

## Chapter 3

### Principles that underpin the use of environmental offsets

3.1 This chapter discusses the levels of support for the concept of environmental offsets, followed by an examination of some of the key principles that underpin the use of offsets in federal environmental approvals in Australia, including:

- the use of offsets as a last resort, including the mitigation hierarchy and whether offsets are appropriate in all circumstances;
- the need for offsets to 'improve or maintain' a protected matter;
- additionality, or that offsets should provide outcomes additional to business as usual;
- the principle of 'like for like' or ecological equivalence; and
- the use of indirect offsets.

### Level of support for environmental offsets

3.2 Levels of support for the practice of offsetting varied widely in evidence to the committee. Many submitters expressed opposition to the concept of environmental offsets.<sup>1</sup> For example, Mr Brendan Sydes of Environmental Justice Australia stated that Environmental Justice Australia:

...strongly opposed to the use of offsets under the EPBC Act, especially in the manner in which they are utilised at the moment...the whole concept of offsetting is deeply flawed and in fact at odds with a regulatory system that is supposed to protect biodiversity.<sup>2</sup>

3.3 Mr Adam Walters from Greenpeace Australia Pacific (Greenpeace) challenged the ability of the offsets policy to deliver environmental outcomes, asserting that it 'fundamentally relies on the destruction and reduction in the quantity of unique habitat within Australia in order for it to function'.<sup>3</sup>

3.4 Mr Philip Spark of the Northern Inland Council for the Environment agreed and cited the example of the Maules Creek project (outlined in further detail at Appendix 3), contending that the offsets policy 'has made possible impacts to Leard

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1 Australian Koala Foundation *Submission 4*, p. 1; North Queensland Conservation Council, *Submission 18*, p. 1; Humane Society International, *Submission 28*, p. 1; Wildlife Preservation Society of Queensland, *Submission 39*, p. 2; National Parks Association of NSW Armidale Branch, *Submission 51*, p. 7; Friends of the Earth Australia, *Submission 58*, p. 1; Ms Sonya Duus, *Submission 67*, p. 1; Environment Defenders Office (Victoria), *Submission 72*, p. 3; Mr Barrie Griffiths, *Submission 91*, p. 1.

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

3 Mr Adam Walters, Research and Investigations Coordinator, Greenpeace, *Committee Hansard*, 5 May 2014, p. 26.

State Forest that would not have otherwise been considered possible'. Mr Spark went on to state that 'in many ways the offset policy has become the saviour for inappropriate development'.<sup>4</sup>

3.5 In expressing opposition to environmental offsets, Friends of the Earth Australia quoted the opinion of ecologist Professor Hugh Possingham of the University of Queensland:

Biodiversity is not fungible, it is not possible to trade it from one place to another and hope to retain its value; biodiversity is dependent on where it is in the landscape (place) and when it is (time).<sup>5</sup>

3.6 Other submitters agreed with ecologist Professor Richard Hobbs of the University of Western Australia who has described the practice of offsetting as 'a furphy' and a 'Faustian pact'. Professor Hobbs explained:

To me it is akin to some guy going into that art gallery and pointing at the Mona Lisa on the wall and saying sorry mate we need that bit...so the Mona Lisa has to go. But we will paint you another one.<sup>6</sup>

3.7 Ms Georgina Woods of the Lock the Gate Alliance referred to the Abbot Point Dredging Project (discussed further in Appendix 6) in similar terms. Ms Woods stated:

...or maybe even more specifically than that cut off one corner of the Mona Lisa because the rest of it is still there. That is the way they describe developments in the World Heritage area, that Abbot Point is just one tiny part of the World Heritage area and the whole of the Great Barrier Reef is still there...As that gets chopped away, as the corners of the Mona Lisa get cut off, something of that whole is degraded, in my view.<sup>7</sup>

3.8 The Gomeri Traditional Custodians were also opposed to environmental offsets, and expressed a specific concern that the practice of biodiversity offsetting is:

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4 Mr Philip Spark, President, Northern Inland Council for the Environment, *Committee Hansard*, 5 May 2014, p. 50.

5 Friends of the Earth Australia, *Submission 58*, p. 3, citing Professor Hugh Possingham on Saturday Breakfast with Geraldine Doogue, *ABC Radio National*, 17 December 2005, <http://www.abc.net.au/radionational/programs/saturdayextra/biodiversity-banking-part-two/3311402> (accessed 1 May 2014).

6 Professor Richard Hobbs in Di Martin, 'Background Briefing: The trouble with offsets', *ABC Radio National*, 16 March 2014, <http://www.abc.net.au/radionational/programs/backgroundbriefing/2014-03-16/5312944> (accessed 1 May 2014); see also Dr Denis Saunders AM, Wentworth Group of Concerned Scientists (Wentworth Group), *Committee Hansard*, 6 May 2014, p. 14; Ms Anne Makhanji, *Submission 14*, p. 1; Martine Maron, Richard Hobbs et al (2012), 'Faustian bargains? Restoration realities in the context of biodiversity offset policies', *Biological Conservation*, vol. 155, pp 141–148.

7 Ms Georgina Woods, Policy Coordinator, Lock the Gate Alliance, *Committee Hansard*, 5 May 2014, p. 3.

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...in direct conflict with our cultural and spiritual beliefs and our custodial obligations and responsibilities to our homelands water and land Country.<sup>8</sup>

3.9 Mr Stephen Talbott, TO Knowledge Holder, Gomeroi Traditional Custodians, stated further:

Our elders are the ones who have all the knowledge. Our Aboriginal and cultural heritage is unique from other countries. We have totems within that forest. Everything in that forest [Leard Forest] has a purpose to us as Aboriginal people. The animals, the trees, they all have cultural meaning to us. When they turn around and look at these offset areas or try to rejuvenate areas, they only plant the trees, but they do not do the grasses, they do not do the bush tucker; they do not take our elders out to do that. For a lot of these areas that they have the biodiversity offsets for, they have not even captured the cultural values.<sup>9</sup>

3.10 The committee also heard evidence that the practice of offsetting has been criticised internationally. For example, the Environment Defenders Office (Victoria) submitted that there is 'growing recognition globally of the failure of using offsetting systems as part of a regulatory framework'.<sup>10</sup>

3.11 Taking this further, Mr Ian Lee<sup>11</sup> and the Gomeroi Traditional Custodians<sup>12</sup> expressed concern that, in allowing for offsets as part of its national environmental law, Australia may be failing to comply with its obligations under international agreements, including the *Convention on Biological Diversity*.<sup>13</sup> Mrs Patricia Julien, Mackay Conservation Group, opined that a failure to directly address the *Convention on Biological Diversity* in regard to the Galilee Coal Project (outlined further at Appendix 4) is a contravention of Australia's obligations under that Convention.<sup>14</sup>

3.12 Conversely, several submitters expressed support for the use of environmental offsets in certain circumstances and within an appropriate framework.<sup>15</sup> Mr Martin Fallding from Lake Macquarie City Council suggested that:

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8 Gomeroi Traditional Custodians, *Submission 93*, p. 11.

9 Mr Stephen Talbott, TO Knowledge Holder, Gomeroi Traditional Custodians, *Committee Hansard*, 18 June 2014, p. 4.

10 Environmental Defenders Office (Victoria), *Submission 72*, p. 3.

11 Mr Ian Lee, *Submission 71*, pp 28–29.

12 Gomeroi Traditional Custodians, *Submission 93*, p. 9.

13 *Convention on Biological Diversity*, <http://www.cbd.int/> (accessed 11 June 2014). Australia became a party to the Convention in 1993.

