

The Senate

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Environment and Communications  
References Committee

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Environmental offsets

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# Recommendations

## 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.

## 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.

## 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.

## 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.

## 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.

## 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.

## **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.

## **Recommendation 10**

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

## **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.

## **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.

## **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.

## **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.

## **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.



### **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.

### **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.

### **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'.

### **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*.



# Chapter 1

## Introduction

### Referral of the inquiry

1.1 On 5 March 2014, the Senate referred the following matter to the Environment and Communications References Committee (the committee) for inquiry and report by 16 June 2014:

- (1) The history, appropriateness and effectiveness of the use of environmental offsets in federal environmental approvals in Australia, including:
  - (a) the principles that underpin the use of offsets;
  - (b) the processes used to develop and assess proposed offsets;
  - (c) the adequacy of monitoring and evaluation of approved offsets arrangements to determine whether promised environmental outcomes are achieved over the short and long term; and
  - (d) any other related matters.
- (2) That in conducting the inquiry the committee consider the terms of reference in (1) with specific regard to, but not restricted to, the following projects:
  - (a) Whitehaven Coal's Maules Creek Project;
  - (b) Waratah Coal's Galilee Coal Project;
  - (c) QGC's Queensland Curtis LNH Project;
  - (d) North Queensland Bulk Ports' Abbot Point Coal Terminal Capital Dredging Project; and
  - (e) Jandakot Airport developments.<sup>1</sup>

1.2 The reporting date was subsequently extended to 25 June 2014.<sup>2</sup>

### Conduct of the inquiry

1.3 The committee advertised the inquiry on its website and in *The Australian* newspaper. The committee also wrote to relevant organisations and individuals inviting submissions by 4 April 2014. The committee received 95 submissions, which were published on the committee's website and are listed at Appendix 1.

1.4 The committee held public hearings relating to its inquiry in Sydney on 5 May 2014, Canberra on 6 May 2014, Brisbane on 7 May 2014 and Canberra on 18 June 2014. A list of witnesses who appeared at the hearings may be found at Appendix 2.

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1 *Journals of the Senate*, No. 17, 5 March 2014, p. 563.

2 *Journals of the Senate*, No. 30, 16 June 2014, p. 849.

## **Acknowledgement**

1.5 The committee would like to thank all the organisations, individuals and government departments that contributed to the inquiry.

## **Notes on references**

1.6 Hansard references in this report are to the proof committee Hansard. Page numbers may vary between the proof and the official Hansard transcript.

1.7 The committee notes that the Environmental Defenders Office (Victoria) changed its name to Environmental Justice Australia during the course of the inquiry. As such, the submission is referenced as being from the Environmental Defenders Office (Victoria) (submission 72), and the hearing appearance by Mr Brendan Sydes is referenced as being from Environmental Justice Australia. The committee also received a separate submission from the Australian Network of Environmental Defender's Offices (ANEDO – submission 60).

## **Structure of the report**

1.8 This chapter outlines the conduct of the inquiry. Chapter 2 provides an introduction and background in relation to environmental offsets, in particular the legal and policy framework relating to offsets, primarily at the Commonwealth level, as well as consideration of relevant past reviews and reports.

1.9 Chapter 3 outlines the overall levels of support for, and opposition to, environmental offsets, followed by a discussion of some of the key principles underpinning the use of offsets under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).

1.10 Chapter 4 considers some key issues relating to the processes for the development and assessment of offsets such as timing, transparency, methods for assessing and calculating offsets, as well as the need for more strategic and consistent approaches to environmental offsets.

1.11 Chapter 5 examines the adequacy of monitoring, enforcement and evaluation of environmental offsets, with a focus on offsets issued as conditions of approval under the EPBC Act.

1.12 Chapter 6 draws together the committee's conclusions and recommendations in relation to environmental offsets.

1.13 The five projects identified in the inquiry's term of reference (2) are outlined in appendices 3–7. Where appropriate, these case studies are identified as examples in the discussion of relevant issues in relation to offsets discussed in chapters 3–5.

## Chapter 2

### Overview of the use of environmental offsets

2.1 This chapter provides an overview of the use of environmental offsets. This includes:

- an explanation of the definition of offsets and the different types of offsets;
- the legal and policy framework relating to offsets, primarily at the Commonwealth level; and
- relevant past reviews and reports relating to offsets.

2.2 This report necessarily focuses on Commonwealth policies and regulation, particularly the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) and its processes. However, state and territory offsets regimes are also briefly outlined and discussed where appropriate and relevant.

#### Environmental offsets

2.3 Essentially, an environmental offset involves compensating for impacts on the environment or biodiversity at one site through activities at another site.<sup>1</sup> At the Commonwealth level, offsets are defined as 'measures that compensate for the residual adverse impacts of an action on the environment'.<sup>2</sup> However, the Department of the Environment (the department) noted that 'under national environment standards all reasonable steps should first be taken to avoid and then mitigate adverse impacts on the environment'.<sup>3</sup>

2.4 The EPBC Act Environmental Offsets Policy (EPBC Act Offsets Policy) states that:

Offsets do not mean proposals with unacceptable impacts will be approved. They simply provide an additional tool that can be used during the environmental impact assessment process.<sup>4</sup>

2.5 The EPBC Act Offsets Policy requires that offsets be in place for the duration of the impact.

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1 See, for example, Maron M, Hobbs RJ, Moilanen A, Matthews JW, Christie K, Gardner TA, Keith DA, Lindenmayer, DB and McAlpine CA, 'Faustian Bargains? Restoration Realities in the Context of Biodiversity Offset Policies' (2012) 155 *Biological Conservation*, p. 141.

2 Australian Government, *Environment Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy*, October 2012, p. 4, <http://www.environment.gov.au/resource/epbc-act-environmental-offsets-policy> (accessed 1 May 2014).

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

4 EPBC Act Offsets Policy, p. 7.

### *Types of environmental offsets*

2.6 The EPBC Act Offsets Policy notes that 'an offsets package is a suite of actions that a proponent undertakes in order to compensate for the residual significant impact of a project'.<sup>5</sup> The actions can comprise a combination of 'direct offsets' or 'other compensatory action/indirect offsets'.

