audits of projects that may involve environmental offsets are also commissioned outside of the auditing plan through the

12 NELA, *Submission 31*, p. 10.

13 Dr Su Wild-River, *Submission 38*, p. 6.

14 Ms Emma Pethybridge, Manager, Environment, Carbon and Heritage, Indigenous Land Corporation, *Committee Hansard*, 7 May 2014, p. 34.

15 Department of the Environment, *Submission 79*, p. 10.

16 Department of the Environment, *Submission 79*, p. 10.

17 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 28.

18 Department of the Environment, *Compliance auditing*, <http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/complian-2> (accessed 5 June 2014).

inclusion of a standard condition in the project approval that requires an independent audit of the conditions of approval to be conducted within a specified timeframe. This requirement has been included in approximately 60 higher risk projects.¹⁹

5.14 In response to questioning on this issue, a departmental representative stated:

If we had more resources, we could undertake more inspections. That is self-evidently true. In terms of whether that is a necessary thing in discharging the government's obligations under the EPBC Act: I do not believe that that is proven, and it would not be my view that it should occur necessarily.²⁰

5.15 The committee notes that a recent independent review found a number of problems with compliance monitoring with conditions of approval by the department. In particular, the report noted that 'the large number of approved projects across Australia (currently around 1200) means that departmental monitoring officers cannot confirm project compliance on the ground in real time, but depend on desktop checks'. The report recommended that resource levels within the department should be sufficient to ensure adequate monitoring capacity. The report noted that since June 2012, there has been a significant increase in monitoring capacity (now around 30 staff), which allows greater oversight of more projects. The report recommended that this increased resourcing should be maintained as a matter of priority.²¹

5.16 The committee notes that during the recent Budget Estimates hearings, the department advised, in response to questioning in relation to staffing levels in the Environment Assessment and Compliance Division, that 'it is not possible to project precisely what number of staff will be performing exactly which activities into the future'.²²

5.17 As noted in Chapter 2 of this report, this committee recommended in its report relating to threatened species that the Australian National Audit Office (ANAO) conduct an audit of monitoring of compliance with approval conditions under the EPBC Act.²³ The committee notes that the ANAO conducted this audit, and the report

19 Department of the Environment, *Answers to questions on notice from public hearing on 6 May 2014*, p. 8 [Q. 5]; see also Mr Dean Knudson, First Assistant Secretary, Environment, Assessment and Compliance Division, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 28.

20 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 28.

21 See further Department of the Environment, *Gladstone Bund Wall Review*, Recommendation 14, pp 35–40, <http://www.environment.gov.au/topics/marine/gbr/gladstone-bund-wall-review> (accessed 4 June 2014).

22 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Estimates Hansard*, 27 May 2014, pp 42–43.

23 Senate Environment and Communications References Committee, *Effectiveness of threatened species and ecological communities' protection in Australia*, August 2013, p. 155.

was published in June 2014.²⁴ As also noted in Chapter 2, the ANAO's report identified a number of concerns with the Department of the Environment's compliance monitoring activities and made a number of recommendations to address these shortcomings.

Evaluating the success of offsets

5.18 Several submitters and witnesses noted the importance of evaluating whether offsets are working. For example, Dr Saunders from the Wentworth Group of Scientists (Wentworth Group) told the committee that:

...offsets theoretically are there for perpetuity. That means there must be some audit process to see whether they are working...we need some system that goes beyond just the short-term political cycle but to the long-term generational cycle to make sure that these areas are basically mapped so we know where they are, we know who is auditing them and we know how we deal with them if they are not coming up to expectations'.²⁵

5.19 However, many submitters and witnesses noted that there is a lack of evidence that offsets are effective and actually achieving their intended outcomes.²⁶ This concern applied to both the outcomes in relation to individual projects and more broadly to offsets schemes as a whole. At the broad level, for example, ANEDO lamented the 'dearth of evidence to show that offset schemes actually achieve the intended biodiversity outcomes'.²⁷ Dr Yung En Chee agreed, noting that 'the small amount of evidence about outcomes from offsetting policy in Victoria indicates that it has not reduced biodiversity loss'.²⁸

5.20 Mr Boyland of the Wildlife Preservation Society of Queensland told the committee that:

The case for offsets to achieve a positive conservation outcome has not been made. 'Build it and they will come' does not necessarily work in nature. Offset policies have been in place in Queensland since the 1980s and to the best of our knowledge there is no assessment available to the

24 ANAO, *Managing Compliance with EPBC Act 1999 Conditions of Approval*, <http://www.anao.gov.au/Publications/Audit-Reports/2013-2014/Managing-Compliance-with-EPBC-Act-1999-Conditions-of-Approval> (accessed 19 June 2014).

25 Dr Denis Saunders AM, Director and Founding Member, Wentworth Group, *Committee Hansard*, 5 May 2014, p. 16.

26 See, for example, Ms Megan Evans, *Submission 26*, p. 1; Association of Mining and Exploration Companies, *Submission 40*, p. 6; Friends of the Earth Australia, *Submission 58*, p. 8; BirdLife Australia, *Submission 77*, p. 12; Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth Australia, *Committee Hansard*, 7 May 2014, p. 40; Dr Yung En Chee, *Submission 57*, p. 1; The Wilderness Society Inc., *Submission 84*, p. 4; Gomeroi Traditional Custodians, *Submission 93*, p. 10.