14 Mrs Patricia Julien, Mackay Conservation Group, *Committee Hansard*, 7 May 2014, p. 26.

15 Queensland Murray-Darling Committee, *Submission 22*, p. 3; Watson Community Association, *Submission 54*, p. 2; WWF-Australia, *Submission 73*, p. 1; QGC, *Submission 74*, p. 1; Wentworth Group, *Submission 85*, p. 1; Environmental Institute of Australia and New Zealand (EIANZ), *Submission 88*, p. 2; see also Environmental Farmers Network, *Submission 46*, p. 1.

...biodiversity offsets represent a very good concept and an important decision-making tool which is increasingly being accepted by the community, particularly because they are putting a value on biodiversity.<sup>16</sup>

3.13 The economic significance of environmental offsets was discussed by the Business Council of Australia, which suggested that they 'provide a mechanism to facilitate beneficial economic development in an environmentally responsible manner'.<sup>17</sup> Their significance to the resources industry was emphasised by the NSW Minerals Council, who explained that, due to the location-specific nature of many projects, 'opportunities to avoid impacts are limited'.<sup>18</sup>

3.14 The Department of the Environment (the department) discussed the use of 'socio-economic co-benefits' as a principle beneath the EPBC Act policy in its submission, noting:

While the primary consideration in determining suitable offsets is the delivery of a conservation gain for the impacted protected matter, the delivery of offsets that establish positive social or economic co-benefits is encouraged.<sup>19</sup>

3.15 The Department submitted that co-benefits could include 'engaging and employing local Indigenous ranger groups...on Indigenous owned land' and 'the provision of funds to rural landowners for the protection and management of biodiversity on their property'.<sup>20</sup>

3.16 Although noting their strong opposition to environmental offsets, the Gomeroi Traditional Custodians encouraged greater consideration of their 'established distinct systems of knowledge, innovation and practices relating to the uses and management of biological diversity' which are 'rarely, if ever' included in decision-making.<sup>21</sup>

3.17 The National Farmers' Federation (NFF) generally supported the use of offsets but expressed a concern that 'that offsets are generally not feasible for agriculture applications under the EPBC Act'. The NFF explained that 'realistic offset opportunities in the agriculture context are limited' for offsets:

In reality, farmers will generally meet the offset requirement from within their current land resources. Unlike larger industries, the purchase of additional land to achieve the offset is unlikely...Unrealistic offsets that are too costly to implement will mean that many proposed developments will not proceed.<sup>22</sup>

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16 Mr Martin Fallding, Environmental Planner, Lake Macquarie City Council, *Committee Hansard*, 5 May 2014, p. 42.

17 Business Council of Australia, *Submission 81*, p. 1.

18 NSW Minerals Council, *Submission 76*, p. 4.

19 Department of the Environment, *Submission 79*, p. 8.

20 Department of the Environment, *Submission 79*, p. 8.

21 Gomeroi Traditional Custodians, *Submission 93*, p. 11.

22 National Farmers' Federation, *Submission 15*, pp 1–2.

3.18 The NFF advocated a more flexible approach to offsets based on the nature of the project, the availability of direct and indirect offsets and whether the offset delivers improved environmental outcomes for the protected matter.<sup>23</sup>

3.19 Some submitters were generally supportive of the existing EPBC Act Offsets Policy.<sup>24</sup> The Environmental Institute of Australia and New Zealand (EIANZ) broadly supported the application of the EPBC Act Offsets Policy 'on the proviso that all reasonable efforts to avoid and mitigate such impacts have first been pursued', and warned that:

Without rigorous attention to the need to protect existing biodiversity values and areas set aside as offsets, any offset policy is simply delaying an inevitable decline.<sup>25</sup>

3.20 Likewise, Dr Philip Gibbons told ABC radio in 2014 that while environmental offsets had popular support, they needed to be implemented in a proper fashion:

A fair-minded person would agree that if a developer destroys some of Australia's natural capital in making a buck, then they should really offset that impact elsewhere...But the devil is in the detail.<sup>26</sup>

3.21 A representative of the department told the committee that:

There are diverse views within the Australian community about the suitability of environmental offsets as a regulatory mechanism...they are able to counteract the negative impacts of development and contribute to environmental improvements as part of a much broader framework of environmental regulation and conservation stewardship activities. They are an important tool in the pursuit of sustainable development, balancing the needs of both economic growth and environmental protection.<sup>27</sup>

### **Principles in the Commonwealth EPBC Act Offsets Policy**

3.22 The EPBC Act Offsets Policy sets out the overarching principles that are applied in determining the suitability of offsets, which are set out in Chapter 2 of this report.<sup>28</sup>

3.23 The committee received evidence that, generally, the principles expressed in the EPBC Act Offsets Policy are adequate. For example, the Minerals Council of Australia described the EPBC Act Offsets policy as 'a significant improvement on past approaches', particularly in that it:

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23 National Farmers' Federation, *Submission 15*, p. 2.

24 See, for example, Wentworth Group, *Submission 85*, p. 1; Business Council of Australia, *Submission 81*, p. 1; Minerals Council of Australia, *Submission 35*, p. 6.

25 EIANZ, *Submission 88*, p. 2.

26 Dr Philip Gibbons in Di Martin, 'Background Briefing: The trouble with offsets', *ABC Radio National*, 16 March 2014; see also Ms Anne Makhanji, *Submission 14*, p. 1.

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

28 EPBC Act Offsets Policy, p. 6.

...recognises the importance of flexibility in the development of offset arrangements to improve cost effectiveness and to allow for offsets to be better tailored to the environmental circumstances of the impacted matter.<sup>29</sup>

3.24 Ms Melanie Stutsel of the Minerals Council of Australia observed that:

...of the 14 or so countries that currently employ environmental offsets, the Australian approach is very well aligned with the business biodiversity offsets program [BBOP], which is the recognised international standard in this space.<sup>30</sup>

3.25 Dr Philip Gibbons submitted that the BBOP principles 'represent a sound basis on which to build a robust policy and assess its performance'.<sup>31</sup>

3.26 The EIANZ described the principles contained in the EPBC Act Offsets Policy as 'laudable and entirely appropriate principles'. However, EIANZ went on to propose that two additional principles be included in the policy:

- offsets must not replace or undermine existing environmental standards or regulatory requirements; and
- offset arrangements must recognise and acknowledge that some environmental values cannot be recreated nor directly offset while achieving 'no net loss' of biodiversity values.<sup>32</sup>

3.27 At the same time, some submitters and witnesses called for greater flexibility in the EPBC Act Offsets Policy.<sup>33</sup> For example, the Indigenous Advisory Committee submitted that:

...the principles outlined in the current 'offsets policy' are too inflexible to accommodate interests of Indigenous peoples and provide for our effective engagement in helping to facilitate good environmental outcomes.<sup>34</sup>

3.28 The Indigenous Advisory Committee noted that the current EPBC Act Offsets Policy 'should not simply state that it provides flexibility', 'it should be more descriptive about how this can be achieved', and 'acknowledge and accommodate the inherent relationship that Indigenous people have with our lands and waters'.<sup>35</sup>

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29 Minerals Council of Australia, *Submission 35*, p. 6.

30 Ms Melanie Stutsel, Director, Health, Safety, Environment and Community Policy, Minerals Council of Australia, *Committee Hansard*, 6 May 2014, p. 6. See Chapter 2 for further information in relation to the Business Biodiversity Offsets Program.