#### *Direct offsets*

2.7 The department submitted that, in the past, direct offsets:

...have been defined as areas of land that are gazetted or covenanted as protected areas as to avert a future loss and ensure continued environmental management.<sup>6</sup>

2.8 The department noted that this approach, while playing an important role in securing remaining habitat in an ecosystem, had not always targeted the key conservation priorities of a particular species, ecosystem or place. As a consequence, in 2012, the offsets policy was amended so that 'direct' offsets are those actions that provide a 'measurable conservation gain for an impacted protected matter'.<sup>7</sup>

2.9 The EPBC Act Offsets Policy states that:

Conservation gain is the benefit that a direct offset delivers to the protected matter, which maintains or increases its viability or reduces any threats of damage, destruction or extinction.<sup>8</sup>

2.10 Some examples whereby a 'conservation gain' may be achieved include:

- improving existing habitat for the protected matter;
- creating new habitat for the protected matter;
- reducing threats to the protected matter;
- increasing the values of a heritage place; and/or
- averting the loss of a protected matter or its habitat that is under threat.<sup>9</sup>

2.11 The department submitted that, under the EPBC Act Offsets Policy, direct offsets may also include:

- the improvement and creation of new habitat through regeneration and rehabilitation activities across a landscape;
- implementing feral animal control programs that reduce predation of a particular threatened species;

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5 EPBC Act Offsets Policy, p. 8.

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

7 Department of the Environment, *Submission 79*, p. 5; EPBC Act Offsets Policy, p. 8.

8 EPBC Act Offsets Policy, p. 8.

9 EPBC Act Offsets Policy, p. 8.

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- improving the population of a species through captive breeding and release programs; or
  - undertaking activities that improve the values of a heritage place or wetland of international importance, such as upstream management activities to improve estuarine water quality.<sup>10</sup>

2.12 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.<sup>11</sup>

*Indirect offsets or other compensatory measures*

2.13 While many submissions refer to 'indirect offsets', the department advised that the term 'indirect offsets' is 'terminology that we have moved on from, because we tie things much more specifically to particular actions presently'.<sup>12</sup> The preferred term in the EPBC Act Offsets Policy is 'other compensatory measures' – that is, actions that do not directly offset the impacts on the protected matter but are anticipated to lead to benefits for the impacted protected matter, for example, funding for research or education programs.<sup>13</sup> This report uses the term 'indirect offsets' interchangeably with 'other compensatory measures'.

2.14 Appendix A of the EPBC Act Offsets Policy outlines the criteria for research or educational programs under the policy.

*Advanced offsets*

2.15 The department noted that the EPBC Act Offsets Policy encourages the supply of offsets before an impact occurs, that is 'advanced offsets'. The EPBC Act Offsets Policy describes 'advanced offsets' as offsets for potential future use, transfer or sale, for example, protection or improvement of habitat for the conservation of a protected matter before an impact is undertaken.<sup>14</sup>

2.16 The EPBC Act Offsets Policy states that:

Advanced offsets are encouraged where practical, as a means to better manage the risks associated with the time delay in realising the conservation gain for a protected matter...

Advanced offsets must satisfy all requirements in this policy, including those relating to offsets being additional to other legislation and schemes...<sup>15</sup>

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10 Department of the Environment, *Submission 79*, pp 5–6.

11 EPBC Act Offsets Policy, p. 8; Department of the Environment, *Submission 79*, p. 6.

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

13 EPBC Act Offsets Policy, p. 9; see also Department of the Environment, *Submission 79*, p. 6.

14 EPBC Act Offsets Policy, p. 9.

15 EPBC Act Offsets Policy, p. 9.

## **Offsets: the legal and policy framework**

2.17 This section provides a brief background of the legal and policy framework relating to use of environmental offsets in federal environmental approvals in Australia.

### ***Overview of the EPBC Act***

2.18 Federal environmental approvals in Australia occur under the EPBC Act. The objects of the EPBC Act include:

- to provide for the protection of the environment, especially those aspects which are a matter of national environmental significance;
- to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources;
- to promote the conservation of biodiversity;
- to provide for the protection and conservation of heritage; and
- to promote a co-operative approach to the protection and management of the environment involving governments, the community, landholders and indigenous peoples.<sup>16</sup>

2.19 The EPBC Act also contains the following principles of ecologically sustainable development:

- (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
- (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
- (c) the principle, inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision making;
- (e) improved valuation, pricing and incentive mechanisms should be promoted.<sup>17</sup>

2.20 In general, the EPBC Act requires a person taking an 'action' that is likely to have a significant impact on a matter of national environmental significance to obtain approval from the Minister for the Environment.

2.21 The nine matters of national environmental significance protected under the EPBC Act<sup>18</sup> are:

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16 EPBC Act, s. 3.

17 EPBC Act, s. 3A.



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- world heritage properties;
  - national heritage places;
  - wetlands of international importance (listed under the Ramsar Convention);
  - listed threatened species and ecological communities;
  - migratory species protected under international agreements;
  - Commonwealth marine areas;
  - the Great Barrier Reef Marine Park;
  - nuclear actions (including uranium mines); and
  - water resources, in relation to coal seam gas and large coal mine developments.<sup>19</sup>

2.22 Actions that may have a significant impact on one of these matters are referred to the environment minister and, if they are considered to be a 'controlled action', undergo environmental assessment in accordance with the EPBC Act. The proponent of the action is responsible for the preparation of assessment documentation. At the completion of an assessment, the minister must decide whether to approve the action, and may approve the action subject to conditions. These conditions can include offsets.<sup>20</sup>

#### ***Consideration of offsets under the EPBC Act***

2.23 The department advised that environmental offsets have been included in conditions of approval since the EPBC Act was enacted in 2000, but their application has evolved and grown over the past decade. However, as water resources in relation to coal seam gas and large coal mine developments was added as a new matter of national environmental significance after the release of the EPBC Act Offsets Policy, the policy does not apply.<sup>21</sup>

2.24 Offsets are not required for all approvals under the EPBC Act—only where residual, unavoidable, impacts are considered to be significant.<sup>22</sup> The department stated that:

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18 Each matter of environmental significance is the subject of a subdivision (A–FB) of Chapter 2, Part 3, Division 1 of the EPBC Act, with any additional matters to be prescribed in Division 2.2 of Part 2 of the *Environment Protection and Biodiversity Conservation Regulations 2000*.

19 Department of the Environment, *What is protected under the EPBC Act?*, <http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/what> (accessed 1 May 2014). Note that other matters protected under the EPBC Act include the environment, where proposed actions involve Commonwealth land or Commonwealth agencies.

20 A flow chart of this process is contained in Figure 1 of the EPBC Act Offsets Policy, p. 13.

21 Department of the Environment, *Submission 79*, p. 1; see also Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 25.