27 ANEDO, *Submission 60*, p. 6.

28 Dr Yung En Chee, *Submission 57*, p. 12.

public on the performance of those offsets. What evidence is there that offsets have achieved any positive conservation outcome?²⁹

5.21 Ms Smiles from the Central West Environment Council agreed that there is 'no real monitoring or measurement in any way' to see the 'actual outcome for the species we are supposed to be protecting'.³⁰ Similarly, the Conservation Council ACT region submitted that they are yet to see examples of the successful application of offsets 'in achieving key biodiversity outcomes'.³¹

5.22 However, the department's submission puts forward two examples of 'offsets outcomes delivered' under the EPBC Act, which it suggested

...demonstrate how offsets can operated to provide conservation outcomes to secure, manage and improve important habitat for threatened species and ecological communities.³²

5.23 In one example, they noted that, since 2005, 'approximately 16,200 hectares of Carnaby's Black Cockatoo habitat has been required to be protected, managed or rehabilitated as offsets'. The department submitted that these offsets have compensated for 'approximately 2,800 hectares of habitat loss that has resulted from projects approved under the EPBC Act'.³³

5.24 Nevertheless, Friends of the Earth were concerned that none of the department's compliance audits look at 'the extent to which the offsets are successfully (or not) offsetting the damage that has been permitted'.³⁴ Friends of Grasslands agreed that the department's compliance audit process 'does not appear to have any capacity for capturing the effectiveness of any offset strategy'.³⁵

5.25 Some submitters and witnesses acknowledged the difficulties in evaluating the effectiveness of offsets and the EPBC Act Offsets Policy. In particular, Dr Philip Gibbons described evaluating the effectiveness of the federal offset policy as a 'very challenging task'.³⁶ Dr Gibbons further noted that:

It is really tough to monitor the environmental outcomes, especially in an offset scenario, because you need baseline information from the

29 Mr Des Boyland, Policies and Campaigns Manager and Secretary, Wildlife Preservation Society of Queensland, *Committee Hansard*, 7 May 2014, p. 14.

30 Ms Beverley Smiles, Secretary, Central West Environment Council, *Committee Hansard*, 5 May 2014, p. 12; see also, for example, Watson Community Association, *Submission 54*, p. 4.

31 Conservation Council ACT region, *Submission 78*, p. 1.

32 Department of the Environment, *Submission 79*, pp 11–12.

33 Department of the Environment, *Submission 79*, p. 11.

34 Friends of the Earth Australia, *Submission 58*, p. 10; see also, Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth Australia, *Committee Hansard*, 7 May 2014, p. 46.

35 Friends of Grasslands, *Submission 13*, pp 2–3.

36 Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, p. 19 and see also p. 24.

development site—what is being lost over time; and then you need information on the offset site—what is being gained.³⁷

5.26 Another factor making it difficult to evaluate offsets are the long time-frames involved in the restoration of ecosystems. As the department noted:

Evaluating the effectiveness of an environmental offset can involve assessing a variety of different variables, such as tenure security, ecological improvements of an offset over time and the ability of an offset to address threats to a protected matter. The effective measurement of environmental gains from an offset against a specified baseline requires sufficient time to pass to deliver meaningful results.³⁸

5.27 In this context, several submitters and witnesses acknowledged that, it is too early to evaluate the success or otherwise of many individual offsets, and in particular, the effectiveness of the EPBC Act Offsets Policy, which has only been in place for a just over a year.³⁹ For example, ANEDO acknowledged that 'in most cases it is too early to say whether an offset mechanism has been restored to an equivalent of the ecosystem that was cleared at the development site'.⁴⁰

5.28 The EIANZ agreed that it is 'too early' to assess whether the use of environmental offsets under the EPBC Act is 'delivering effective outcomes in terms of the protection and management of biodiversity values'.⁴¹

5.29 NELA concurred that the short history of offsets in Australia means that 'there is inadequate evidence of the long-term effectiveness of any offsets to date':

In particular, there is very limited data on the environmental outcomes of offset projects, nor is there a coordinated program of evaluation that would inform future offsetting arrangements.⁴²

5.30 Dr Gibbons suggested that monitoring and evaluation 'needs to be undertaken by a qualified, appropriate third party' and requires a 'program-wide monitoring of environmental outcomes'. He proposed that:

...individual proponents should report data related to compliance at a project level and a dedicated third party should collect environmental data at a program level. The federal government should make these data available publicly.⁴³

37 Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, p. 23.

38 Department of the Environment, *Answers to questions on notice from public hearing on 6 May 2014*, p. 9 [Q. 6].

39 Ms Melanie Stutsel, Director, Health, Safety, Environment and Community Policy, Minerals Council of Australia, *Committee Hansard*, 6 May 2014, p. 1; Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, p. 19.

40 ANEDO, *Submission 60*, p. 6.

41 EIANZ, *Submission 88*, p. 8.

42 NELA, *Submission 31*, p. 10.

43 Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, p. 19 and see also p. 24.

5.31 Some suggested there needs to be an audit or review of 'all offsets to date, to inform future offset proposals and inform the public of capacity for offsets to meet their objectives'.⁴⁴ Several submitters and witnesses pointed to the recent Productivity Commission report (outlined in Chapter 2) which recommended an independent and public national review of environmental offset policies and practices to report by the end of 2014.⁴⁵

5.32 As noted in Chapter 2 of this report, this committee recommended in its report relating to threatened species that the department:

...conduct an audit and evaluation of the offsets granted under the Environment Protection and Biodiversity Conservation Act 1999 to date, and make the results of this audit publicly available.⁴⁶

5.33 The committee notes that, at the time of writing, there has been no government response to this report, nor this recommendation.

5.34 In relation to the evaluation of offsets, a representative of the department advised that 'there is empirical evidence that offsets are successful when they are implemented correctly'.⁴⁷ However, the department also noted that their focus at this point is on 'ensuring that there is compliance with the conditions'.⁴⁸ The department further advised that:

The policy and offsets assessment guide were scheduled to undergo a technical review one year from release and a complete review of effectiveness against the aims of the policy every five years thereafter. The performance of the offsets policy against the stated objectives will be evaluated as part of these review processes, this will include evaluations of the environmental performance of offsets required under the policy.⁴⁹

5.35 At the same time, the department noted that:

The one year technical review has been temporarily delayed to allow consideration of state and territory processes that may need to be accredited

44 See, for example, Friends of Grasslands, *Submission 13*, p. 3; The Wilderness Society Inc., *Submission 84*, pp 12–13; Association of Mining and Exploration Companies, *Submission 40*, p. 6.

45 See, for example, The Wilderness Society Inc., *Submission 84*, p. 12; NELA, *Submission 31*, p. 4; ANEDO, *Submission 60*, p. 2.