31 Dr Philip Gibbons, *Submission 21*, p. 1.

32 EIANZ, *Submission 88*, pp 4–5.

33 See, for example, Minerals Council of Australia, *Submission 35*, p. 7; NFF, *Submission 15*, p. 2.

34 Indigenous Advisory Committee, *Submission 82*, p. 3.

35 Indigenous Advisory Committee, *Submission 82*, p. 3.

3.29 Other submitters expressed general concern about the way the principles have not been consistently applied or properly adhered to.<sup>36</sup> Dr Gibbons advised that in his view:

...the principles that the Commonwealth government have used in their policy are valid and reflect those supported internationally, but I think their execution warrants some close scrutiny.<sup>37</sup>

3.30 The Environmental Defender's Office (Victoria) referred with concern to examples of offsets principles being 'relaxed' in order to approve certain developments.<sup>38</sup> Dr Anita Foerster and Professor Jan McDonald suggested:

...the available evidence in Australia and internationally...suggests that there is a tendency to weaken these standards in practice in order to facilitate development and the use of offsets.<sup>39</sup>

3.31 The Blue Mountains Conservation Society criticised individual principles that are listed in the EPBC Act Offsets Policy, describing some of the principles as 'motherhood statements to the extent that they set down what one hopes might be happening' and others as containing 'loopholes big enough to drive the biggest mining dump truck through'.<sup>40</sup>

3.32 Some submitters doubted whether the use of offsets in the approval process has been in line with the objects of the EPBC Act, including the principles of ecologically sustainable development (as outlined in Chapter 2).<sup>41</sup>

3.33 The following discussion addresses issues relating to the key principles that were raised in evidence to the committee.

### ***Offsets as a last resort: the mitigation hierarchy***

3.34 The EPBC Act Offsets Policy expresses a commitment to the use of offsets as a last resort through the following statement:

Offsets will not be considered until all reasonable avoidance and mitigation measures are considered, or acceptable reasons are provided as to why avoidance or mitigation of impacts is not reasonably achievable.<sup>42</sup>

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36 See, for example, Lock the Gate Alliance, *Submission 20*, p. 1; Dr Anita Foerster and Professor Jan McDonald, *Submission 23*, p. 2; Ms Rachel Walmsley, Australian Network of Environmental Defender's Offices, *Committee Hansard*, 5 May 2014, p. 29.

37 Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, p. 18.

38 Environmental Defenders Office (Victoria), *Submission 72*, p. 4.

39 Dr Anita Foerster and Professor Jan McDonald, *Submission 23*, p. 2.

40 Blue Mountains Conservation Society, *Submission 52*, p. 3.

41 Wildlife Queensland, *Submission 39*, p. 2; Friends of the Earth Australia, *Submission 58*, p. 3; Mr Ian Lee, *Submission 71*, pp 16–19; The Wilderness Society, *Submission 84*, p. 3; Gomeroi Traditional Custodians, *Submission 93*, p. 10.

42 EPBC Act Offsets Policy, p. 7.

3.35 According to the policy, avoidance and mitigation measures should be 'the primary strategies for managing the potential significant impact' of proposed action, whereas offsets should be designed to 'compensate for any residual significant impact'.<sup>43</sup>

3.36 A representative of the department communicated the importance of this principle in the implementation of the EPBC Act Offsets Policy:

For offsetting to work effectively, it has to sit within a suitable hierarchy of actions, normally referred to as the mitigation hierarchy. In the case of the EPBC Act offsets policy, offsets are only considered where a residual significant impact on a protected matter remains, following all reasonable avoidance and mitigation measures.<sup>44</sup>

3.37 The committee received submission supporting the principle that offsets must be used as a last resort, after avoidance and mitigation measures are exhausted.<sup>45</sup> Ms Emma Pethybridge of the Indigenous Land Corporation (ILC) told the committee that the ILC supports 'the continued use of the mitigation hierarchy as a fundamental principle'.<sup>46</sup>

3.38 The Environmental Decisions Group expressed concern that if offsets are:

...not implemented according to the mitigation hierarchy and a set of standards, the approach could allow development in areas where impacts should have been avoided or more effectively minimized.<sup>47</sup>

3.39 Timing was a key consideration in relation to the mitigation hierarchy. As Birdlife Southern NSW submitted, offsets need 'to be considered well before development occurs, not as a last minute decision'.<sup>48</sup> Mr Sydes of Environmental Justice Australia argued that:

The critical thing really is that we need to make sure that, if we are being pragmatic and saying that we are going to use offsets, we do not have the offset tail wagging the dog of biodiversity protection. The biodiversity protection needs to come first, and then offsets, if they are to be used at all,

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43 EPBC Act Offsets Policy, p. 7.

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

45 See, for example, Indigenous Land Corporation (ILC), *Submission 19*, p. 3; National Environmental Law Association (NELA), *Submission 31*, p. 3; Friends of Ken Hurst Park, *Submission 65*, p. 6; QGC, *Submission 74*, p. 2; Business Council of Australia, *Submission 81*, p. 1. Although supportive of the principle of the mitigation hierarchy, some submitters argued that the policy did not go far enough: Dr Yung En Chee and members of the Quantitative and Applied Ecology Group (Dr Yung En Chee), *Submission 57*, p. 3; BirdLife Australia, *Submission 77*, p. 5.

46 Ms Emma Pethybridge, Manager, Environment, Carbon and Heritage, ILC, *Committee Hansard*, 7 May 2014, p. 34.

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

48 Birdlife Southern New South Wales, *Submission 5*, p. 7.



should only be used as a last resort when we are fully comfortable with the impacts on biodiversity of a particular proposal.<sup>49</sup>

3.40 Many submitters and witnesses called for a stronger commitment to the use of offsets as a last resort, and referred the committee to evidence that the mitigation hierarchy is not being rigorously applied in practice.<sup>50</sup> For example, Dr Foerster and Professor McDonald submitted that there is evidence that:

...in practice, the mitigation hierarchy is not rigorously applied, and that offsets are being proposed as a first not last resort.<sup>51</sup>

3.41 Friends of the Earth suggested that:

Offsets are only supposed to be granted if the damage can be neither avoided or mitigated. Unfortunately, proponents often avoid that obligation with ease—they simply claim it is too costly. There is no requirement for them to establish and verify those costs...<sup>52</sup>

3.42 Friends of the Earth further commented that:

The no project alternative is virtually never considered. It is the easiest and potentially the most valuable form of avoidance. Federally, over 99% of all developments are approved (or deemed not federal matters).<sup>53</sup>

3.43 The Environmental Decisions Group were similarly concerned that it 'is evident from recent studies that the mitigation hierarchy is either bypassed or poorly implemented' and 'there is a tendency in Australia to treat offsets as a foregone conclusion'. The group noted that a key challenge in avoiding the use of offsets as a last resort is:

...to establish—and rigorously adhere to—a clear and defensible process for determining when offsets are an appropriate tool in conformance with the mitigation hierarchy, and when offsets should be rejected in favour of more intensive efforts at steps higher up in the mitigation hierarchy.<sup>54</sup>

3.44 The Environmental Defenders Office (Victoria) agreed that 'greater emphasis should be given to *avoidance* of loss or destruction in the first place'.<sup>55</sup> Mr Sydes of Environmental Justice Australia told the committee that:

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49 Mr Brendan Sydes, Chief Executive Officer, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, p. 17.

50 See, for example, Australian Koala Foundation, *Submission 4*, pp 2–3; Environmental Decisions Group, *Submission 50*, p. 2; Mr Adam Walters, Research and Investigations Coordinator, Greenpeace, *Committee Hansard*, 5 May 2014, p. 24; NELA, *Submission 31*, p. 5.

51 Dr Anita Foerster and Professor Jan McDonald, *Submission 23*, p. 3.

52 Friends of the Earth, *Submission 58*, p. 2; see also Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth Australia, *Committee Hansard*, 7 May 2014, pp 42–43.