22 EPBC Act Offsets Policy, p. 7; Department of the Environment, *Submission 79*, p. 3.

Environmental offsets are considered during the detailed environmental impact assessment process of an action undertaken through Part 8 of the EPBC Act, following the exploration of all potential avoidance and mitigation measures.<sup>23</sup>

2.25 Offsets can also be considered as part of strategic assessments, which consider matters of national environmental significance at a landscape or regional scale, rather than on a project-by-project basis.<sup>24</sup>

### ***Commonwealth policy on environmental offsets***

2.26 The development of the Offsets Policy was part of a package of reforms to the EPBC Act as part of the Government's response to the independent review (Hawke review) of the EPBC Act led by Dr Allan Hawke which reported in 2009.<sup>25</sup>

2.27 The Hawke review contained a discussion of 'biobanking' schemes, and recommended, amongst other matters, that national biodiversity banking systems and standards be developed, and that the EPBC Act be amended to 'facilitate and promote the use of biobanking as part of project approvals'.<sup>26</sup> The Government agreed in principle to this recommendation and indicated that it would be releasing an Environmental Offsets Policy.<sup>27</sup>

2.28 The EPBC Act Offsets Policy and Offsets Assessment Guide were finalised and released in October 2012, following 'detailed research and stakeholder consultation'.<sup>28</sup> The then Minister, the Hon Tony Burke, stated that the policy would 'better explain to proponents and the community how offsets are assessed and what would be acceptable under specific proposals'.<sup>29</sup>

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

24 Department of the Environment, *Submission 79*, p. 3; see further Department of the Environment, *Strategic Assessments*, <http://www.environment.gov.au/topics/environment-protection/environment-assessments/strategic-assessments> (accessed 21 May 2014).

25 Department of the Environment, Water Heritage and the Arts, *The Australian Environment Act: Report of the Independent review of the Environment Protection and Biodiversity Conservation Act 1999* (Hawke review), October 2009, <http://www.environment.gov.au/legislation/environment-protection-and-biodiversity-conservation-act/epbc-review-2008> (accessed 21 May 2014).

26 Hawke review, October 2009, recommendation 7 and also pp 117–122.

27 Australian Government, *Australian Government Response to the Report of the Independent Review of the EPBC Act*, August 2011, p. 21, <http://www.environment.gov.au/resource/australian-government-response-report-independent-review-environment-protection-and> (accessed 21 May 2014).

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

29 The Hon Tony Burke MP, then Minister for Sustainability, Environment, Water, Population and Communities, 'Reforms better for the environment, better for business', *Media Release*, 24 August 2011, at: <http://www.environment.gov.au/minister/archive/burke/2011/mr20110824.html> (accessed 21 May 2014).

2.29 In addition to the Hawke review, the development of the EPBC Act Offsets Policy also considered the Business and Biodiversity Offsets Program (BBOP) *Standard on Biodiversity Offsets*, published in 2012.<sup>30</sup> The BBOP is an international collaboration between companies, financial institutions, government agencies and civil society organisations. The members are developing best practice in following the mitigation hierarchy (avoid, minimise, restore, offset) to achieve no net loss or a net gain of biodiversity.<sup>31</sup>

2.30 The department submitted that the EPBC Act Offsets Policy now 'articulates the role offsets play under the EPBC Act and how suitable offsets are determined' and the Offsets Assessment Guide is a metric that 'measures an offset against a relevant impact to determine whether the offsets proposal is suitable'.<sup>32</sup> The policy 'provides additional detail and guidance regarding how the department determines what constitutes a suitable offset' and 'an increased focus on the conservation gain that is delivered by an offset'.<sup>33</sup>

2.31 The EPBC Act Offsets Policy states that its five key aims are to:

1. ensure the efficient, effective, timely, transparent, proportionate, scientifically robust and reasonable use of offsets under the EPBC Act
2. provide proponents, the community and other stakeholders with greater certainty and guidance on how offsets are determined and when they may be considered under the EPBC Act
3. deliver improved environmental outcomes by consistently applying the policy
4. outline the appropriate nature and scale of offsets and how they are determined
5. provide guidance on acceptable delivery mechanisms for offsets.<sup>34</sup>

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

2.32 The EPBC Act Offsets Policy sets out a number of principles that are applied in determining the suitability of offsets. That is, 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 environmental law and affected by the proposed action;

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

31 Business and Biodiversity Offsets Programme, *Standard on Biodiversity Offsets*, [http://www.forest-trends.org/documents/files/doc\\_3078.pdf](http://www.forest-trends.org/documents/files/doc_3078.pdf) and see also <http://bbop.forest-trends.org/> (accessed 29 May 2014).

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

33 Department of the Environment, *Q&A offsets under national environmental law*, June 2013, p. 2, <http://www.environment.gov.au/system/files/resources/12630bb4-2c10-4c8e-815f-2d7862bf87e7/files/offsets-faq.pdf> (accessed 21 May 2014).

34 EPBC Act Offsets Policy, p. 6.

- be built around direct offsets but may include other compensatory measures;
- be in proportion to the level of statutory protection that applies to the protected matter;
- be of a size and scale proportionate to the residual impacts on the protected matter;
- effectively account for and manage the risks of the offset not succeeding;
- be additional to what is already required, determined by law or planning regulations or agreed to under other schemes or programs;
- be efficient, effective, timely, transparent, scientifically robust and reasonable; and
- have transparent governance arrangements, including being able to be readily measured, monitored, audited and enforced.<sup>35</sup>

#### *Application of the policy*

2.33 As noted above, the EPBC Act Offsets Policy can be applied in relation to all protected matters of national environmental significance, with the exception of water resources in relation to coal seam gas and large coal mine developments. The EPBC Act Offsets Policy applies to offsetting requirements in both terrestrial and aquatic (including marine) environments and for both project-by-project assessments and strategic assessments approved under the EPBC Act. The policy has effect for all referrals made since 2 October 2012, and applies to projects that were undergoing assessment and had not had a proposed approval decision made by 2 October 2012.<sup>36</sup>

#### *Offsets Assessment Guide*

2.34 The EPBC Act Offsets Policy is accompanied by an Offsets Assessment Guide, which is described as a decision support tool used by regulators within the department 'to determine the suitability of offsets for listed threatened species and ecological communities'. The department noted that the offset assessment only applies to assessing offsets for threatened species and ecological communities, which form the majority of offset requirements under the EPBC Act.<sup>37</sup>

2.35 The department went on to note that an important feature of the assessment guide is that it accounts for delays in the delivery of any conservation benefit.<sup>38</sup>

#### *Size and scale of offsets*

2.36 The department stated that the EPBC Act Offsets Policy and guide were developed to 'systemise the judgments that go into determining suitable offsets'. The

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35 EPBC Act Offsets Policy, p. 6.