46 Senate Environment and Communications References Committee, *Effectiveness of threatened species and ecological communities' protection in Australia*, August 2013, p. 207; see also, for example, Ms Megan Evans, *Submission 26*, p. 2.

47 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 25.

48 Mr Dean Knudson, First Assistant Secretary, Environment, Assessment and Compliance Division, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 32.

49 Department of the Environment, *Answers to questions on notice from public hearing on 6 May 2014*, p. 10 [Q. 6]; see also EPBC Act Offsets Policy, p. 4; BirdLife Australia, *Submission 77*, p. 11; Department of the Environment, *Submission 79*, p. 14; Minerals Council of Australia, *Submission 35*, p. 8.

through the 'one stop shop' policy. The evaluation of offset effectiveness and performance will also be a feature of the Department's ongoing assurance and policy role under the Australian Government's 'one stop shop' policy for environmental approvals.⁵⁰

Monitoring and evaluation: need for a public register of offsets

5.36 Submitters and witnesses suggested that the problems relating to monitoring and evaluation of offsets are compounded due to lack of transparency and public information available in relation to offsets. The committee heard that stakeholders have had difficulty identifying the offsets that have been put in place in many jurisdictions because there are no publicly available maps or registers of offsets. For example, Ms Woods of Lock the Gate Alliance told the committee that:

It is difficult to make rigorous analysis of the offsetting system, because there is not that much public information available. There is no register that I am aware of where you can see properties that have been set aside as offsets and the mechanisms that have been used to protect them.⁵¹

5.37 WWF Australia agreed that there is little public information to:

...determine if environmental offsets are achieving intended outcomes, whether development proponents are compliant with their offset obligations or where offset funds have been invested.⁵²

5.38 Dr Gibbons similarly told the committee that 'it is difficult to evaluate the effectiveness of the federal offset policy to date' because 'we have a poor evidence base'. In particular, he pointed to the lack of public register maintained by the department. He concluded that 'in terms of environmental outcomes, we do not know what is going on because these data are not adequately collected'.⁵³

5.39 Due to the difficulties with monitoring and evaluation, and the need for greater transparency in offsetting processes (as discussed in Chapter 4), many

50 Department of the Environment, *Answers to questions on notice from public hearing on 6 May 2014*, p. 10 [Q. 6]; see also Department of the Environment, *Submission 79*, p. 14.

51 Ms Georgina Woods, Policy Coordinator, Lock The Gate Alliance, *Committee Hansard*, 5 May 2014, p. 1; see also, for example, Mrs Patricia Julien, Research Analyst, Mackay Conservation Group, *Committee Hansard*, 7 May 2014, p. 32; Ms Beverley Smiles, Secretary, Central West Environment Council, *Committee Hansard*, 5 May 2014, p. 9; Mr Adam Walters, Research and Investigations Coordinator, Greenpeace, *Committee Hansard*, 5 May 2014, p. 28; Ms Sue Higginson, Principal Solicitor, NSW, ANEDO, *Committee Hansard*, 5 May 2014, p. 35.

52 WWF Australia, *Submission 73*, p. 2; BirdLife Australia, *Submission 77*, p. 11.

53 Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, p. 19.

submitters and witnesses supported the development of an online public register of offsets.⁵⁴ For example, Ms Woods from Lock the Gate Alliance observed that:

...the failure here is partly just one of record keeping... there is simply no public register. The jurisdictional difficulty with that, I think, is something that certainly needs to be addressed. New South Wales makes decisions and puts offsets aside, and then the federal government is asked to consider offsets, and it is simply not aware of decisions the state has made that one area or another ought to be an offset. So a public register would be extraordinarily helpful...⁵⁵

5.40 The Wentworth Group submitted that an independently maintained public register 'is essential to avoid duplication of offsets and for evaluation of the success or otherwise of offsets in restoring landscape processes'.⁵⁶

5.41 The Interdisciplinary Conservation Science Research Group suggested that a public register would not only allow the effectiveness of offsets to be measured and evaluated over time, but would also improve public confidence in the offsetting process.⁵⁷

5.42 Some noted that Western Australia does have a public register of offsets.⁵⁸ Dr Gibbons described the Western Australia register as a 'good example of the type of information that should be contained' in a public register' and as a 'great step forward in terms of compliance':

...it gives the latitudes and longitudes of all sites and how much was to be cleared—the Western Australian one also goes through all the steps and tells you the status of all the steps: when the assessment was started and finished, when the offset activities began, whether they have commenced and what offset activities are going on.⁵⁹

54 See, for example, Ms Megan Evans, *Submission 26*, p. 3; Dr Philip Gibbons, *Submission 21*, p. 4; Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, p. 23; Ms Georgina Woods, Policy Coordinator, Lock The Gate Alliance, *Committee Hansard*, 5 May 2014, p. 7; Queensland Murray-Darling Committee, *Submission 18*, p. 24; Chamber of Minerals and Energy Western Australia, *Submission 33*, p. 6; Interdisciplinary Conservation Science Research Group, *Submission 34*, pp 2–3; Canberra Ornithologists Group, *Submission 36*, p. 4; Environmental Decisions Group, *Submission 50*, p. 2; Urban Bushland Council WA Inc., *Submission 53*, p. 4; Friends of the Earth Australia, *Submission 58*, p. 8; WWF Australia, *Submission 73*, p. 2; NSW Minerals Council, *Submission 76*, p. 9; BirdLife Australia, *Submission 77*, p. 13; Wentworth Group, *Submission 85*, p. 4.

55 Ms Georgina Woods, Policy Coordinator, Lock The Gate Alliance, *Committee Hansard*, 5 May 2014, p. 7.

56 Wentworth Group, *Submission 85*, p. 4.

57 Interdisciplinary Conservation Science Research Group, *Submission 34*, p. 3.

58 For example, Interdisciplinary Conservation Science Research Group, *Submission 34*, pp 2–3; Mr Adam Walters, Research and Investigations Coordinator, Greenpeace, *Committee Hansard*, 5 May 2014, p. 28; Urban Bushland Council WA Inc., *Submission 53*, p. 4.

59 Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, pp 19 and 23.