53 Friends of the Earth, *Submission 58*, p. 2.

54 Environmental Decisions Group, *Submission 50*, pp 2–3.

55 EDO (Victoria), *Submission 72*, p. 5.

The fact that offsets are almost invariably available infects the whole regulatory process. Refusal is hardly ever contemplated and almost never actually happens. It is just a process of horse-trading to get to an almost inevitable yes, with bureaucrats doing their best to extract something in the way of compensation, which conveniently often allows both the minister and the proponent to shelter behind claims that the destruction of irreplaceable biodiversity values has been compensated for.<sup>56</sup>

3.45 Mr Sydes stated that the mitigation hierarchy 'needs to be built into' the EPBC Act, because at present there is no legal compulsion to follow the mitigation hierarchy.<sup>57</sup>

3.46 The Tasmanian Farmers and Graziers Association concurred that there should be a 'greater emphasis on avoidance and mitigation measures' and that:

...environmental offsets should not be seen as a failsafe contingent. Rather, avoidance and mitigation strategies should be seen as the real and practical solution to environmental impacts.<sup>58</sup>

3.47 In contrast, Ms Stutsel of the Minerals Council of Australia told the committee that:

...offsets are not the first or an easy option for mining proponents. In line with both industry policy and regulatory requirements, the avoidance, minimisation and mitigation hierarchy must first be fully considered before offsets can be employed to address significant residual environmental impacts.<sup>59</sup>

3.48 The Association of Mining and Exploration Companies (AMEC) recommended 'a greater focus on the benefits of rehabilitation in the mitigation hierarchy', including allowing rehabilitation to be a 'legitimate mitigation measure'.<sup>60</sup> They suggested that this would encourage proponents to 'improve rehabilitation activities in order to reduce their offsets obligations' and result in 'better environmental outcomes'.<sup>61</sup>

3.49 Conversely, Ms Rachel Walmsley from Australian Network of Environmental Defender's Offices (ANEDO) advised that as 'there is no guarantee of ecological outcome or what the results of...rehabilitation are going to be' rehabilitation of

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

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

58 Tasmanian Farmers and Graziers Association, *Submission 10*, p. 4.

59 Ms Melanie Stutsel, Director, Health, Safety, Environment and Community Policy, Minerals Council of Australia, *Committee Hansard*, 6 May 2014, p. 1.

60 AMEC, *Submission 40*, pp 6–7.

61 AMEC, *Submission 40*, p. 7.

impacts 'does not meet the principle of additionality' (discussed below).<sup>62</sup> The Conservation Council ACT region also recommended caution, noting that:

Too often, avoidance, minimization and rehabilitation are done to a minimal extent in favour of moving directly to offsetting to enable a timely completion of proposed development activities...<sup>63</sup>

3.50 The Abbot Point Dredging Project, outlined in further detail at Appendix 6, was put forward as an example of a development where the mitigation hierarchy has not been followed. It was argued that the government should have insisted on land-based disposal of the dredge spoil as alternative to offshore dumping.<sup>64</sup>

3.51 In response to questioning on this issue, departmental representatives advised that:

The approach that we take is to understand the maximum possible impact of the project and then to work through the avoidance and mitigation principles embedded in the [EPBC] act to ensure that the activities that are undertaken are done in the most environmentally sensible and sensitive way possible within the construct of the project.<sup>65</sup>

#### *Unacceptable offsets or 'red flags'*

3.52 Many submitters argued that offsets are not appropriate in all circumstances, particularly where impacts of a proposed development are 'unacceptable' or the matters being impacted upon are irreplaceable.<sup>66</sup> Lock the Gate Alliance called for the principles of the EPBC Act Offsets Policy to reflect this point.<sup>67</sup>

3.53 The EPBC Act Offsets Policy states that 'offsets do not mean proposals with unacceptable impacts will be approved'.<sup>68</sup> In their submission, the department

62 Ms Rachel Walmsley, Policy and Law Reform Director, NSW, ANEDO, *Committee Hansard*, 5 May 2014, p. 35.

63 Conservation Council ACT Region, *Submission 78, Attachment 1*, p. 5.

64 See, for example, Mrs Patricia Julien, Research Analyst, Mackay Conservation Group, *Committee Hansard*, 7 May 2014, pp 30–31; Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth Australia, *Committee Hansard*, 7 May 2014, pp 41–42.

65 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 29.

66 BirdLife Australia, *Submission 77*, p. 5; Blue Mountains Conservation Society Inc., *Submission 52*, p. 5; Australasian Bat Society, *Submission 69*, p. 2; Humane Society International, *Submission 28*, p. 2; The Wilderness Society Inc., *Submission 84*, p. 12; NSW Minerals Council, *Submission 76*, p. 4; Chamber of Minerals and Energy of Western Australia, *Submission 33*, p. 4; Friends of Grasslands, *Submission 13*, p. 1; Queensland Murray-Darling Committee, *Submission 22*, p. 3; WWF-Australia, *Submission 73*, p. 1; EIANZ, *Submission 88*, p. 5; Dr Denis Saunders AM, Wentworth Group, *Committee Hansard*, 6 May 2014, p. 14; Ms Emma Pethybridge, Manager, Environment, Carbon and Heritage, ILC, *Committee Hansard*, 7 May 2014, p. 34.

67 Lock the Gate Alliance, *Submission 20*, p. 3.

68 EPBC Act Offsets Policy, p. 7.

acknowledged that offsets 'may not be appropriate in all circumstances' and that 'there are limits to their use'.<sup>69</sup>

3.54 A representative of the department explained that the EPBC Act Offsets Policy is intended to be:

...applied at the last point in considering a project approval. It is not the project approval. The [EPBC Act] contains the 'clearly unacceptable' provision and it contains provisions that enable the minister to assess the ecological and environmental impact of a project and then to make a decision as to whether or not that project is able to progress and, if so, under what conditions.<sup>70</sup>

3.55 However, many submitters requested further guidance on when offsetting would not be appropriate, and a definition of what an unacceptable impact would be.<sup>71</sup> Ms Woods of Lock the Gate Alliance suggested that the EPBC Act Offsets Policy should articulate:

...the threshold for: what is an unacceptable impact? So the EPBC Act allows for activities to not be given approval if they have a clearly unacceptable impact, but there is no guidance as to what an unacceptable impact is...'habitat critical to the survival of a species' is a phrase that I would think most people would think describes something that cannot be replaced.<sup>72</sup>

3.56 ANEDO recommended the use of 'red flag' or 'no go' areas:

...to make it clear that there are certain matters in relation to which offsetting cannot be an appropriate strategy. This is particularly relevant to critical habitat and threatened species or communities that can withstand no further loss.<sup>73</sup>

3.57 Dr Martine Maron recommended that:

It should be made much more explicit that many impacts cannot be offset, and then the choice is between development and associated biodiversity loss, or the alternative. We cannot always have our cake and eat it, and it is misleading to imply otherwise.<sup>74</sup>

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69 Department of the Environment, *Submission 79*, p. 5.

70 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 33.

71 Lock the Gate Alliance, *Submission 20*, p. 3; Dr Yung En Chee, *Submission 57*, p. 5; Ms Georgina Woods, Policy Coordinator, Lock the Gate Alliance, *Committee Hansard*, 5 May 2014, p. 8.

