

Chapter 6

Conclusions and recommendations

Introduction

6.1 The use of environmental offsets to compensate for the environmental impacts of activities and developments has become increasingly common in recent years. They are now used at all levels of government in Australia. While not specifically recognised in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), their use has evolved as an administrative practice and they are now regularly included in the conditions of approval for actions that are likely to have a significant impact on matters of national environmental significance.¹

6.2 There were differing perspectives on the suitability of environmental offsets in evidence to the committee. While some submitters supported environmental offsets as a means to facilitate development in an environmentally responsible manner, others were concerned that it is a flawed concept which is used to justify unsustainable developments. Other submitters were supportive of the principles of environmental offsets but concerned about their application in practice.

Projects listed at term of reference (2)

6.3 The committee notes that its terms of reference canvassed a number of particular projects as case studies in relation to environmental offsets. These case studies are outlined in further detail in appendices 3–7 of this report. The committee does not intend to comment on particular projects. Rather, these case studies have been identified as illustrations of particular problems in relation to the implementation of offsets where relevant.

The EPBC Act Offsets Policy

6.4 The EPBC Act Offsets Policy has been in place since October 2012 and provides guidance to all stakeholders on how offsets are determined under the EPBC Act. The committee acknowledges evidence that the policy has only been in place for just over a year and, as such, it may be somewhat premature to be reviewing its effectiveness. However, the committee notes that many submitters and witnesses were generally supportive of the EPBC Act Offsets Policy and the principles articulated in the policy.

6.5 The committee received evidence that the EPBC Act Offsets Policy and accompanying Offsets Assessment Guide have clarified Commonwealth policy in relation to offsets and made offsets calculations and assumptions more transparent and predictable. As such, it appears that the policy is meeting its aim of providing

1 Although note that the EPBC Act Offsets Policy does not apply to water resources in relation to coal seam gas and large coal mine developments, which was added as a new matter of national environmental significance after the release of the policy: Department of the Environment, *Submission 79*, p. 3.

stakeholders with greater certainty and guidance. Indeed, the committee considers that the EPBC Act Offsets Policy has resulted in substantial improvements in the approach to offsets at the Commonwealth level.

6.6 The committee considers that environmental offsets are an important tool in the environmental assessment framework to address the residual environmental impacts of developments. Nevertheless, the committee is persuaded by evidence that some aspects of the policy and its implementation could be improved. These are set out in further detail below.

6.7 The committee further notes that the use of offsets and the associated principles are currently only administratively based, rather than expressly included in the EPBC Act itself. Given the evidence from the Department of the Environment that the use of offsets has grown over the last decade, the committee considers that the EPBC Act Offsets Policy principles should have a statutory basis. This would ensure that the offsets principles are relevant considerations for the minister in making decisions in relation to the conditions of approval under the EPBC Act. The committee considers that this will create an obligation on the minister to ensure that the principles are more rigorously implemented.

Recommendation 1

6.8 The committee recommends that the *Environment Protection and Biodiversity Conservation Act 1999* be amended to expressly recognise environmental offsets and to include the principles set out in the *Environment Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy* as relevant considerations for the minister in making decisions about conditions of approval relating to offsets.

Additionality

6.9 The EPBC Act Offsets Policy requires offsets to be 'additional'—that is, they must deliver a conservation gain—and activities that are already required by law or agreed to under other schemes cannot be used to meet offsets under the EPBC Act. In addition, a particular offset cannot be used for more than one action, although it is appropriate to recognise state or territory offsets under the EPBC Act for the *same* action.

6.10 However, the committee received several examples illustrating the failure to apply the principle appropriately, such as offsets being used to protect land that it is already protected as a park or nature reserve. The committee finds it hard to see how this practice is delivering a conservation gain. Rather, it is consistent with the EPBC Act Offsets Policy and has the potential to undermine the objectives of the EPBC Act to promote the conservation of biodiversity.