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

37 Department of the Environment, *Submission 79*, pp 1 and 8.

38 Department of the Environment, *Submission 79*, p. 9.

size and scale of an offset under the EPBC Act are determined by a number of different variables, including:

- the overall size of the residual impact on the matter of national environmental significance;
- the specific attributes of the protected matter, or its habitat, being impacted, including its listing status;
- the quality or importance of the habitat or area attributes being impacted with regard to ongoing viability of the relevant matter of national environmental significance;
- the duration of any impacts, that is, permanent or temporary;
- the level of threat that a proposed offset site may be under;
- the time it may take for any management, rehabilitation or restoration activities to deliver a benefit; and
- the risk of any conservation gain not being delivered, including scientific certainty in relation to the proposed activities.<sup>39</sup>

2.37 So, for example, the Offsets Assessment Guide uses data on the annual probability of extinction for different threatened species categories to ensure that 'the more threatened a species or community is the larger the offset requirement'.<sup>40</sup>

#### *Additionality*

2.38 The department also noted 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...Environmental offsets must also be additional to what has been paid for under other schemes or programs on a pro rata basis, for example, an environmental grant program funded by the Australia Government.<sup>41</sup>

2.39 The department commented that additionality policy requirements do not preclude the recognition of state or territory offsets that may be suitable as offsets under the EPBC Act for the same action.<sup>42</sup>

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39 Department of the Environment, *Submission 79*, p. 7 and see also pp 8–10.

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

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

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

## **Past reviews and inquiries in relation to offsets**

2.40 This section considers a number of reviews and inquiries that are relevant to the issue of offsets.

### ***Inquiry into the operation of the EPBC Act***

2.41 This committee has been considering the issue of environmental offsets for some time. In 2009, the committee undertook an inquiry into the operation of the EPBC Act and concerns were raised about the increasing use of environmental offsets under the EPBC Act. The committee noted that there was a 'degree of disquiet amongst submitters about offsets'. The committee recognised that:

...the use of offsets must only be applied as an adjunct to avoidance and mitigation. Offsets must not be used as a tool to get projects, which would otherwise be unacceptable, 'over the line'.<sup>43</sup>

2.42 The committee recommended that government policy regarding the use of offsets for habitation conservation state that the use of offsets:

- is a last resort;
- must deliver a net environmental gain; and
- should not be accepted as a mitigating mechanism in instances where other policies or legislation (such as state vegetation protection laws) are already protecting the habitat proposed for use as an offset.<sup>44</sup>

2.43 The Government agreed in part to this recommendation and stated that it would 'release a policy on environmental offsets to provide greater certainty for business and improve environmental outcomes'.<sup>45</sup>

### ***Inquiry into the effectiveness of threatened species and ecological communities' protection in Australia, August 2013***

2.44 During its inquiry into the effective of threatened species and ecological communities, one of the two key issues raised with the committee relating to environmental assessment and approval processes was the use of offsets. Submitters raised the use of biodiversity offsets and expressed concern about their potential to adversely impact on threatened species and communities. It was noted that offsets are

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43 Senate Standing Committee on Environment, Communications and the Arts, *The operation of the Environment Protection and Biodiversity Conservation Act 1999, First Report*, March 2009, p. 70.

44 Senate Standing Committee on Environment, Communications and the Arts, *The operation of the Environment Protection and Biodiversity Conservation Act 1999, First Report*, March 2009, pp 66–70.

45 Australian Government, *Australian Government Response to the Senate Standing Committee on Environment, Communications and the Arts Committee Report: Operation of the Environment Protection and Biodiversity Conservation Act 1999 (First, Second and Final Reports)*, September 2011, p. 6.

'not specifically addressed within the EPBC Act', but that their use 'has developed as an administrative practice over a number of years'.<sup>46</sup>

2.45 The then Department of Sustainability, Environment, Water, Population and Communities (SEWPAC) told the committee that EPBC Act Offsets Policy was 'proving useful', by 'giving a clear guide as to how to calculate offsets and when, and how to determine where they would best deliver the broader ecological and biodiversity outcome'. This was compared to the past practice, which SEWPAC representatives described as 'ad hoc and project specific'.<sup>47</sup>

2.46 In its report on the inquiry, the committee:

- welcomed the publication of a formal policy guiding the use of offsets under the EPBC Act, acknowledging evidence that it was designed to improve transparency around how offsets are determined;
- considered that offsets should be used with great caution where threatened species and ecological communities are involved; and
- noted with concern that SEWPAC is only now reviewing offsets that have been granted in the past.<sup>48</sup>

2.47 The committee recommended that SEWPAC:

...conduct an audit and evaluation of the offsets granted under the *Environment Protection and Biodiversity Conservation Act 1999* to date, and make the results of this audit publicly available.<sup>49</sup>

2.48 In additional comments to the report, the Australian Greens added:

We are also supportive of the proposal of an audit of all offsets granted under the EPBC Act to date – and we urge that this audit be independent, subject to public input, and result in a public register of offsets that is kept up to date. The Greens have serious concerns about the use of offsets to wave through otherwise inappropriate developments, and hope that a thorough audit will bring more credibility to the system, and clearly identify where offsetting should not be allowed.<sup>50</sup>

2.49 In a related recommendation (given that offsets are often a condition of approval under the EPBC Act), the committee recommended that the Australian National Audit Office (ANAO) conduct an audit of monitoring of compliance with

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46 Senate Environment and Communications References Committee, *Effectiveness of threatened species and ecological communities' protection in Australia*, August 2013, p. 185.

47 Senate Environment and Communications References Committee, *Effectiveness of threatened species and ecological communities' protection in Australia*, August 2013, p. 187.

48 Senate Environment and Communications References Committee, *Effectiveness of threatened species and ecological communities' protection in Australia*, August 2013, p. 196.

49 Senate Environment and Communications References Committee, *Effectiveness of threatened species and ecological communities' protection in Australia*, August 2013, p. 207.

50 Senate Environment and Communications References Committee, *Effectiveness of threatened species and ecological communities' protection in Australia*, August 2013, p. 207.

approval conditions under the EPBC Act.<sup>51</sup> The committee notes that the ANAO has conducted this audit, and the report was published in June 2014.<sup>52</sup>

2.50 The report identified a number of concerns with the Department of the Environment's compliance monitoring activities. The ANAO found that:

...compliance monitoring undertaken by the department has, generally, been insufficient to provide an appropriate level of assurance of proponents' ongoing compliance with their conditions of approval.<sup>53</sup>

2.51 The ANAO further noted that:

The increasing workload on compliance monitoring staff over time has resulted in Environment adopting a generally passive approach to monitoring proponents' compliance with most approval conditions.<sup>54</sup>

2.52 The ANAO made five recommendations to address the identified shortcomings in the department's compliance monitoring activities. The Department of the Environment agreed to all the recommendations. More specifically, the ANAO recommended that the department:

...develop a compliance intelligence capability and undertake periodic risk assessments; develop and implement annual compliance monitoring programs that target the greatest risk areas; update investigation procedures and improve the documentation of enforcement responses; and improve record-keeping and performance reporting related to the compliance monitoring function.<sup>55</sup>

### ***Productivity Commission research report on Major Project Development Assessment Processes***

2.53 In December 2013, the Productivity Commission released a research report on its study to benchmark Australia's major project development assessment processes.<sup>56</sup> The study considered the extent to which major project development assessment processes across all levels of government affect the costs incurred by business, deliver good regulatory outcomes for the public and provide transparency and certainty to promote business investment.