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

73 ANEDO, *Submission 60*, p. 3; see also NELA, *Submission 31*, p. 9.

74 Dr Martine Maron, *Submission 7*, p. 4.

3.58 It was put to the committee that this could be implemented either as an additional principle in the policy<sup>75</sup> or as further detail in the legislation.<sup>76</sup> Mr Sydes of Environmental Justice Australia told the committee that there is 'no actual legal compulsion' built into the EPBC Act Offsets Policy in relation to offsets that are unacceptable:

...the whole process is governed not by the legislation but by a non-statutory policy. For offsets to be in fact a credible option under the EPBC Act, the act would need to contain an obligation on the minister to actually protect biodiversity when making approval decisions, and this, we would say, would need to include an early red-flag option where it could be determined that offsetting was not going to be an acceptable option in any particular case.<sup>77</sup>

3.59 Dr Yung En Chee submitted that offsets should be unavailable in certain circumstances, such as where the impacted entity is critically endangered, unique and irreplaceable, is in good to excellent condition, there is a lack of knowledge or uncertainty about restoration techniques, or the resources required to generate gains is prohibitive.<sup>78</sup> In line with this view, a representative of the department told the committee that '[i]t would be difficult to contemplate clearing the last remaining habitat of a particular species or the last remaining habitat of a plant'.<sup>79</sup>

3.60 Some submitters referred to world heritage areas as sites where offsets should not be available. For example, Ms Moorhouse of the Alliance to Save Hinchinbrook told the committee that:

...in our World Heritage areas, the whole idea of being able to destroy something and creating an offset is just not on. It is anathema to the World Heritage concept, and Australia and every state that has a world-heritage area has signed an international agreement in which they have said they would protect—to the utmost—those special areas.<sup>80</sup>

3.61 Likewise, Mr Walters of Greenpeace Australia Pacific (Greenpeace) referred to 'an area that is considered a World Heritage area or as having some unique or irreplaceable values' as unacceptable for offsets, explaining:

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75 EIANZ, *Submission 88*, p. 5.

76 Queensland Murray-Darling Committee, *Submission 22*, p. 3.

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

78 Dr Yung En Chee, *Submission 57*, p. 5.

79 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 27.

80 Ms Margaret Moorhouse, Acting Secretary/Treasurer, Alliance to Save Hinchinbrook, *Committee Hansard*, 7 May 2014, p. 55; see also, for example, Mr Jan Arens, President, Gladstone Conservation Council, *Committee Hansard*, 7 May 2014, p. 50.

Our concern is that the use of offsetting is allowing destruction to a place—in fact, eroding some of the protections that it would otherwise receive.<sup>81</sup>

3.62 Mr Walters also noted that 'cultural heritage is another area where offsetting seems to be particularly problematic'.<sup>82</sup>

3.63 Mrs Patricia Julien of the Mackay Conservation Group referred to the Abbot Point Dredging Project (see Appendix 6) as an example of a development in a world heritage area with unacceptable impacts:

...it is inconsistent with the management of a World Heritage area. Offsets do not really have a place...I cannot see how they can really justify, especially at the level of science that they are at right now, doing what they are doing and in the face of the lack of long-term monitoring...<sup>83</sup>

3.64 Other submissions used the Curtis LNG Project (see Appendix 5) to illustrate the problems of inappropriate offsetting in the Great Barrier Reef World Heritage Area.<sup>84</sup> Lock the Gate Alliance argued strongly that the Department had 'erred gravely' in recommending approval for the developments in the World Heritage Area. It stated the first principle of offsetting (that the value in question be maintained or improved) has been abandoned and that the World Heritage Area is in danger of being removed from the World Heritage List because of the impact of these developments. The Alliance went on to state that it should have been obvious that there are no adequate offsets for development within the World Heritage Area: the Outstanding Universal Values for which it is listed 'include its integrity, its beauty, complexity and size. The unique values that it holds cannot, by definition, be "offset," since it is the only one of its kind on the planet'.<sup>85</sup>

3.65 At an industry level, Ms Stutsel of the Minerals Council of Australia told the committee that the Minerals Council:

...has a policy that says that mining companies will not undertake mining or exploration in World Heritage areas, because we recognise that those are places of specific cultural and environmental value and are unique on an international scale.<sup>86</sup>

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81 Mr Adam Walters, Research and Investigations Coordinator, Greenpeace, *Committee Hansard*, 5 May 2014, p. 25.

82 Mr Adam Walters, Research and Investigations Coordinator, Greenpeace, *Committee Hansard*, 5 May 2014, p. 25.

83 Mrs Patricia Julien, Research Analyst, Mackay Conservation Group, *Committee Hansard*, 7 May 2014, p. 30.

84 See, for example, Australian Orchid Council, *Submission 2*, p. 3; Lock the Gate Alliance, *Submission 20*, p. 4; NELA, *Submission 31*, p. 6; Gladstone Conservation Council Inc., *Submission 59*, p. 2; ANEDO, *Submission 60*, p. 17.

85 Lock the Gate Alliance, *Submission 20*, p. 5.

86 Ms Melanie Stutsel, Director, Health, Safety, Environment and Community Policy, Minerals Council of Australia, *Committee Hansard*, 6 May 2014, p. 7.

3.66 Submitters also discussed the clearing of Banksia woodland for the Jandakot Airport development as an example of an 'unacceptable environmental impact'.<sup>87</sup> It was noted that in this case, mature woodland was destroyed which provided habitat for the Carnaby's Black Cockatoo. It would take many years before the woodland in the offset areas were of an age to provide a suitable food source for the Cockatoo.<sup>88</sup> Dr Denis Saunders, Wentworth Group of Concerned Scientists (Wentworth Group), also commented:

Quite frankly, the removal of one single banksia tree on the Swan Coastal Plain could have a significant impact on elements of Carnaby's cockatoo—167 hectares of some of the most beautiful banksia woodland that the cockatoos do use is being offset by taking off topsoil and dropping it somewhere else, when nobody really knows whether you can re-create banksia woodland in that way.<sup>89</sup>

This development is discussed further at Appendix 7.

3.67 In answers to the Committee's questions about whether there had been any refusals under the EPBC Act due to the inadequacy of the offsets proposed, the department provided a list of ten decisions not to approve projects following environmental assessment. In five of the ten proposals listed, '[o]ffsets were proposed but were not considered adequate to compensate for the potential impacts on protected matters.' The department further advised that in addition to projects not approved:

...there have also been seven decisions made under the EPBC Act where a project has been determined to be 'clearly unacceptable' at the referral stage. Offsets are not considered for these decisions as they are considered beneficial impacts and cannot be taken into account during a projects referral.<sup>90</sup>

***'No net loss' or 'improve or maintain'***

3.68 The first principle outlined in the EPBC Act Offsets Policy is that suitable offsets must:

...deliver an overall conservation outcome that improves or maintains the viability of the aspect of the environment that is protected by national environment law and affected by the proposed action.<sup>91</sup>

3.69 The department advised that 'improve or maintain' is the 'overarching test of both the policy and the guide'.<sup>92</sup> To measure this, any proposed benefit from an offset

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87 Urban Bushland Council of WA Inc., *Submission 53*, p. 1.

88 Professor Richard Hobbs and Dr Leonie Valentine, *Submission 25*, p. 2.

89 Dr Denis Saunders, Wentworth Group of Concerned Scientists, *Committee Hansard*, 6 May 2014, p. 17.

90 Department of the Environment, *Answers to questions on notice from public hearing 6 May 2014*, pp 11–13 [Q. 7].

91 EPBC Act Offsets Policy, p. 6.

92 Department of the Environment, *Submission 79*, p. 4.

is compared with 'a business as usual scenario' in the absence of both the offset and the development action.<sup>93</sup>

3.70 Submitters and witnesses expressed general support for this principle. For example, Dr Peter Cosier of the Wentworth Group advised that, in his view, the Commonwealth policy contains the correct principle. He stated:

This 'improve or maintain' principle should underpin all offset policies and should be applied consistently to all development, both public and private, across all land tenure.<sup>94</sup>

3.71 However, the Wentworth Group were concerned that an increasing number of offset schemes:

...fail the fundamental standard that environmental offsets should maintain or improve environmental outcomes. Too often, offsets are not satisfying this basic standard and are instead being used to trade long-term environmental damage for short-term economic benefit.<sup>95</sup>

3.72 Other submitters expressed similar concern that offsets are not contributing to the improvement or maintenance of environmental outcomes, and that the impact of offsets appears contrary to the principle of 'no net loss'.<sup>96</sup> Submitters and witnesses cited several examples of developments which had been offset, but they suggested did not meet the principle of 'improve or maintain'. This included the Maules Creek Project (see Appendix 3)<sup>97</sup> and the Jandakot Airport development (see further Appendix 7).<sup>98</sup>

3.73 Dr Philip Gibbons warned that 'improve or maintain' and 'no net loss' are very difficult to achieve using environmental offsets:

I have modelled, using a metric similar to the one the federal government uses, that no net loss or 'improve or maintain' can only be achieved in a narrow range of circumstances in development scenarios.<sup>99</sup>

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93 Department of the Environment, *Submission 79*, p. 4.