5.43 The committee notes that the EPBC Act Offsets Policy commits to a publicly available register of offsets:

All offsets will be registered and details, such as spatial information (for example GPS data), information on the relevant protected matters and the ongoing managed actions required will be recorded. This information will be made publicly available on the department's website where it is appropriate to do so.⁶⁰

5.44 However, as submitters and witnesses noted, this register has not been established nor made publicly available.⁶¹ This was acknowledged by the department, which submitted that the public register is:

...currently being considered in the context of improved management and display of environmental information that will support the government's 'one stop shop' policy.⁶²

5.45 In response to questioning on this issue, a representative of the department agreed that 'it would be desirable to have an offset register, and it is a recommendation that we are progressing within the department presently'.⁶³ The representative further advised that, in the absence of a register of offsets, 'we use the knowledge and information available to staff in terms around species and particular ecosystems' to ensure that sufficient offsets are available.⁶⁴

Security and enforceability of offsets

5.46 In relation to the enforceability of offsets, submitters and witness raised two key issues:

- mechanisms for securing offsets in the long term; and
- whether offsets conditions are adequately enforced.

60 EPBC Act Offsets Policy, p. 24.

61 BirdLife Australia, *Submission 77*, p. 12; Mr Adam Walters, Research and Investigations Coordinator, Greenpeace, *Committee Hansard*, 5 May 2014, p. 27; Ms Megan Evans, *Submission 26*, p. 2.

62 Department of the Environment, *Submission 79*, p. 14.

63 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 30.

64 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 30.

Mechanisms for securing offsets

5.47 Many submitters identified the need for offsets to be 'in perpetuity'.⁶⁵ As such, many submitters and witnesses emphasised the need for offsets to have long-term legal and financial security.⁶⁶ For example, ANEDO submitted that:

An offset area must be legally protected and managed in perpetuity, as the impact of the development is permanent. Offset areas should not be amenable to being offset again in the future.⁶⁷

5.48 The EPBC Act Offsets Policy does provide some guidance as to the appropriate tenure for offsets, where it states that:

...the tenure of the offset should be secured for at least the same duration as the impact on the protected matter arising from the action, not necessarily the action itself...the best legal mechanisms for protecting land are intended to be permanent (lasting forever) and are secure (that is, they are difficult to change or alter).⁶⁸

5.49 The EPBC Act Offsets Policy then canvasses suitable mechanisms for offsets depending on tenure.⁶⁹ The department stated that the policy 'explicitly requires that offsets be in place for the duration of the impact' and that:

For permanent impacts, this would require an offset to deliver an enduring conservation gain. In many cases for offsets that aim to avert a future loss, this requires the permanent protection of areas of habitat.⁷⁰

5.50 The EPBC Act Offsets Policy identifies conservation agreements, under the EPBC Act, and conservation covenants, in the states and territories, as the appropriate legal mechanisms. The policy states that these mechanisms 'enable the protection of land that is set aside for environmental purposes on a permanent or long-term basis'.⁷¹

5.51 However, Mr Sydes of Environmental Justice Australia observed that legal security for offsets can be difficult, telling the committee that for offsets:

65 Dr Anita Foerster and Professor Jan McDonald, *Submission 23*, p. 5; ANEDO, *Submission 60*, p. 60; Humane Society International, *Submission 28*, p. 2; Trust for Nature, *Submission 45*, p. 1; Nature Conservation Society of South Australia, *Submission 89*, p. 2; BirdLife Australia, *Submission 77*, p. 6; Mr Martin Fallding, Biodiversity offsets: Practice and promise, *Australian Environment and Planning Law Journal* (2014) vol. 31, p. 12 (tabled at public hearing 5 May 2014).

66 See, for example, ANEDO, *Submission 60*, p. 4; Urban Bushland Council WA Inc., *Submission 53*, pp 3–4; Birdlife Australia, *Submission 77*, p. 6; Australian Koala Foundation, *Submission 4*, p. 3; Birdlife Southern New South Wales, *Submission 5*, p. 7; North Queensland Conservation Council, *Submission 18*, p. 3; Dr Yung En Chee, *Submission 57*, p. 10.

67 ANEDO, *Submission 60*, p. 4; see also Mr Brendan Sydes, Chief Executive Officer, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, p. 20.

68 EPBC Act Offsets Policy, p. 18.

69 EPBC Act Offsets Policy, Box 3, p. 19

70 Department of the Environment, *Submission 79*, p. 6.

71 EPBC Act Offsets Policy, pp 18–19.

...to be credible, they really need to be long term, secure and in perpetuity. Designing a regime to ensure that that happens, putting in place the legal security mechanisms, bonds and all that sort of thing to actually secure that obligation, is enormously difficult.⁷²

5.52 Mr Sydes further observed that 'having good legal security mechanisms in place would be a very significant advance over the current situation':

...we are sold a pup in many cases. There are offset commitments made on the basis of promises that are effectively unenforceable and never followed up or monitored. One thing we could do, if we are insistent on using offsets, is pay much more attention to how those offsets are actually secured.⁷³

5.53 Ms Doherty from the NSW Minerals Council observed that there has been some uncertainty about the appropriate legal mechanism to secure offsets.⁷⁴ She noted that 'whole raft of different mechanisms that can be used', but the most common one used in recent years is a voluntary conservation agreement.⁷⁵

5.54 Indeed, there was considerable discussion during the committee's inquiry about the various mechanisms for securing offsets, including conservation agreements and conservation covenants.⁷⁶ However, the committee heard that conservation agreements or conservation covenants do not necessarily provide sufficient protection as the areas covered by them can still be subject to mining exploration and extraction activities in the future.⁷⁷ Indeed, the committee received evidence that, in many jurisdictions, it is difficult to find a secure mechanism for the 'in perpetuity' protection of offset areas on private land.⁷⁸

72 Mr Brendan Sydes, Chief Executive Officer, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, p. 20.

73 Mr Brendan Sydes, Chief Executive Officer, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, p. 18.

74 Ms Claire Doherty, Director, Community Development, NSW Minerals Council, *Committee Hansard*, 6 May 2014, p. 2.

75 Ms Claire Doherty, Director, Community Development, NSW Minerals Council, *Committee Hansard*, 6 May 2014, p. 2.

76 See also Mr Brendan Sydes, Chief Executive Officer, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, p. 18; Trust for Nature, *Submission 45*, p. 1; Mr Martin Fallding, Environmental Planner, Lake Macquarie City Council, *Committee Hansard*, 5 May 2014, p. 46; Mr Philip Spark, President, Northern Inland Council for the Environment, *Committee Hansard*, 5 May 2014, p. 51.