6.11 The committee agrees with suggestions that the EPBC Act Offsets Policy could be revised to provide further clarity on the principle of additionality, and to ensure that areas are not being used as offsets if they are already protected under existing conservation legislation or agreements.

Recommendation 2

6.12 The committee recommends that the *Environment Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy* be revised to provide further clarity on the principle of additionality.

Recommendation 3

6.13 The committee recommends that the Department of the Environment ensure that all offsets adequately reflect the principles of additionality, and are not granted in relation to areas that are already protected under existing Commonwealth, state or territory legislation or policy.

Offsets as a last resort: the mitigation hierarchy

6.14 The committee agrees that environmental offsets must be used only as an absolute last resort. The Department of the Environment advised that, under the EPBC Act Offsets Policy, prior to the granting of environmental offsets, 'all reasonable steps should first be taken to avoid and then mitigate adverse impacts on the environment'.² However, the committee was concerned by evidence that this mitigation hierarchy is not being rigorously applied and that there is insufficient emphasis on avoidance and mitigation measures.

6.15 Clearly, offsets should be a last resort and the mitigation hierarchy needs to continue to be rigorously followed. The committee considers that its recommendation above for offsets principles to be explicitly recognised in the EPBC Act should assist in this regard.

Recommendation 4

6.16 The committee recommends that offsets be used only as a last resort.

Recommendation 5

6.17 The committee recommends that, prior to approval being given for actions under the *Environment Protection and Biodiversity Conservation Act 1999*, the mitigation hierarchy be rigorously implemented, with a greater emphasis on avoidance and mitigation.

Unacceptable impacts

6.18 In addition to a strong emphasis on avoiding and mitigating impacts of development, the committee considers that offsets should not be used as an excuse to allow developments in all circumstances. The committee notes that the EPBC Act Offsets Policy states that 'offsets do not mean proposals with unacceptable impacts will be approved'.³

6.19 However, there was ample evidence to the committee that this is not always the case. As a consequence, submitters and witnesses called for greater guidance on situations when offsetting will not be appropriate and clarification on what is

2 Department of the Environment, *Submission 79*, p. 1.

3 EPBC Act Offsets Policy, p. 7.

considered to be an 'unacceptable impact'. It was suggested that some matters are irreplaceable and, as such, there should be some clear 'red flags' or 'no go' areas where offsetting is not an appropriate strategy.

6.20 The committee is persuaded by the argument that offsets should be unavailable in some circumstances; for example, where the impacted matter is listed as critically endangered, or within a world heritage area.

Recommendation 6

6.21 The committee recommends that the *Environment Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy* be revised to provide greater guidance on developments in which offsets are unacceptable, including a list of 'red flag' areas, such as world heritage and critically endangered ecological communities and species.

Timing of offsets and approval conditions

6.22 The committee is also concerned by evidence that approvals are being given under the EPBC Act that include offsets that are not properly identified. The committee recognises that it can take some time to ensure that legal mechanisms are in place to secure offsets. However, the committee heard that it is an increasingly common practice for the conditions placed on approvals to require the proponent to develop an offsets plan or strategy, rather than requiring the delivery of the offsets themselves.

6.23 The department gave evidence that such plans and strategies are required to be developed prior to commencement of any development activities. However, the case studies examined by this committee, such as the Galilee Coal Project—where an offsets management plan was required 12 months after commencement—demonstrate that this is not always the case. Further, the committee heard that conditions of approval are being varied where offsets are unavailable or unable to be secured.

6.24 The committee considers that this approach effectively excludes public participation in the process of assessing and developing offsets. The committee is also concerned that this approach could hamper the ability to enforce conditions relating to the actual delivery of offsets. The committee was concerned to hear that offsets plans and strategies are not always made publicly available, compounding concerns about the lack of transparency in relation to offsets.

6.25 The committee considers that it is imperative for offsets to be properly and fully identified prior to approval being given for the particular activity.

Recommendation 7

6.26 The committee recommends that environmental offsets related to any particular development or activity should be clearly identified prior to approval being given for that development or activity.