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

52 ANAO, 'Managing Compliance with EPBC Act 1999 Conditions of Approval', *Performance Audit Report No. 43 2013–14* (ANAO Audit Report), <http://www.anao.gov.au/Publications/Audit-Reports/2013-2014/Managing-Compliance-with-EPBC-Act-1999-Conditions-of-Approval> (accessed 19 June 2014).

53 ANAO Audit Report, p. 16.

54 ANAO Audit Report, p. 16.

55 ANAO Audit Report, p. 18 and see pp 26–28 for the recommendations in full.

56 Productivity Commission, *Major Project Development Assessment Processes*, Research Report, December 2013, <http://www.pc.gov.au/projects/study/major-projects> (accessed 20 May 2014).



2.54 The Commission considered offsets as part of Australia's project development assessment processes and made a number of relevant recommendations, including a review of environment assessment policies and practices, legislation to enable amendments to offsets, and monitoring and compliance activities for offsets:

#### RECOMMENDATION 8.2

COAG should commission an independent and public national review of environmental offset policies and practices to report by the end of 2014. The review should:

- survey the consistency of offset policy objectives against the principles of ecologically sustainable development
- critically assess the methodologies used for measuring and valuing offsets
- examine the role of market-based offset approaches, including offset funds
- consider the case for greater national consistency and linkages between offset regimes, including the potential for a single national scheme.

#### RECOMMENDATION 10.2

Governments should ensure legislation enables regulatory agencies to amend conditions and offsets, provided that there is a strong case, the proponent is consulted and the proposed change is publicly announced.

#### RECOMMENDATION 10.3

Regulators should produce an annual major projects compliance statement that reviews monitoring and compliance activities and identifies redundant or ineffective conditions on approvals.<sup>57</sup>

### **Relationship between Commonwealth, state and territory offset regimes**

2.55 The Commonwealth EPBC Act Offsets Policy explains the relationship between Commonwealth, state and territory legislation and the use of environmental offsets. The policy notes that:

The majority of proposed actions that need approval under the EPBC Act also require environmental approval from the relevant state or territory government before they can proceed.<sup>58</sup>

2.56 The policy further states that:

...while there are many similarities between the environmental laws of the states and territories and the EPBC Act, they also differ in a fundamental way. The EPBC Act focuses on protecting matters of national

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<sup>57</sup> Productivity Commission, *Major Project Development Assessment Processes, Research Report*, December 2013, <http://www.pc.gov.au/projects/study/major-projects> (accessed 20 May 2014).

<sup>58</sup> EPBC Act Offsets Policy, p. 23.

environmental significance and only protects the broader environment in certain circumstances. State and territory laws on the other hand usually protect the environment as a whole (for example air quality, noise pollution, water quality, biodiversity, and heritage values). These differing legislative objectives result in different assessment processes and can result in different offset requirements.<sup>59</sup>

2.57 As a consequence of different assessment processes and offset requirements, it is noted that:

...some proponents may need to provide offsets under both state or territory laws and the EPBC Act for the same action. A state or territory offset will count toward 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>60</sup>

### ***'One stop shop' proposal***

2.58 In addition, the Commonwealth Government is committed to delivering a 'one stop shop' for environmental approvals. The department stated that the delivery of a 'one stop shop' will accredit state and territory approval processes to meet environmental standards required by the Commonwealth.<sup>61</sup> The 'one stop shop':

...will accredit state planning systems under national environmental law, to create a single environmental assessment and approval process for nationally protected matters. The one stop shop policy aims to simplify the approvals process for businesses, lead to swifter decisions and improve Australia's investment climate, while maintaining high environmental standards.<sup>62</sup>

2.59 Part 5 of Chapter 3 of the EPBC Act makes provision for the Commonwealth environment minister to enter into bilateral agreements subject to conditions set out in the Act. The EPBC Act provides for two types of bilateral agreement:

- an assessment agreement – where state or territory processes are used to assess the environmental impacts of a proposed action, but the approval decision is made by the minister under the EPBC Act;<sup>63</sup> and
- an approval agreement – where actions that are subject to a bilaterally accredited management arrangement or authorisation process in place under

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59 EPBC Act Offsets Policy, p. 23.

60 EPBC Act Offsets Policy, p. 23.

61 Department of the Environment, *Submission 79*, p. 13.

62 Department of the Environment, *'One stop shop' for environmental approvals*, <http://environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/one-stop> (accessed 23 May 2014).

63 EPBC Act, s. 47.

state or territory law do not require further assessment or approval under the EPBC Act.<sup>64</sup>

2.60 The department explained that the 'one stop shop' will be achieved through a three-stage process with each willing state/territory. First, memoranda of understanding have been signed with all states and territories before assessment bilateral agreements will be agreed or updated. This will be followed by the negotiation of an approval bilateral agreement, which would 'enable states and territories to be the sole approver of projects'.<sup>65</sup>

2.61 In terms of progress towards the 'one stop shop' proposal, memoranda of understanding have been signed with each state and territory. The Commonwealth Government has entered into assessment bilateral agreements with all state and territory governments.<sup>66</sup> Draft approval bilateral agreements have been published for Queensland and New South Wales, and were open for public comment until 13 June 2014.<sup>67</sup>

### *State and territory regimes*

2.62 State and territory legislation and policy also provides for use of environmental offsets in certain circumstances. These are outlined briefly for each state and territory below.

#### *New South Wales*

2.63 The public consultation for the *Draft NSW Biodiversity Offsets Policy for Major Projects* closed on 9 May 2014. The policy will apply to state significant development and state significant infrastructure under the *Environmental Planning and Assessment Act 1979* (NSW). The policy, which is accompanied by a Biodiversity Offsets Credit Calculator, aims to 'strike an effective balance between the needs of proponents, communities and the environment' by:

- providing clear, efficient and certain guidance for stakeholders;
- improving outcomes for the environment and communities; and
- providing a practical and achievable offset scheme for proponents.<sup>68</sup>

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64 EPBC Act, s. 29, s. 46.