77 See, for example, Lake Macquarie City Council, *Submission 17*, p. 2; Mr Martin Fallding, Environmental Planner, Lake Macquarie City Council, *Committee Hansard*, 5 May 2014, p. 46; Ms Megan Evans, *Submission 26*, p. 6.

78 See, for example, Lock the Gate Alliance, *Submission 20*, p. 12; Ms Georgina Woods, Policy Coordinator, Lock the Gate Alliance, *Committee Hansard*, 5 May 2014, pp 1, 4–5; Lake Macquarie City Council, *Submission 17*, p. 2; Mr Philip Spark, President, Northern Inland Council for the Environment, *Committee Hansard*, 5 May 2014, p. 51.

5.55 For example, Ms Sue Higginson from ANEDO told the committee that in NSW 'there is no failsafe measure currently available to permanently and irrevocably protect an area of land in perpetuity'.⁷⁹

5.56 The North Queensland Conservation Council similarly submitted that:

...there is no guarantee that areas set aside as offsets will not, themselves, be subject to development. Indeed, we have recently seen that legal agreements for protection 'in perpetuity' can be ignored in the light of a development application...⁸⁰

5.57 Dr Yung En Chee agreed:

The mounting evidence for the lack of security in the tenure of existing offset sites and the poor prospects for improved security of tenure in future, seriously calls into question the effectiveness and credibility of offsets as a tool for balancing development and conservation.⁸¹

5.58 Indeed, the committee heard examples of areas that were protected under conservation agreements where developments have subsequently been approved. Several submitters and witnesses highlighted the Waratah Coal Galilee Basin project which has impacted upon the Bimblebox Nature Refuge, which was, in theory, protected under a conservation agreement and as part of the Australian National Reserve system. This case study is outlined further at Appendix 4.⁸²

5.59 The committee also received evidence of examples of development in areas supposed to be set aside under offsets.⁸³ Several submitters and witnesses gave the example of the Warkworth Mine extension in NSW, where a previously offset area is now proposed to be mined as a result of a change to the conditions of approval. The committee heard that the Warkworth mine was approved for expansion in 2004, with a condition that over 700 hectares be set aside as a 'non-disturbance' area, to protect the Warkworth Sands ecological community. However, that area was made available for mining due to a variation of the conditions of approval in July 2012 to allow open-cut mining in the 'non-disturbance' area. The variation contained a requirement to submit an offset management plan within 12 months. In December 2013, the approval was again varied and an extension was granted for the submission of the offset

79 Ms Sue Higginson, Principal Solicitor, NSW, ANEDO, *Committee Hansard*, 5 May 2014, p. 35.

80 North Queensland Conservation Council, *Submission 18*, p. 3.

81 Dr Yung En Chee, *Submission 57*, p. 11.

82 See, for example, Ms Paola Cassoni, Co-owner, Bimblebox Nature Refuge, *Committee Hansard*, 7 May 2014, p. 22; Interdisciplinary Conservation Science Research Group, *Submission 34*, p. 4; Dr Yung En Chee, *Submission 57*, p. 11; Mr Peter Boulot and Mr Ross Parisi, *Submission 62*, p. 2.

83 See, for example, Lock the Gate Alliance, *Submission 20*, p. 9; Mr Martin Fallding, Environmental Planner, Lake Macquarie City Council, *Committee Hansard*, 5 May 2014, p. 44.

management plan to 13 April 2014. At the time of writing, it was unclear whether this plan had been submitted.⁸⁴

5.60 Indeed, the committee heard that the EPBC Act Offsets Policy explicitly provides for the possibility of development which impacts on existing offsets. It states that, in this situation:

...the person proposing to take the action must develop an offsets package to compensate for both the impact of the proposed action, as well as the original action for which the offset was a condition of approval. The subsequent offset conditions would not amount to a variation of the original conditions of approval or excuse non-compliance with those conditions.⁸⁵

5.61 The Minerals Council of Australia expressly supported the idea of allowing access to offset sites for future development, submitting that:

...access to offsets areas may be required in the future. Those areas should remain available provided proponents can demonstrate offsetting the previous offset is viable.⁸⁶

5.62 The department submitted that:

Given the complex nature of land protection mechanisms and different legislative provisions governing allowable land use, there are circumstances where an offset may be subject to developmental impacts. Section 7.2.2 of the policy specifically outlines the requirements that apply where a development may potentially impact on an established EPBC Act offset.⁸⁷

5.63 In response to further questioning on this issue, the department noted that 'if a property is already being used as an offset and it is subject to mining in the future, that substantially increases the offset obligation that exists for that subsequent activity'.⁸⁸

84 Note that this project was approved under both the EPBC Act and also the NSW *Environmental Planning and Assessment Act 1979*. See further EPBC Act Referral No. 2002/629, http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=629 (accessed 13 June 2014). See also Lock the Gate Alliance, *Submission 20*, pp 9–10; Ms Georgina Woods, Policy Coordinator, Lock the Gate Alliance, *Committee Hansard*, 5 May 2014, pp 5 and 7; Ms Sue Higginson, Principal Solicitor, NSW, ANEDO, *Committee Hansard*, 5 May 2014, p. 35; Dr Yung En Chee, *Submission 57*, p. 10; ANEDO, *Submission 60*, p. 6; Greenpeace, *Submission 61*, p 5–6; BirdLife Australia, *Submission 77*, p. 12; see also Department of the Environment, EPBC Referral Detail Ref 2002/629 and 2009/5081, http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=5389 and http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=1369 (accessed 4 June 2014).