Transparency

6.27 The EPBC Act Offsets Policy states that, in assessing the suitability of an offset, government decision-making should be 'conducted in a consistent and transparent manner'.⁴ The committee acknowledges evidence that the publication of the EPBC Act Offsets Policy and accompanying Assessment Guide has greatly improved the transparency of offsets at the Commonwealth level.

6.28 Nevertheless, the committee heard that there could be improved transparency and public consultation and reporting in the development and implementation of offsets. The committee welcomes the department's evidence that it has been working with the Indigenous Advisory Committee to improve consultation with Indigenous Australians about the delivery and appropriate use of offsets.

6.29 The committee notes that there is opportunity for public participation at various stages of the assessment process, and that information relating to offsets is often included in assessment documentation. However, it appears that the final stages of the process are often lacking in transparency.

6.30 The committee notes the frustration of stakeholders who gave evidence that offsets plans are not being made publicly available and, indeed, are often developed through closed-door negotiations between proponents and the department. The committee considers that its recommendation above for environmental offsets to be clearly identified prior to approval should assist in this regard. However, the committee also strongly recommends that all environmental offsets plans and strategies that have been, or are in future, required as part of the conditions of approval under the EPBC Act be published on the Department of the Environment's website.

Recommendation 8

6.31 The committee recommends that all environmental offsets plans and strategies, required as part of the conditions of approval under the *Environment Protection and Biodiversity Conservation Act 1999*, be published on the Department of the Environment's website.

Transparency: Public register of offsets

6.32 The EPBC Act Offsets Policy expressly provides for offsets to be registered and information in relation to those offsets to be made publicly available on the Department of the Environment's website. However, the committee was troubled to hear from the department that the development of this public register of offsets has been delayed. The committee considers that there is an urgent need for a public register of offsets in order to improve transparency and monitoring of offsets. A public register of offsets would also assist in providing greater accountability and scrutiny in relation to offsets decision-making.

6.33 The committee recommends that the Department of the Environment prioritise the development of a publicly available nationally coordinated register of

4 EPBC Act Offsets Policy, p. 6.

offsets. This should, as a minimum, include offsets granted under the EPBC Act and in time should be extended to include offsets granted under state and territory regimes. The committee therefore considers that the department should be working with states and territories towards the development of one nationally coordinated register of all offsets granted around Australia. However, the committee notes that it is unclear how this might be achieved under the so-called 'one stop shop' proposal, whereby national environmental responsibilities are proposed to be devolved to the states and territories.

Recommendation 9

6.34 The committee recommends that the Department of the Environment expedite the development of a publicly available nationally coordinated register of environmental offsets.

Methods for assessing and calculating offsets

6.35 The EPBC Act Offsets Policy states that, in assessing the suitability of an offset, government decision-making will be 'informed by scientifically robust information and incorporate the precautionary principle in the absence of scientific certainty'.⁵

6.36 The committee notes the department's evidence that the EPBC Act Offsets Policy and accompanying guide are based on the best available science. Nevertheless, concerns were raised that there may be some weaknesses in terms of the science underpinning the calculation and assessment of offsets. In particular, the committee recognises the concerns as to the application of offsets in the marine environment. The committee therefore suggests that the department give consideration to developing a separate offsets policy in relation to the marine environment. In the meantime, the committee considers that offsets for developments in the marine environment should only be used in limited circumstances and with full consideration of the precautionary principle.

Recommendation 10

6.37 The committee recommends that the Department of the Environment develop a separate offsets policy in relation to the marine environment.

6.38 The committee notes concerns about the independence of scientific advice and information underpinning the assessment process, including the calculation of offsets. The committee therefore considers that the department's role is critical in this regard. In particular, information and calculations relating to offsets need to be carefully verified by the department.

Recommendation 11

6.39 The committee recommends that the Department of the Environment carefully verify all calculations and information provided by proponents in relation to environmental offsets.