65 Department of the Environment, *Submission 79*, p. 13.

66 Copies of the current assessment bilateral agreements may be found on the website of the Department of the Environment: <http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements> (accessed on 04/06/2014). Note that Queensland and New South Wales have recently entered into new assessment bilateral agreements. The ACT, Northern Territory, South Australia and Western Australia have published new draft assessment agreements.

67 See further Department of the Environment, *'One stop shop' for environmental approvals*, <http://environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/one-stop> (accessed 23 May 2014).

68 Environment and Heritage NSW, *Draft NSW Biodiversity Offsets Policy for Major Projects*, <http://www.environment.nsw.gov.au/biodivoffsets/biooffsetspol.htm> (accessed 21 May 2014).

2.64 For other projects, the 'Principles for the use of biodiversity offsets in NSW' continue to apply and provide a framework for assessing offset proposals for other approvals under the *Environmental Planning and Assessment Act 1979*.<sup>69</sup>

2.65 In NSW, formal offset arrangements are already a feature of:

- the NSW Biodiversity Banking and Offsets Scheme, introduced in 2007;<sup>70</sup>
- land-use planning through biodiversity certification of land under the *Threatened Species Conservation Amendment (Biodiversity Certification) Act 2010* (NSW);<sup>71</sup> and
- the regulation of native vegetation under the *Native Vegetation Act 2003*.<sup>72</sup>

### Queensland

2.66 On 23 May 2014, the Queensland Parliament passed the Environmental Offsets Bill 2014<sup>73</sup> which had the purpose of coordinating Queensland's environmental offsets framework. The five separate previous Queensland offsets policies are to be replaced with a single Queensland offsets policy.<sup>74</sup>

### Victoria

2.67 In Victoria, an offset can be required if a permit to remove native vegetation is granted. Offset requirements are determined in accordance with the *Permitted clearing of native vegetation – Biodiversity assessment guidelines*. A 'native vegetation gain scoring manual' contains standards for first- and third-party offsets.<sup>75</sup>

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69 Environment and Heritage NSW, *OEH principles for the use of biodiversity offsets in NSW*, <http://www.environment.nsw.gov.au/biodivoffsets/oehoffsetprincip.htm> (accessed 21 May 2014).

70 See further Environment and Heritage NSW, *Biobanking*, <http://www.environment.nsw.gov.au/biobanking/index.htm> (accessed 21 May 2014).

71 Environment and Heritage NSW, *Biocertification*, <http://www.environment.nsw.gov.au/biocertification/index.htm> (accessed 21 May 2014).

72 Environment and Heritage NSW, *Biodiversity Offsets*, <http://www.environment.nsw.gov.au/biodivoffsets/index.htm> (accessed 21 May 2014).

73 <https://www.legislation.qld.gov.au/Bills/54PDF/2014/EnvironmentalOffsetsB14.pdf>

74 Queensland Minister for Environment and Heritage Protection, 'New offset legislation delivers for Queensland's environment', *Media statement*, 23 May 2014, see also <http://statements.qld.gov.au/Statement/2014/5/23/new-offset-legislation-delivers-for-queenslands-environment> (accessed 28 May 2014); see also Clayton Utz, 'Queensland's single State environmental offsets policy', 6 March 2014, [http://www.claytonutz.com/publications/edition/6\\_march\\_2014/20140306/queenslands\\_single\\_state\\_environmental\\_offsets\\_policy.page](http://www.claytonutz.com/publications/edition/6_march_2014/20140306/queenslands_single_state_environmental_offsets_policy.page) (accessed 28 May 2014); and Department of Environment and Heritage Protection, *Environmental offsets*, <https://www.ehp.qld.gov.au/management/environmental-offsets/environmental-offsets.html> (accessed 21 May 2014).

75 Victorian Department of Environment and Primary Industries, *Native vegetation offsets* <http://www.depi.vic.gov.au/environment-and-wildlife/biodiversity/native-vegetation/native-vegetation-permitted-clearing-regulations/native-vegetation-offsets> (accessed 1 May 2014).

2.68 Victoria also has a 'BushBroker' scheme which 'helps landowners to generate native vegetation credits by permanently protecting and managing their native vegetation and assists permit holders clearing native vegetation to find a matching third party offset site'.<sup>76</sup>

#### *South Australia*

2.69 In South Australia, the Department of Environment, Water and Natural Resources (DEWNR) and the Native Vegetation Council assess all applications to clear native vegetation in line with the *Native Vegetation Act 1991* (SA). The DEWNR website states that, in most situations, when a clearance application is approved, conditions are attached to ensure that the clearance is offset by restoration work that provides a 'significant environmental benefit'.<sup>77</sup> It also states that the government is 'committed to protecting native vegetation as part of a broader nature conservation strategy' which includes the No Species Loss strategy.<sup>78</sup>

#### *Western Australia*

2.70 The Western Australian Government's Environmental Offsets Policy has been in place since September 2011. The policy explains that:

Environmental offsets are most often applied to proposals subject to environmental impact assessment and as a condition of permits for clearing of native vegetation under the *Environmental Protection Act 1986*, but may be considered in relation to other legislation, including planning developments under the *Planning and Development Act 2005* and mining proposals under the *Mining Act 1978*.<sup>79</sup>

#### *Tasmania*

2.71 In Tasmania, the website of the Department of Primary Industries, Parks, Water and Environment states that development planning should consider the mitigation hierarchy (avoid, minimise, mitigate, offset), and that 'where impacts on natural values are unavoidable an appropriate form of offset may be required from the proponent'. Any proposed offsets must be developed in consultation with DPIPWE

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76 See further Victorian Department of Environment and Primary Industries, *Bushbroker*, <http://www.depi.vic.gov.au/environment-and-wildlife/biodiversity/native-vegetation/native-vegetation-permitted-clearing-regulations/native-vegetation-offsets/bushbroker> (accessed 5 June 2014).

77 South Australian Department of Environment, Water and Natural Resources, *Significant environmental benefit*, [http://www.environment.sa.gov.au/managing-natural-resources/Native\\_vegetation/Managing\\_native\\_vegetation/Significant\\_environmental\\_benefit](http://www.environment.sa.gov.au/managing-natural-resources/Native_vegetation/Managing_native_vegetation/Significant_environmental_benefit) (accessed 5 June 2014).

78 South Australian Department of Environment, Water and Natural Resources, *Native vegetation*, [http://www.environment.sa.gov.au/managing-natural-resources/Native\\_vegetation](http://www.environment.sa.gov.au/managing-natural-resources/Native_vegetation); see also *No species loss*, [http://www.environment.sa.gov.au/managing-natural-resources/Ecosystem\\_conservation/No\\_species\\_loss](http://www.environment.sa.gov.au/managing-natural-resources/Ecosystem_conservation/No_species_loss) (accessed 5 June 2014).