85 EPBC Act Offsets Policy, p. 19; see also, for example, Greenpeace, *Submission 61*, p. 5.

86 Minerals Council of Australia, *Submission 35*, p. 7.

87 Department of the Environment, *Submission 79*, p. 6.

88 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 31.

5.64 Some suggested that the most secure protection would be for offsets to be placed in national parks.⁸⁹ Ms Woods from Lock the Gate Alliance told the committee that:

...there is not a covenant or a protection mechanism that secures against future development of that offset. So the purpose of them is that they are supposed to be set aside in perpetuity—and that is the terminology that gets used in a lot of the conditions—to replace the area that gets lost. But I am not aware of a mechanism that has successfully been used in that way, other than national park listing which is not normally on the table.⁹⁰

5.65 The EIANZ submitted that, 'in Australia, national parks are the only areas where resource extraction remains prohibited' and that 'any lesser category of reserve can be relatively easily opened up for resource extraction activities'. The EIANZ further submitted that:

...for an offset policy to be of real benefit in the protection and management of biodiversity values, offset areas must be given the highest level of protection—even if that means a new category of land is created that is fully protected from resource extraction activities.⁹¹

5.66 The Minerals Council of Australia noted that the new Queensland offsets legislation has introduced 'a new mechanism for the legal securing of offsets' which it suggested 'could be a useful case study to assess the way in which offset land could be secured in the future'.⁹²

5.67 The department's submission acknowledges that:

The capacity of an offset to deliver a conservation gain through averting a future loss is contingent on the strengths of any legal protective mechanisms that are applied to an offset. Generally, legal protective mechanisms, such as conservation covenants, are administered through state and territory government land, planning and/or environmental legislation. The interaction between land use legislation is complex. For example certain types of protective covenants or voluntary conservation agreements in a number of jurisdictions may be overridden by certain rights, such as resource exploration and extraction...Where a protective

89 See, for example, Mr Philip Spark, President, Northern Inland Council for the Environment, *Committee Hansard*, 5 May 2014, p. 51; Mr Des Boyland, Policies and Campaigns Manager and Secretary, Wildlife Preservation Society of Queensland, *Committee Hansard*, 7 May 2014, p. 14; Ms Paola Cassoni, Co-owner, Bimblebox Nature Refuge, *Committee Hansard*, 7 May 2014, p. 24; Ms Megan Evans, *Submission 26*, p. 6.

90 Ms Georgina Woods, Policy Coordinator, Lock the Gate Alliance, *Committee Hansard*, 5 May 2014, pp 4–5; see also Ms Sue Higginson, Principal Solicitor, NSW, ANEDO, *Committee Hansard*, 5 May 2014, p. 35.

91 EIANZ, *Submission 88*, p. 12.

92 Minerals Council of Australia, *Submission 35*, p. 7.

mechanism is insufficient in treating a risk to an area, this reduces the potential suitability of the offset.⁹³

5.68 The committee also notes that the EPBC Act Offsets Policy states that:

In some situations there may be difficulties in permanently securing a site for conservation purposes due to the existing tenure of the land...where the security of an offset is diminished, the risk to any protected matters, and subsequently the magnitude of offsets required, will increase.⁹⁴

Security of funding

5.69 Submitters and witnesses emphasised the need for offsets to have both legal and financial security, including long-term funding for the future management of offset sites. Dr Anita Foerster and Professor Jan McDonald explained:

It is critical that offset schemes guarantee legal protection and management for agreed conservation outcomes in perpetuity. They must also provide for funding mechanisms to support ongoing management activities. Funding guarantees to support management of offset sites are particularly important. Such funding is integral to the establishment of the offset site, and should not be regarded as an indirect offset in its own right.⁹⁵

5.70 For example, Mr Martin Fallding of Lake Macquarie City Council told the committee that offsets need both secure tenure and 'active management of land'.⁹⁶ In this context, some submitters and witnesses noted that a bond or similar financial mechanism, paid for by the proponent, could be used to ensure that there are funds to maintain the offset into the future.⁹⁷

Advanced offsets and biobanking

5.71 There was also some discussion during the committee's hearings about 'advanced' offsets, whereby offsets are identified and secured in advance. Although, as noted in chapter 2, the EPBC Act Offsets Policy encourages the use of advanced offsets,⁹⁸ the committee received little evidence to indicate that this is occurring in practice.

93 Department of the Environment, *Submission 79*, p. 6.

94 EPBC Act Offsets Policy, p. 19.

95 Dr Anita Foerster and Professor Jan McDonald, *Submission 23*, p. 6; see also, for example, Wentworth Group, *Submission 85*, p. 4; Ms Georgina Woods, Policy Coordinator, Lock The Gate Alliance, *Committee Hansard*, 5 May 2014, p. 8.

96 Mr Martin Fallding, Environmental Planner, Lake Macquarie City Council, *Committee Hansard*, 5 May 2014, pp 46,48; see also, for example, Ms Claire Doherty, Director, Community Development, NSW Minerals Council, *Committee Hansard*, 6 May 2014, p. 3.

97 See, for example, Mr Martin Fallding, Environmental Planner, Lake Macquarie City Council, *Committee Hansard*, 5 May 2014, pp 46, 48; Wentworth Group, *Submission 85*, p. 4; Greenpeace, *Submission 61*, p. 1; see also, for example, Ms Claire Doherty, Director, Community Development, NSW Minerals Council, *Committee Hansard*, 6 May 2014, p. 3.