5 EPBC Act Offsets Policy, p. 6.

6.40 The committee notes that the EPBC Act Offsets Policy and Offsets Assessment Guide were scheduled to undergo a technical review one year from release—that is, in October 2013. However, the department advised that this technical review had been 'temporarily delayed' to allow consideration in relation to the 'one stop shop' policy.

6.41 The committee considers that this technical review should be commenced as soon as possible and finalised and made publicly available by the end of this year. The committee suggests that this technical review consider the evidence provided to this committee in relation to potential weaknesses in the Offsets Assessment Guide.

Recommendation 12

6.42 The committee recommends that the scheduled technical review of the *Environment Protection and Biodiversity Conservation Act 1999 Offsets Policy* be commenced as soon as possible. The technical review should be made publicly available and should consider evidence provided to this committee in relation to the Offsets Assessment Guide.

Use of indirect offsets

6.43 The committee acknowledges the department's evidence that the use of indirect offsets, or 'other compensatory measures' such as research or education programs, has evolved over the course of the implementation of the EPBC Act. The committee acknowledges evidence that the use of indirect offsets should be strictly limited and notes that the EPBC Act Offsets Policy states that 'a minimum of 90 per cent of the offset requirements for any given impact must be met through direct offsets'.⁶

6.44 The committee supports the use of other compensatory measures in limited circumstances and notes that the department's evidence that its use is appropriate in some cases. The committee further considers that the approach in relation to 'indirect' offsets has greatly improved under the EPBC Act Offsets Policy. The committee considers that the EPBC Act Offsets Policy in relation to the use of indirect offsets provides sufficient flexibility and is broadly appropriate.

6.45 At the same time, the committee recognises the importance of the principle of 'like for like' in the context of offsetting. That is, the environmental values of offset sites should be equivalent to the environmental values being impacted upon by a proposed action. Although the EPBC Act Offsets Policy incorporates a requirement that offsets target the specific matter of national environmental significance being impacted upon, the committee considers that care should be taken to fully consider the specific attributes of the protected matter to ensure that offsets are truly equivalent.

Monitoring and compliance

6.46 The committee was concerned to hear evidence that there appears to be insufficient monitoring and compliance in relation to offsets. The department reported that it conducts annual audits of compliance with EPBC approval conditions,

6 EPBC Offsets Policy, p. 8.

including conditions relating to offsets. However, the committee notes that these audit reports only involve a small percentage of projects each year. The committee considers that the department's auditing program should be expanded. The committee notes that its recommendation above in relation to the public register of offsets should improve the ability to monitor compliance in relation to offsets.

6.47 The committee recognises the need for the Department of the Environment to have sufficient resources and staffing to conduct rigorous monitoring of compliance with the EPBC Act, including with offsets conditions under EPBC Act approvals. The committee notes that a recent independent review found a number of problems with compliance monitoring in relation to conditions of approval by the Department of the Environment. The report recommended that the increased resourcing being applied to monitoring and compliance be maintained as a matter of priority.⁷ The committee endorses this recommendation, but is concerned as to whether this can be achieved given the recent cuts to staffing in the Department of the Environment.

6.48 The committee also notes that the Australian National Audit Office (ANAO) has undertaken an audit looking into compliance and monitoring of conditions of approval in relation to the EPBC Act. This audit follows on from this committee's recommendations in its threatened species report in August 2013. The committee has examined the ANAO's findings in this regard with great interest and notes that the ANAO has made a number of recommendations designed to address shortcomings in the Department of the Environment's compliance monitoring activities.

Recommendation 13

6.49 The committee recommends that resource and staffing levels within the Department of the Environment should be sufficient to ensure adequate monitoring capacity in relation to approvals of conditions under the *Environment Protection and Biodiversity Conservation Act 1999*, including conditions relating to offsets.

Evaluation of offsets

6.50 The committee considers that, while it is important to ensure compliance with the conditions of approval relating to offsets, there is also a need to evaluate whether offsets are achieving their intended outcomes. Unfortunately, it appears to the committee that there is little evidence to indicate whether offsets are effective.