79 WA Environmental Protection Authority, *WA Environmental Offsets Policy*, p. 1, <http://www.epa.wa.gov.au/EPADocLib/WAEnvOffsetsPolicy-270911.pdf> (accessed 21 May 2014).

and will be assessed against the principles outlined in their General Offset Principles.<sup>80</sup>

#### *Northern Territory*

2.72 The Northern Territory's Environmental Assessment Act makes no provision for imposition of an environmental offset, or social or other community benefit, as a part of an assessment or approval process. The Northern Territory Environment Protection Authority provides 'Guidelines on environmental offsets and associated approval conditions' which are 'confined to generic matters' rather than 'more proposal-specific issues'.<sup>81</sup>

#### *Australian Capital Territory*

2.73 The ACT Government is currently developing an environmental offsets policy. Offsets have also been identified in the ACT as part of approvals under the EPBC Act. Some of these offsets fall on land managed by the ACT Government.<sup>82</sup>

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80 <http://dipwe.tas.gov.au/Documents/General-Offset-Principles.pdf> (accessed 1 May 2014).

81 Northern Territory Environment Protection Authority, *Guidelines on environmental offsets and associated approval conditions*, [http://www.ntepa.nt.gov.au/\\_data/assets/pdf\\_file/0008/349937/guideline\\_assessment\\_environmental\\_offsets.pdf](http://www.ntepa.nt.gov.au/_data/assets/pdf_file/0008/349937/guideline_assessment_environmental_offsets.pdf) (accessed 1 May 2014).

82 ACT Department of Territory and Municipal Services, Environmental Offsets, [http://www.tams.act.gov.au/parks-recreation/parks\\_and\\_reserves/environmental-offsets](http://www.tams.act.gov.au/parks-recreation/parks_and_reserves/environmental-offsets) (accessed 18 June 2014); see also Conservation Council ACT Region, *Submission 78*, p. 2.

## 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.

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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

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.



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...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>

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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.



# Chapter 4

## Processes for developing environmental offsets

4.1 While Chapter 3 has explored some of the principles underlying environmental offsets, this chapter examines some of the key issues raised in relation to the processes for the development and assessment of environmental offsets in federal environmental approvals, such as:

- timing of approvals in relation to offsets;
- the need for greater transparency;
- methods for assessing and calculating offsets; and
- the need for more strategic and consistent approaches to environmental offsets.

4.2 Many of these issues relate to principle 7 in the EPBC Act Offsets Policy, which states that suitable offsets must be 'efficient, effective, timely, transparent, scientifically robust and reasonable'.<sup>1</sup>

### Timing of approvals in relation to offsets

4.3 The EPBC Act Offsets Policy states that:

Offsets must also be timely. That is, an offset should be implemented either before, or at the same point in time as, the impact arising from the action. This timing is distinct from the time it will take an offset to yield a conservation gain for the protected matter, which may be a point in the future.<sup>2</sup>

4.4 As explained in Chapter 2, the Department of the Environment (the department) submitted that environmental offsets are considered during the detailed environmental impact assessment process, following the exploration of all potential avoidance and mitigation measures. Offsets may then be included as part of the conditions of approval for a particular action, where residual, unavoidable impacts are considered significant.<sup>3</sup>

4.5 However, several submitters and witnesses raised concerns in relation to the timing of the consideration of offsets. As outlined in Chapter 3, there were concerns that avoidance and mitigation measures aren't being fully considered, and offsets are used as a first, rather than last, resort. Additional concerns were raised that approvals are being given prior to offsets being fully identified and/or secured.

4.6 Submitters and witnesses stressed that there is a need to ensure that offsets are fully identified and in place earlier in the process, and in particular, prior to approval

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1 EPBC Act Offsets Policy, p. 6.

2 EPBC Act Offsets Policy, p. 23.

3 Department of the Environment, *Submission 79*, pp 2–3; EPBC Act Offsets Policy, p. 7.

being given.<sup>4</sup> For example, Mr Des Boyland of the Wildlife Preservation Society of Queensland (Wildlife Queensland) told the committee that 'offsets should be clearly identified at the time approval is given for the development'.<sup>5</sup>

4.7 However, Mr Brendan Sydes of Environmental Justice Australia, told the committee that conditions on approval are often 'framed around offsets that are yet to be found and yet to be delivered'. Mr Sydes suggested that the process should be changed to 'to insist that the offset actually be there and secured and available prior to the activity occurring'.<sup>6</sup>

4.8 Ms Georgina Woods of the Lock the Gate Alliance described the granting of approvals prior to securing offsets as a 'systematic and repeated failure of the offset policy', suggesting that:

...the signing of an approval by the minister should be the last thing that happens before an impact occurs, before a development begins. But increasingly approvals are given with elaborate conditions that then entail 18 months, two years of backroom negotiation between the Department of the Environment and the proponent of the development to continue massaging the impact.<sup>7</sup>

4.9 Lock the Gate Alliance also pointed to comments from the UNESCO Monitoring Mission for the Great Barrier Reef World Heritage Area that in relation to offsets from projects impacting on the World Heritage Area:

Notwithstanding the mission's concern...regarding the principle of offsets, it is not clear why the offset plan is not to be prepared and approved before dredging is authorised to proceed.<sup>8</sup>

4.10 The Friends of Ken Hurst Park submitted that 'an environmental offset must be implemented or commenced prior to any development occurring'.<sup>9</sup> Friends of Grasslands agreed that offset programs should be in place 'in advance of any development commencing':

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4 See, for example, Ms Georgina Woods, Policy Coordinator, Lock The Gate Alliance, *Committee Hansard*, 5 May 2014, pp 5–6; Mr Brendan Sydes, Chief Executive Officer, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, p. 18; Ms Sue Higginson, Principal Solicitor, NSW, ANEDO, *Committee Hansard*, 5 May 2014, p. 34; Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth Australia, *Committee Hansard*, 7 May 2014, p. 43; Friends of Grasslands, *Submission 13*, p. 2; Greenpeace, *Submission 61*, p. 1.

5 Mr Des Boyland, Policies and Campaigns Manager and Secretary, Wildlife Queensland, *Committee Hansard*, 7 May 2014, p. 20.

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

7 Ms Georgina Woods, Policy Coordinator, Lock the Gate Alliance, *Committee Hansard*, 5 May 2014, p. 6 and see also p. 2.