98 See also Department of the Environment, *Submission 79*, p. 6.

5.72 Submitters and witnesses expressed support for the use of advanced offsets. For example, Dr Gibbons described 'advanced offsets' as the 'gold standard' and suggested that offsets policy 'should be moving towards advanced offsets'.⁹⁹ Mr McCombe from the Minerals Council noted that advanced offsets have 'a number of benefits for mining proponents', including 'having ready access to offsets'.¹⁰⁰

5.73 Several witnesses and submitters also expressed support for biobanking schemes, such as the NSW Biobanking Scheme.¹⁰¹ Ms Walmsley of ANEDO explained that the idea behind this scheme is that it 'creates a pool of ready-made offset credits':

So when a proponent is about to undertake a development, they can actually look up what offset credits are available...The idea is that that speeds up the process because you have a centralised offsets pool and proponents can choose to buy those credits instead of sourcing their own offsets.¹⁰²

5.74 She suggested that the NSW biobanking scheme has a number of positive aspects, including that biobanking site agreements are in perpetuity, providing an income stream to landholders to manage vegetation for biodiversity outcomes and a rigorous and transparent process involving a register of offsets. Ms Walmsley further told the committee that a NSW biobanking agreement is 'relatively robust', compared to other conservation agreements.¹⁰³

5.75 It was noted that some recent approval conditions have required offsets to be secured via biobanking agreements.¹⁰⁴ Mr Fallding from Lake Macquarie City Council expressed a preference for a biobanking agreement as 'a very secure mechanism'.¹⁰⁵ However, Ms Claire Doherty from the NSW Minerals Council

99 Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, pp 19, 24.

100 Mr Chris McCombe, Assistant Director, Environmental Policy, Minerals Council of Australia, *Committee Hansard*, 6 May 2014, p. 4; see also, for example, Trust for Nature, *Submission 45*, p. 4.

101 See, for example, NSW Minerals Council, *Submission 76*, pp 9–10; Ms Rachel Walmsley, Policy and Law Reform Director, NSW, ANEDO, *Committee Hansard*, 28 May 2014, pp 31–32; Mr Martin Fallding, Environmental Planner, Lake Macquarie City Council, *Committee Hansard*, 5 May 2014, p. 43.

102 Ms Rachel Walmsley, Policy and Law Reform Director, NSW, ANEDO, *Committee Hansard*, 28 May 2014, p. 31.

103 Ms Rachel Walmsley, Policy and Law Reform Director, NSW, ANEDO, *Committee Hansard*, 28 May 2014, pp 32–33.

104 See, for example, Mr Brendan Sydes, CEO, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, p. 18; Ms Sue Higginson, Principal Solicitor, NSW, ANEDO, *Committee Hansard*, 5 May 2014, p. 35.

105 Mr Martin Fallding, Environmental Planner, Lake Macquarie City Council, *Committee Hansard*, 5 May 2014, p. 46.

cautioned that requiring biobanking agreements post approval could be problematic 'if they have not used the biobanking tools to assess the offset'.¹⁰⁶

5.76 The committee notes that the Hawke review of the EPBC Act, as outlined in Chapter 2, did recommend a biobanking system be developed and that its use be promoted as part of project approvals under the EPBC Act.¹⁰⁷ The government agreed in principle to this recommendation.¹⁰⁸

Enforcement of offsets

5.77 In terms of non-compliance with conditions of offsets, several submissions raised concerns that offsets are not actually being adequately enforced.¹⁰⁹ For example, Mr Sydes of Environmental Justice Australia told the committee that:

To the extent that there is any enforcement under the EPBC Act, it tends to be for breaches of the referral provisions and so forth, but the actual routine and persistent follow-up of conditions including offset conditions and so forth does not seem to be a feature of the scheme as it currently stands—and it really needs to be.¹¹⁰

5.78 However, a representative of the department advised that there are penalties under the EPBC Act which apply to the breach of conditions of approval, including a breach of a condition relating to offsets.¹¹¹ The department submitted that:

When contraventions occur, a range of compliance and enforcement mechanisms are used. These include education and communication, investigation of alleged contraventions, and enforcement measures. The legislation provides enforcement options that include criminal and civil penalties, and administrative sanctions.¹¹²

5.79 In response to further questioning on this issue, a representative of the department explained that offsets are part of the conditions of approval under the EPBC Act, and as such, there are penalties for non-compliance with the conditions of

106 Ms Claire Doherty, Director, Community Development, NSW Minerals Council, *Committee Hansard*, 6 May 2014, p. 2.

107 Hawke review, recommendation 7, p. 122; see also Ms Rachel Walmsley, Policy and Law Reform Director, NSW, ANEDO, *Committee Hansard*, 28 May 2014, p. 32.

108 Australian Government, *Australian Government Response to the Report of the Independent Review of the EPBC Act*, August 2011, p. 21.

109 See, for example, Friends of Grasslands, *Submission 13*, p. 3; Mr Peter Cosier, Director and Founding Member, Wentworth Group, *Committee Hansard*, 6 May 2014, p. 16; Friends of Grasslands, *Submission 13*, p. 3; Queensland Seafood Industry Association, *Submission 48*, p. 2.

110 Mr Brendan Sydes, Chief Executive Officer, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, p. 20.

111 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 26; see also Department of the Environment, *Answers to questions on notice from public hearing on 6 May 2014*, pp 5–6 [Q. 3].

112 Department of the Environment, *Submission 79*, p. 11.

approval.¹¹³ The department also noted that, in responding to a contravention of a condition of approval, the conditions of approval can be varied, or the approval can be revoked or suspended.¹¹⁴

5.80 However, the variation of conditions of approval relating to offsets was a key complaint for some submitters. For example, the Lock the Gate Alliance submitted that, rather than conditions being enforced, they 'are loosened, weakened and blow out long after the environmental impacts are felt'. They cited several examples of failure to fulfil offset conditions in relation to environmental approvals, which had resulted in further negotiation with proponents:

Our examples demonstrate the Department of Environment complying repeatedly with requests by coal and gas project proponents to change the conditions of their approvals multiple times to allow for their repeated failure to fulfil the offset conditions imposed on their approvals.¹¹⁵

5.81 Lock the Gate Alliance suggested that this exposes a 'failure not only of the offsetting program, but of the EPBC compliance process':

...failure to comply with offsetting commitments is basically forgiven and erased by the Department of Environment's willingness to rewrite conditions, rather than enforce them. Indeed, this approach is written into the Department's offset policy, which states that 'Where a proponent becomes aware that they may not be able to fulfil a condition of approval, they should approach the department in the first instance to discuss the matter and see what options are available to remedy the situation'.¹¹⁶

5.82 However, other witnesses expressed support for a flexible approach to conditions relating to offsets. For example, Ms Stutsel from the Minerals Council told the committee that:

...the ability to modify offsets is quite important, because the monitoring and evaluation of offsets may, over time, demonstrate that the environmental objectives of those offsets are not being achieved to the extent that they were required as part of the approval.¹¹⁷

5.83 In response to questioning in relation to specific projects where conditions have been varied to extend compliance timeframes, the department noted that they had been extended to finalise the legal mechanism under which the offset areas are to be

113 Dr Kimberley Dripps, Department of the Environment, *Committee Hansard*, 6 May 2014, pp 28–29; see also Department of the Environment, *Answers to questions on notice from public hearing on 6 May 2014*, pp 5–6 [Q. 3].