6.51 The committee recognises that, in many cases, it may be too early to evaluate the success or otherwise of individual offsets. The committee also acknowledges the difficulties inherent in evaluating the effectiveness of offsets, including the long time-frames and uncertainties involved. In any case, it appears that little or no attempts are being made to conduct any such evaluation.

7 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).

6.52 The department advised that its focus at this stage is on compliance with conditions under the EPBC Act, including those relating to offsets. However, the committee considers that the department should extend its focus to evaluating the impact and progress of offsets granted as conditions of approval under the EPBC Act in achieving their intended environmental outcomes. The committee suggests that the scheduled five-year review of the EPBC Act Offsets Policy include consideration and an evaluation of the extent to which offsets are achieving positive environmental outcomes.

Recommendation 14

6.53 The committee recommends that the Department of the Environment's compliance audit program be extended to include an evaluation of the progress of offsets granted as conditions of approval under the *Environment Protection and Biodiversity Conservation Act 1999* in achieving their intended environmental outcomes.

Recommendation 15

6.54 The committee recommends that the scheduled five-year review of the *Environment Protection and Biodiversity Conservation Act 1999 Offsets Policy* include consideration and evaluation of the extent to which offsets are achieving positive environmental outcomes.

Security of offsets

6.55 In terms of security of offsets, the committee supports the principle that offsets should be protected in perpetuity. It is therefore imperative to ensure that offsets have legal and financial security into the future.

Legal security of offsets

6.56 The committee notes that various legal mechanisms such as conservation agreements and conservation covenants are being used to secure offsets under the EPBC Act. However, the committee heard that conservation agreements or conservation covenants do not provide sufficient protection as they can still be subject to mining exploration and extraction activities in the future.

6.57 Indeed, the committee was somewhat disturbed to receive numerous examples of developments on areas that were supposed to be 'secure', whether as offsets or under another type of conservation protection. The committee was concerned about evidence that in most, if not all, jurisdictions in Australia, there is no secure mechanism available for the 'in perpetuity' protection of offset areas on private land. The committee also heard that long-term protection of offsets is not always legally possible unless the offset is on public land and/or receives national park status. The committee recognises that this will not be practical in many circumstances.

6.58 The committee recognises that legal mechanisms, such as conservation covenants, are generally administered at the state and territory level. The committee also acknowledges the department's evidence that where a protective mechanism may be insufficient, this reduces the potential suitability of the offset, and may increase the magnitude of the offsets required. Nevertheless, it seems to the committee that

improved legal mechanisms are required to ensure that offsets are actually secured in perpetuity.

Recommendation 16

6.59 The committee recommends that the Department of the Environment reviews the mechanisms for securing offsets under the *Environment Protection and Biodiversity Conservation Act 1999* with a view to ensuring that the strongest possible legal mechanisms are used or developed, if required, to secure offsets in perpetuity.

6.60 The committee also notes that the Commonwealth EPBC Act Offsets Policy explicitly provides for the possibility of development which impacts on existing offsets.⁸ However, the committee was troubled to hear of examples of offsets being developed that resulted in subsequent offsets, themselves.

6.61 The committee notes evidence from the Department of the Environment that, if an offset is subject to future development, there is a substantially increased offset obligation for that subsequent activity. Nevertheless, the committee considers that this approach, whereby an offset can itself be offset, appears to undermine the principle that offsets should be protected in perpetuity. The committee therefore recommends that the EPBC Act Offsets Policy be amended to clarify that offsets need to be protected in perpetuity and should not be subject to future development.

Recommendation 17

6.62 The committee recommends that the Department of the Environment revise the *Environment Protection and Biodiversity Conservation Act 1999 Offsets Policy* to clarify that offsets need to be protected in perpetuity and should not be subject to future development.

Financial security of offsets

6.63 In addition, the committee notes the importance of secure funding for the future management of offset areas. The committee therefore suggests that the Department of the Environment consider including requirements for suitable funding mechanisms in conditions of approval relating to offsets. This could include bonds, paid for by the proponent, to support the financial viability of the offset such as funding for ongoing management activities in relation to the offset. This is a particularly important issue where the management of an offset area is transferred to a state or territory government.