94 Mr Peter Cosier, Director and Founding Member, Wentworth Group, *Committee Hansard*, 6 May 2014, p. 11; see also, for example, Mr Geoffrey Penton, Chief Executive, Queensland Murray-Darling Committee, *Committee Hansard*, 7 May 2014, p. 7.

95 Wentworth Group, *Submission 85*, p. 1.

96 Dr Anita Foerster and Professor Jan McDonald, *Submission 23*, p. 3; Humane Society International, *Submission 28*, p. 2; Professor Richard Hobbs and Dr Leonie Valentine, *Submission 25*, p. 2; Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, p. 18; ANEDO, *Submission 60*, p. 4; Environmental Defenders Office Victoria, *Submission 72*, p. 3.

97 See, for example, Mr Philip Spark, President, Northern Inland Council for the Environment, *Committee Hansard*, 5 May 2014, p. 50.

98 See, for example, Dr Denis Saunders AM, Wentworth Group, *Committee Hansard*, 6 May 2014, p. 17.

99 Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, p. 18.



3.74 Dr Martine Maron submitted the EPBC Act Offsets Policy is 'not designed to achieve no net loss of biodiversity from developments'.<sup>100</sup> In her view, because offsets are required only for significant impacts on aspects of the environment protected under the EPBC Act:

...biodiversity more broadly, and even particular threatened species, would still suffer potentially large net negative impacts of developments, even if the policy were performing perfectly.<sup>101</sup>

3.75 The NSW Minerals Council submitted that it is a 'misapprehension that offsetting cannot provide any additional benefit, thereby resulting in a net loss'.<sup>102</sup> By way of example, the council referred to the regeneration of the Hunter Valley from the impact of grazing<sup>103</sup> and the North Parkes Mine in Western New South Wales.<sup>104</sup>

3.76 Mr Des Boyland of the Wildlife Preservation Society of Queensland recommended that offsets should work towards 'net gain' rather than 'no net loss'. He told the committee that:

...for an offset policy to receive qualified support there must be a clearly demonstrated, positive gain for conservation...[the] beneficial outcome should exceed the environmental impacts arising from the development. The gains must also be long term.<sup>105</sup>

3.77 Mr Fallding provided only qualified support for this view, noting that in the Lake Macquarie City Council area, 'there is no prospect of having a net gain...because of the development that is anticipated'.<sup>106</sup> Ms Margaret Moorhouse of the Alliance to Save Hinchinbrook also queried the viability of ever achieving 'net gain' with environmental offsets. Ms Moorhouse commented:

It sounds like a good idea, except that it is not actually feasible. If you go right to the heart of it, when you are looking for a net gain, or even an equivalent, when you start talking about genetic variability about that gene pool, the fact is that you are destroying some natural area and all its genes and you are attempting a make-up somewhere else.<sup>107</sup>

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100 Dr Martine Maron, *Submission 7*, p. 1.

101 Dr Martine Maron, *Submission 7*, p. 1.

102 NSW Minerals Council, *Submission 76*, p. 4.

103 NSW Minerals Council, *Submission 76*, p. 4.

104 NSW Minerals Council, *Submission 76*, pp 5, 16–18.

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

106 Mr Martin Fallding, Environmental Planner, Lake Macquarie City Council, *Committee Hansard*, 5 May 2014, p. 45.

107 Ms Margaret Moorhouse, Acting Secretary/Treasurer, Alliance to Save Hinchinbrook, *Committee Hansard*, 7 May 2014, p. 55.

### *Additionality*

3.78 Many submitters emphasised the importance of the principle of additionality to the use of environmental offsets.<sup>108</sup> The department explained that:

The principle of 'additionality' ensures that a particular offset cannot be used for more than one action, and that activities already required by law cannot be used to meet offset obligations under the EPBC Act.<sup>109</sup>

3.79 The sixth principle in the EPBC Act Offsets Policy reflects additionality, but the committee heard that governments are not applying the test properly.<sup>110</sup> Dr Philip Gibbons told the committee that:

While the Department of the Environment should be applauded for explicitly including additionality in their offset assessment guide, there needs to be better guidelines underpinning its application because I think it is being abused...There are options for implementing additionality that can be borrowed from carbon policy internationally.<sup>111</sup>

3.80 The committee was told that activities required to offset a development approved under state environmental legislation could also be approved as offsets to a different development being assessed under the EPBC Act.<sup>112</sup> The department submitted that:

...the policy requirements around 'additionality' do not preclude the recognition of state or territory offsets that may be suitable as offsets under the EPBC Act for the same action. The EPBC Act policy establishes that a state or territory offset will count towards an offset under the EPBC Act to the extent that it compensates for the residual impact to the protected matter identified under the EPBC Act.<sup>113</sup>

3.81 Submitters and witnesses illustrated failures to apply the principle of additionality with reference to numerous examples. This included an example in the ACT where an impact was offset using measures to protect land that was already 'an existing park' and 'an existing nature reserve'.<sup>114</sup> Dr Gibbons explained that this is a common example that runs counter to the principle of 'additionality', stating:

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108 See, for example, ANEDO, *Submission 60*, p. 4; Humane Society International, *Submission 28*, p. 2; Nature Conservation Society of South Australia, *Submission 89*, p. 2; Australian Koala Foundation *Submission 4*, p. 5; Watson Community Association, *Submission 54*, p. 2.

109 Department of the Environment, *Submission 79*, p. 8.

110 ANEDO, *Submission 60*, p. 5.

111 Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, p. 18.

112 Mr Dean Knudson, First Assistant Secretary, Environment, Assessment and Compliance Division, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 26.

113 Department of the Environment, *Submission 79*, p. 8.

114 Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, p. 20; Watson Community Association, *Submission 54*, p. 3.

...there are too many offsets going into intact vegetation on land that was not under threat from clearing under current legislation...There is no avoided loss and also there is little capacity for gain if that vegetation or habitat is already in reasonably good condition.<sup>115</sup>

3.82 To deliver improved environmental outcomes, Dr Gibbons called for 'an explicit and repeatable test for additionality'.<sup>116</sup>

3.83 Mr Sydes of Environmental Justice Australia provided a further example of a mining development approved with an offset that 'to fund recovery plan actions', rather than providing outcomes that were 'additional to and on top of' that existing commitment. He explains that that this is an example of:

...the problems with additionality and insistence that whatever is done as an offset activity go over and above what would have and should have occurred anyway. Actually determining what would have and should have occurred anyway is often a really tricky thing to work out.<sup>117</sup>

3.84 Several submitters raised the Queensland Curtis LNG project, which is further discussed in Appendix 5, as an illustration of failure to apply the principle of additionality.<sup>118</sup>

3.85 Expressing a different view, Ms Emma Pethybridge of the ILC advised that some offset actions on already protected areas could be of value:

...there could be value in considering whether offset funds could support specific management actions in existing protected areas, such as national parks, including Indigenous protected areas and so forth.<sup>119</sup>

3.86 In response to questioning, a representative of the department clarified that the 'main way' that the department deals with additionality in this context is to consider:

...what sort of actions would have been required by a state or a local government with respect to protecting certain habitats. So as long as we can determine that what the proponent has proposed is indeed new and incremental, then it meets the additionality test. That being said, we still have properties that can be proposed for being considered as offsets which may have had some level of direction from another level of government—for example, just to secure land but not being specific on how that land should be maintained et cetera for environmental benefit.<sup>120</sup>

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115 Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, p. 24.