114 Department of the Environment, *Answers to questions on notice from public hearing on 6 May 2014*, pp 5–6 [Q. 3].

115 Lock the Gate Alliance, *Submission 20*, p. 1; Ms Georgina Woods, Policy Coordinator, Lock The Gate Alliance, *Committee Hansard*, 5 May 2014, p. 1.

116 Lock the Gate Alliance, *Submission 20*, p. 7; EPBC Act Offsets Policy, p. 12.

117 Ms Melanie Stutsel, Director, Health, Safety, Environment and Community Policy, Minerals Council of Australia, *Committee Hansard*, 6 May 2014, p. 9.

secured. The department advised that although the relevant conservation covenants had not yet been secured, 'the offset areas are being managed in accordance with the approved offset management plans'.¹¹⁸

5.84 In response to the committee's requests, the department also gave two examples of where penalties had been applied for the breach of conditions in relation to offset areas protected as a condition of approval:

In June 2010 a reparations package totalling \$658,500 was agreed and implemented through a variation of conditions attached to EPBC 2002/569 for Anglo Coal (Callide Management) Pty Ltd's coalmine near Gladstone. A potential breach of EPBC approval conditions was identified after 420m² of spoil was dumped onto an area of Semi-evergreen vine thicket ecological community which was protected under the approval.

On 13 September 2011 an infringement notice totalling \$6,600 was issued to Quanstruct (Aust) Pty Ltd for contravening conditions relating to their approval (EPBC 2010/5552). The approval holder was found to be in breach of their conditions for the disposal of spoil on an area designated as an offset as part of their approval.¹¹⁹

Accountability in offsets decision-making

5.85 Some witnesses and submitters called for stronger accountability mechanisms in relation to the implementation and delivery of offsets.¹²⁰ In particular, it was suggested that there is a need for stronger and independent oversight of how offsets are being implemented. For example, Mr Walters from Greenpeace Australia Pacific argued that:

...the level of oversight even within the existing system is incredibly low...there is no independent scrutiny of the current policy in that it is heavily reliant upon consultants' reports, and peer review of that may involve getting the proponent to get their own work reviewed by a different consultant. There is no independent oversight of that.¹²¹

5.86 One suggestion was for merits review of ministerial decisions under the EPBC Act to be made available.¹²² For example, Mr Sydes of Environmental Justice

118 Department of the Environment, *Answers to questions on notice from public hearing on 6 May 2014*, p. 15 [Q. 8].

119 Department of the Environment, *Answers to questions on notice from public hearing on 6 May 2014*, p. 7 [Q. 4].

120 See, for example, Mr Brendan Sydes, Chief Executive Officer, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, p. 15.

121 Mr Adam Walters, Research and Investigations Coordinator, Greenpeace, *Committee Hansard*, 5 May 2014, p. 26; see also Mr Brendan Sydes, Chief Executive Officer, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, p. 15.

122 See, for example, Mr Brendan Sydes, Chief Executive Officer, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, p. 15; Ms Georgina Woods, Policy Coordinator, Lock The Gate Alliance, *Committee Hansard*, 5 May 2014, p. 8; Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth Australia, *Committee Hansard*, 7 May 2014, p. 47.

Australia suggested that decisions under the EPBC Act should be able to be scrutinised through merits review of decisions.¹²³ Ms Woods from Lock the Gate Alliance argued that there is currently 'no recourse for the community to argue that the minister had made the wrong decision...they can essentially make whatever decision they choose and justify it'.¹²⁴

5.87 The committee notes that decisions made under the EPBC Act are subject to judicial review by the Federal Court.¹²⁵ That is, a person aggrieved by a decision made by a government official can have that decision scrutinised by the court. The court is not concerned with the merits of the decision, but rather with whether there has been an error of law in the making of the decision. The court can send the decision back to the original decision-maker to make a new decision. In contrast, under merits review, the court can substitute its own decision for that of the primary decision-maker.¹²⁶

5.88 Another suggestion, made by Mr Sydes of Environmental Justice Australia, was that a 'National Environment Commissioner' could provide that stronger independent oversight of offsets. In response to questioning as to what the role and responsibilities of a national environmental commissioner might be, Mr Sydes explained that:

The responsibilities would stretch across independent oversight of approvals and decision making generally under the legislation; a responsibility for developing a policy and program of ongoing monitoring and evaluation of the success of the implementation of this legislation...It would be critical, we say, for it to be a body or an organisation that had an independent statutory foundation and preferably, in fact, a body that reported directly to parliament rather than being part of the department.¹²⁷

5.89 The committee notes that the Hawke review recommended a National Environmental Commissioner be established under the EPBC Act.¹²⁸ However, this recommendation was not agreed to by the then government.¹²⁹

123 Mr Brendan Sydes, Chief Executive Officer, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, p. 15.

124 Ms Georgina Woods, Policy Coordinator, Lock The Gate Alliance, *Committee Hansard*, 5 May 2014, p. 8.

125 *Administrative Decisions (Judicial Review) Act 1977*; see also s. 487 of the EPBC Act.

126 See further Hawke review, pp 316–317.

127 Mr Brendan Sydes, Chief Executive Officer, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, p. 16; see also EDO (Vic), *Submission 72*, p. 6 and Attachment 2.

128 Hawke review, recommendation 71 and see pp 401–410.

129 Australian Government, *Response to the report of the independent review of the EPBC Act*, 2011, p. 114.