Recommendation 18

6.64 The committee recommends that the Department of the Environment include requirements in conditions of approval under the *Environment Protection and Biodiversity Conservation Act 1999* for the secure funding of the future management of offset areas.

8 EPBC Act Offsets Policy, p. 19.

Enforcement of offsets

6.65 The committee notes that concerns were raised as to whether penalties and enforcement in relation to offset conditions are sufficient. The committee notes the evidence from the Department of the Environment that there are substantial penalties—which have been applied in some cases—for breaching the conditions of an approval under the EPBC Act, including conditions relating to offsets.

6.66 However, the committee notes the concerns raised that approval conditions are being varied on a regular basis in cases where offsets conditions have not been met. At the same time, support was expressed by industry groups for the flexibility to modify offset conditions, where needed. The committee considers that the provisions allowing conditions of approval relating to offsets to be varied should be used sparingly and only in limited circumstances.

Strategic approaches and advanced offsets

6.67 The committee notes concerns that the approach to offsets is somewhat piecemeal given that they are often considered on a case-by-case or project-by-project basis. As such, the committee heard that offsets do not effectively manage the cumulative impacts of multiple developments. The committee recognises calls for a more strategic approach to the identification and delivery of offsets.

6.68 The committee also received evidence that there should be greater moves towards the use of 'advanced offsets', whereby offsets are identified and secured in advance of particular developments. Although the EPBC Act Offsets Policy purportedly encourages the use of advanced offsets, the committee received little evidence to indicate that this is occurring in practice. The committee considers that advanced offsets provide a good opportunity for a more strategic approach to offsets and that their use should indeed be encouraged. This could include, for example, greater use of the BioBanking schemes that are available in some states.

Recommendation 19

6.69 The committee recommends that the Department of the Environment examine and review options to ensure a more strategic approach to offsets, including encouraging greater use of 'advanced offsets'.

National consistency in relation to offsets

6.70 This inquiry has focussed on Commonwealth policies and regulation relating to offsets, particularly the EPBC Act and its processes. However, offsets are also in regular use at the state, territory and local government level in Australia and these regimes are increasingly relevant at the Commonwealth level given that the Australian Government is committed to delivering a 'one stop shop' by accrediting state and territory environmental approval processes.

6.71 The committee recognises the need for greater consistency between Commonwealth, state and territory offset regimes. The committee also agrees with the suggestion that there should be one consistent, rigorous national standard governing environmental offsets, and considers that the EPBC Act Offsets Policy provides a good template for this standard.

6.72 However, the committee is concerned as to how a consistent national standard can be achieved, given the Australian Government's current 'one stop shop' proposal to accredit state and territory planning processes under the EPBC Act. The committee notes the department's evidence that any offsets delivered through an accredited process must be consistent with either the EPBC Act Offsets Policy, or another policy accredited by the minister as achieving the objects of the EPBC Act to an equivalent or better level. However, the committee considers that the relevant state and territory standards and legislation should meet the national offsets standard, not merely be accredited as meeting the objects of the EPBC Act.

6.73 The committee is further concerned that the delegation of approval powers to the states could actually exacerbate the reported lack of consistency in the context of offsets. The committee has grave concerns about the Australian Government's 'one stop shop' proposal, and particularly the evidence that the proposal may actually increase the complexity of processes. Further, the committee considers that it is inappropriate for the Commonwealth to be devolving its responsibilities for matters of national environmental significance to the state and territories.

Recommendation 20

6.74 The committee recommends that a consistent national standard be developed in relation to environmental offsets based on the *Environment Protection and Biodiversity Conservation Act 1999 Offsets Policy*.

Recommendation 21

6.75 The committee recommends that the Australian Government not accredit state and territory approval processes under the *Environment Protection and Biodiversity Conservation Act 1999*.

**Senator the Hon Lin Thorp
Chair**