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

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

118 Lock the Gate Alliance, *Submission 20*, p. 4; NELA, *Submission 31*, p. 8.

119 Ms Emma Pethybridge, Manager, Environment, Carbon and Heritage, ILC, *Committee Hansard*, 7 May 2014, p. 34.

120 Mr Dean Knudson, First Assistant Secretary, Environment, Assessment and Compliance Division, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 26.

### *'Like for like' offsets and ecological equivalence*

3.87 Many submitters supported the principle that offsets should be delivered in a 'like for like' fashion: that is, the environmental values of the offset should be of the same type or equivalent to that affected by the proposed action.<sup>121</sup> For example, ANEDO articulated the centrality of 'like for like' offsetting in calling for a 'national standard' for environmental offsetting, which in their view:

...must enshrine the requirement of like-for-like offsets, to ensure that the environmental values of the site being used as an offset are equivalent to the environmental values impacted by the proposed action. Otherwise the resulting action is not an offset. A like for like requirement is absolutely fundamental to the ecological integrity and credibility of any offset scheme.<sup>122</sup>

3.88 The EPBC Act Offsets Policy incorporates the issue of 'like for like' by containing:

...an explicit requirement that offsets must target the specific matter being impacted...there is no scope for trading across protected matters...there is also a requirement for offsets to address the relevant attribute of the protected matter that is being impacted. An example would be the requirement for an offset to target the same type of habitat as that being impacted, such as foraging or breeding habitat. In some circumstances it may be possible to demonstrate that a better conservation outcome can be achieved for the protected matter by deviating from this rule...<sup>123</sup>

3.89 The EPBC Act Offsets Policy also contains a related concept of proportionality:

Offsets must be proportionate to the size and scale of the residual impacts arising from the action so as to deliver a conservation gain that adequately compensates for the impacted matter.<sup>124</sup>

3.90 The department submitted that 'under this principle the more threatened a species or community is the larger the offset requirement'.<sup>125</sup>

3.91 Submitters and witnesses told the committee that achieving 'like for like' offsets or equivalence was difficult in practice.<sup>126</sup> For example, Mr Walters from

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121 ANEDO, *Submission 60*, p. 3; Humane Society International, *Submission 28*, p. 2; Nature Conservation Society of South Australia, *Submission 89*, p. 2; Friends of Ken Hurst Park, *Submission 65*, p. 6; Dr Yung En Chee, *Submission 57*, p. 4; Dr Anita Foerster and Professor Jan McDonald, *Submission 23*, p. 5; Environmental Decisions Group, *Submission 50*, p. 3.

122 ANEDO, *Submission 60*, p. 4.

123 Department of the Environment, *Submission 79*, pp 4–5.

124 EPBC Act Offsets Policy, p. 22.

125 Department of the Environment, *Submission 79*, p. 7.

Greenpeace advised that he was 'not aware of any literature that shows it is possible to replicate a habitat or to duplicate an area'.<sup>127</sup>

3.92 Greenpeace submitted that '[m]ultiple incidences have occurred where the 'like for like' principle is not met, or has been applied inappropriately to biodiversity or cultural assets than cannot be offset'.<sup>128</sup>

3.93 Submitters gave many examples of situations where they suggested that principle of 'like for like' had been inadequately implemented in practice, including the Maules Creeks Project (Appendix 3)<sup>129</sup> and the Jandakot Airport development (Appendix 7).<sup>130</sup>

3.94 Others submitters and witnesses noted that availability of suitable offsets can also make 'like for like' difficult to realise in practice. Friends of Grasslands discussed the difficulty of achieving 'like for like' offsets because 'in the case of our temperate grassy ecosystems, there are few left to be used as offsets'.<sup>131</sup> Ms Smiles of the Central West Environment Council agreed that 'we are just running out of areas where there is like for like'.<sup>132</sup>

3.95 The department stated:

In theory a point could arise when there was no like-for-like offset available. It is not something we have encountered to date with the possible exception of the woodlands west of Sydney, which are under an awful lot of development pressure.<sup>133</sup>

3.96 Some submitters and witnesses called for a relaxation of the principle of 'like for like' offsets. For example, Mr David Hogg submitted that:

...there can be situations in which a like-for-like offset may be of more limited biodiversity benefit in a broad sense than a different type of offset of greater strategic value.<sup>134</sup>

126 See, for example, Environmental Decisions Group, *Submission 50*, p. 3; Mr Adam Walters, Research and Investigations Coordinator, Greenpeace, *Committee Hansard*, 5 May 2014, p. 28; Friends of Grasslands, *Submission 13*, p. 1.

127 Mr Adam Walters, Research and Investigations Coordinator, Greenpeace, *Committee Hansard*, 5 May 2014, p. 28.

128 Greenpeace, *Submission 61*, p. 6.

129 See, for example, Australian Koala Foundation, *Submission 4*, p. 4; Greenpeace, *Submission 61*, p. 7; The Wilderness Society, *Submission 84*, p. 8.

130 See, for example, Professor Richard Hobbs and Dr Leonie Valentine, *Submission 25*, p. 1.

131 Friends of Grasslands, *Submission 13*, p. 1.

132 Ms Beverley Smiles, Secretary, Central West Environment Council, *Committee Hansard*, 5 May 2014, p. 13.

133 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 27.

134 David Hogg, *Submission 16*, p.2.

3.97 In calling for greater flexibility, Ms Stutsel of the Minerals Council of Australia advised that 'many of our projects are bound by the geological resource and as such cannot be relocated within the landscape'.<sup>135</sup>

3.98 Dr Foerster and Professor McDonald argued against this approach:

...any substantial relaxation of the ecological equivalence principle will create loopholes within the decision-making parameters, which may lead to the approval of unacceptable biodiversity loss.<sup>136</sup>

### Use of 'indirect' offsets

3.99 As noted in Chapter 2, under the EPBC Act Offsets Policy, a minimum of 90 per cent of the offset requirements for any given impact must be met through direct offsets, that is, actions that provide a 'measurable conservation gain for an impacted protected matter'.<sup>137</sup> The remaining 10 per cent can be met through 'other compensatory measures', or actions that do not directly offset the impacts on the protected matter, but are anticipated to lead to benefits for the impacted protected matter, such as funding for research or education programs.<sup>138</sup>

3.100 The EPBC Act Offsets Policy further states that:

Deviation from the 90 per cent direct offset requirement will only be considered where:

- it can be demonstrated that a greater benefit to the protected matter is likely to be achieved through increasing the proportion of other compensatory measures in an offsets package; or
- scientific uncertainty is so high that it isn't possible to determine a direct offset that is likely to benefit the protected matter. For example, this can be the case in some poorly understood ecosystems in the Commonwealth marine environment.<sup>139</sup>

3.101 Some submitters expressed support for the flexibility provided by the use of indirect offsets.<sup>140</sup> For example, Ms Stutsel from the Minerals Council of Australia told the committee that indirect offsets meant that 'industry could also contribute to things like research and development to support third parties undertaking work on

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135 Ms Melanie Stutsel, Director, Health, Safety, Environment and Community Policy, Minerals Council of Australia, *Committee Hansard*, 6 May 2014, p. 1.

136 Dr Anita Foerster and Professor Jan McDonald, *Submission 23*, p. 5.

137 EPBC Act Offsets Policy, p. 8.

138 EPBC Act Offsets Policy, p. 9.

139 EPBC Act Offsets Policy, p. 9. The marine environment is discussed further in Chapter 4.

140 See, for example, National Farmers' Federation, *Submission 15*, p. 2; NSW Minerals Council, *Submission 76*, p. 12; Minerals Council of Australia, *Submission 35*, p. 6; QGC, *Submission 74*, p. 2; Ms Melanie Stutsel, Director, Health, Safety, Environment and Community Policy, Minerals Council of Australia, *Committee Hansard*, 6 May 2014, p. 5.

threatened species protection and other things that had been identified by the government as important and scientifically valid activities'.<sup>141</sup>

3.102 Indeed, the Minerals Council submitted that 'more flexibility is needed in the offsets mix':

In addition to direct and indirect offsets, a mechanism to fund relevant and targeted conservation initiatives should be developed and the offsets mix employed in a way which is both cost effective and improves environmental outcomes.<sup>142</sup>

3.103 The Business Council of Australia similarly suggested that 'efforts to support the monetisation of offsets, should be further pursued'.<sup>143</sup> In this context, the Minerals Council welcomed that the new Queensland offsets framework, which it submitted would allow 'a mix or either financial or land-based offsets with no limitation on the provision of financial offsets'.<sup>144</sup>

3.104 The Indigenous Advisory Committee submitted that 'direct offsets and other compensatory measures need reconsideration' and that:

...more flexibility has the potential to deliver a range of environmental, social, economic and cultural outcomes...The 'Other Compensatory Measures' outlined in the policy provides a useful approach to engaging Indigenous people to support the management of an offsets arrangement, particularly in marine environments.<sup>145</sup>

3.105 However, other submitters and witnesses expressed concern about the use of 'indirect offsets'. It was suggested that their use be 'strictly limited'.<sup>146</sup> For example, ANEDO advocated that, as matter of principle:

There should be extremely limited use of indirect offsets...This is due to significant uncertainty of linkages with impacts, and higher risk that biodiversity outcomes may not be achieved. Allowing expanded use of indirect offsets would result in net loss of impacted matters.<sup>147</sup>

3.106 NELA agreed that the effectiveness of indirect offsets:

...remains theoretically dubious and unproven in practice, so wider use of such tools should be implemented extremely cautiously. Where indirect

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141 Ms Melanie Stutsel, Director, Health, Safety, Environment and Community Policy, Minerals Council of Australia, *Committee Hansard*, 6 May 2014, p. 5.

142 Minerals Council of Australia, *Submission 35*, p. 6.

143 Business Council of Australia, *Submission 81*, p. 1.

144 Minerals Council of Australia, *Submission 35*, p. 6; see also, for example, QGC, *Submission 74*, p. 2.

145 Indigenous Advisory Committee, *Submission 82*, p. 4.

146 ANEDO, *Submission 60*, p. 4; see also, for example, Birdlife Australia, *Submission 77*, p. 6; Ms Rachel Walmsley, Policy and Law Reform Director, NSW, ANEDO, *Committee Hansard*, 5 May 2014, p. 30; Australasian Bat Society, *Submission 69*, p. 4,

147 ANEDO, *Submission 60*, p. 4.

offsets are made available because of a lack of available offset sites, there should be a specific link between the funds and the impact on the environment.<sup>148</sup>

3.107 Others expressed concern about reliance on financial offsets in particular.<sup>149</sup> For example, Ms Walmsley of ANEDO asserted that 'indirect' offsets allow 'a developer to buy their way out of a difficult offsetting requirement'. She suggested that this is 'particularly detrimental for areas where there is no offset available because the species or ecosystem to be cleared is so rare'.<sup>150</sup>

3.108 Several submissions commented on the funding of research as a type of indirect offset. For example, the Australian Institute of Marine Science (AIMS) also expressed support for the use of indirect offsets, particularly funding for targeted research, in the context of marine ecosystems.<sup>151</sup> In contrast, NELA submitted that funding to support research is not appropriate:

...because the link to conservation outcomes depends on the quality of the research, the findings of the research, and the political will and resources of the responsible agency to implement management changes. Instead, funds should be applied to the acquisition of, or actions to improve the condition of strategic areas identified in collaboration with states and territories.<sup>152</sup>

3.109 The Environmental Decisions Group acknowledged that, in some cases, 'funding for research or other activities without a measurable, direct conservation benefit may be necessary to enable an offset to occur'. However, it suggested that this funding itself should not be part of the offset. Rather:

Funding for research or other activities should be included after 100% of the impact has been accounted for using direct offsets. In this way, research or other activities can then be seen as one component of mitigating the risk of the offset failing to deliver 'no net loss' of biodiversity.<sup>153</sup>

3.110 Greenpeace suggested that:

The use and size of indirect offsets, or additional payments, is not directly linked to the value of the biodiversity loss or activities associated with

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

149 See, for example, Queensland Murray-Darling Committee, *Submission 22*, pp 25–27; Ms Rachel Walmsley, Policy and Law Reform Director, NSW, ANEDO, *Committee Hansard*, 5 May 2014, p. 30.

150 Ms Rachel Walmsley, Policy and Law Reform Director, NSW, ANEDO, *Committee Hansard*, 5 May 2014, p. 29; see also, for example, Mr Geoffrey Penton, Chief Executive, Queensland Murray-Darling Committee, *Committee Hansard*, 7 May 2014, p. 8.

151 AIMS, *Submission 43*, p. 2.

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

153 Environmental Decisions Group, *Submission 50*, p. 4.



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biodiversity offsets. Rather, it is an arbitrary amount negotiated between the Department and the Proponent.<sup>154</sup>

3.111 Mr Sydes of Environmental Justice Australia observed that 'the idea of funding research into a threatened species is not a bad idea. The idea of actually in some way saying that that compensates for the environmentally destructive activity that has been approved is problematic'.<sup>155</sup>

3.112 Dr Maron was concerned that the use of other compensatory measures may 'crowd out' other conservation funding.<sup>156</sup> Others witnesses agreed, suggesting, for example, that any funding for recovery planning actions should be 'additional to and on top of what was already committed to under the recovery plan'.<sup>157</sup>

3.113 Friends of the Earth submitted that indirect offsets should be 'abolished immediately' as there is 'no evidence that indirect offsets protect anything'. They argued 'indirect offsets provide money for purposes that should already be funded':

As Governments continue to reduce funding for and commitment to conservation, we are asked to allow destruction in order to secure some environmental protections or some funding for conservation.<sup>158</sup>

3.114 Birdlife Australia noted that, since the introduction of the EPBC Act Offsets Policy, the 'use of indirect offsets as a compensatory measure is apparently declining'. However, they were concerned that the rule of a maximum of 10 per cent compensatory measures is not being consistently applied.<sup>159</sup>

3.115 A representative of the department advised that the term 'indirect offsets' is 'terminology that we have moved on from', with the preference now being for 'other compensatory measures'. However, she told the committee that:

...as long as the ecological outcome is tied through the amount of money to an actual action, the monetization of offsets is an entirely legitimate policy approach.<sup>160</sup>

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154 Greenpeace, *Submission 61*, p. 9; see also Mr Adam Walters, Research and Investigations Coordinator, Greenpeace, *Committee Hansard*, 5 May 2014, p. 26.

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

156 Dr Martine Maron, *Submission 7*, p. 4.

157 See, for example, Mr Brendan Sydes, Chief Executive Officer, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, p. 20.

158 Friends of the Earth, *Submission 58*, p. 4; see also Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth Australia, *Committee Hansard*, 7 May 2014, p. 43.

159 Birdlife Australia, *Submission 77*, p. 7.

160 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 35.

3.116 The department further noted that, although there is 'a general principle that most of the offsets should be direct', there are some cases where it does not make sense. Dr Dripps gave the example of the Tasmanian devil:

The problem for Tasmanian devils, for example, is not that there is no habitat for them—there is a lot of habitat for them—but unfortunately they are suffering from a disease that is killing them. In that case, it would be completely inappropriate to require more habitat to be protected and entirely appropriate for a financial contribution to that captive breeding program to be the required condition.<sup>161</sup>

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161 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 34.