8 Lock the Gate, *Submission 20*, p. 6.

9 Friends of Ken Hurst Park, *Submission 65*, p. 7.

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Unfortunately, the reverse is generally true; offsets may be decided at the time of the decision to proceed with the development, in some cases requiring only that a nebulous offset package be developed in the future...<sup>10</sup>

4.11 Greenpeace Australia Pacific (Greenpeace) agreed that offsets 'should be established prior to approval of destructive activities'.<sup>11</sup> Mr Walters from Greenpeace expressed concern that 'offsets are often developed after the approval is given under the EPBC Act' and that approval conditions often require an offset plan or strategy to be developed after the EPBC approval is given.<sup>12</sup>

4.12 Indeed, a commonly raised concern was that approvals often only require an offsets plan or strategy to be developed, rather the offset itself to be identified and secured.<sup>13</sup> For example, the National Environmental Law Association (NELA) submitted that approval for clearing for the Galilee Coal project (discussed further in Appendix 4) was 'conditional upon completion of the Offsets Management Plan, but not on securing the offsets themselves, which could be done up to two years after the area was destroyed'.<sup>14</sup>

4.13 Submitters and witnesses gave other examples of development approvals being given without the offsets needing to be in place prior to the development commencing.<sup>15</sup> This included the Abbot Point development, discussed further in Appendix 6, where 'the condition of approval on an offset was to prepare an offset strategy'.<sup>16</sup>

4.14 The Whitehaven Coal Maules Creek Project, outlined in further detail at Appendix 3, was also highlighted, because it was suggested that the approval was worded in such a way that there was no need for offset conditions to be satisfied before clearing commenced.<sup>17</sup>

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10 Friends of Grasslands, *Submission 13*, p. 2.

11 Greenpeace, *Submission 61*, p. 1.

12 Mr Adam Walters, Research and Investigations Coordinator, Greenpeace, *Committee Hansard*, 5 May 2014, p. 22 and see also p. 27.

13 See, for example, NELA, *Submission 31*, p. 6; Friends of the Earth Australia, *Submission 58*, p. 6; Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth Australia, *Committee Hansard*, 7 May 2014, p. 40; Mr Jan Arens, President, Gladstone Conservation Council, *Committee Hansard*, 7 May 2014, p. 51.

14 NELA, *Submission 31*, p. 6.

15 See, for example, Friends of Grasslands, *Submission 13*, p. 2; Lock the Gate Alliance, *Submission 20*, p. 14; NELA, *Submission 31*, pp 5–6; Birdlife Australia, *Submission 77*, p. 6; Ms Georgina Woods, Policy Coordinator, Lock The Gate Alliance, *Committee Hansard*, 5 May 2014, p. 5.

16 Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth Australia, *Committee Hansard*, 7 May 2014, p. 40; see also Friends of the Earth Australia, *Submission 58*, pp 6–7.

17 For example, Lock the Gate Alliance, *Submission 20*, p. 12; Mr Philip Spark, President, Northern Inland Council for the Environment, *Committee Hansard*, 5 May 2014, p. 56; Ms Sue Higginson, Principal Solicitor, NSW, ANEDO, *Committee Hansard*, 5 May 2014, p. 34.

4.15 NELA noted that, for the Curtis LNG project (discussed further at Appendix 5), no deadline was imposed for actually securing offsets.<sup>18</sup> Mr Jan Arens, President of the Gladstone Conservation Council, further noted that, in the case of a project where a condition of approval was to develop an offset plan which was required to be made public, he had not been able to access it.<sup>19</sup> Transparency issues relating to offsets are discussed further later in this chapter.

4.16 However, the NSW Minerals Council disputed this evidence. Ms Claire Doherty argued that offsets are developed 'while you are developing your approval and they get assessed...It is unusual to get to the end of a project, get an approval and not have any of your offsets identified'.<sup>20</sup> Ms Doherty also explained that:

Usually, by the time you get your approval, you have done a lot of work to either purchase those offset properties or have in place mechanisms like options so that you know that you are going to be able to purchase those offsets. If your approval is conditioned to allow you further time to look for offsets, it is usually in very low risk areas.<sup>21</sup>

4.17 Ms Melanie Stutsel from the Minerals Council of Australia told the committee that many companies 'actually work on identifying potential offset locations even prior to referral of projects' under the EPBC Act. She further advised that they would 'actually vary their referral if they did not consider that they would be in an appropriate position to secure the offsets'.<sup>22</sup>

4.18 At the same time, some submitters and witnesses expressed support for the 'staging' of offsets. For example, QGC submitted that:

Securing agreements for land based offsets are lengthy processes and the complications involved should be recognised in offsets frameworks...delivering offsets at the operational stage rather than at the application stage of a project is preferred, after impacts have been quantified. This gives a more accurate indication of the residual significant impact and therefore the required offset.<sup>23</sup>

4.19 Similarly, the Minerals Council suggested that:

...long-term development plans should be supported by alternative arrangements for delivery of offsets over a greater time scale. Specifically, staging of offsets enables proponents to deliver offsets for actual

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18 NELA, *Submission 31*, p. 6.

19 Mr Jan Arens, President, Gladstone Conservation Council, *Committee Hansard*, 7 May 2014, p. 51.

20 Ms Claire Doherty, Director, Community Development, NSW Minerals Council, *Committee Hansard*, 6 May 2014, p. 5.

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

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

23 QGC, *Submission 74*, p. 2.

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disturbances rather than estimated impacts at the EIS [Environmental Impact Stage] stage.<sup>24</sup>

4.20 However, as is discussed in Chapter 5, it was suggested that this failure to fully identify and secure offsets prior to approval being granted has led to the renegotiation of the conditions of approval in some cases.<sup>25</sup>

4.21 A representative of the department confirmed that approvals are often constructed to allow for a 'staged provision of offsets where that is an appropriate thing from an ecological perspective':

What we usually do with the offset strategies that are subsequent to the initial approval is require them as a condition precedent for moving forward with the project—not always, but that is the general approach.<sup>26</sup>

4.22 A representative of the department further explained that, depending on the individual project, the conditions of approval normally contain 'a requirement of when the proponent is required to develop and have approved an offset strategy for their proposal. Quite often that is tied to the date of commencement'. He also noted that:

...we do not have a view as to which piece of land is secured, as long as the same environmental outcome occurs. That is why we write our conditions that way, understanding that yes, there is that remaining uncertainty with respect to what specific land will be secured.<sup>27</sup>

4.23 Another representative further advised that:

The intention of the EPBC Act is, among other things, to ensure that, where development is approved and will have an environmental impact, that impact is acceptable to the community. It is not the intention of the act to slow down the development of the economy or to impose costs on business at inappropriate stages of the cycle...<sup>28</sup>

4.24 She concluded that:

...as long as the ecological impact is managed in a timely manner, it is reasonable for a proponent to expect to progress with their project while they are simultaneously doing their work on their offset strategy or, indeed, providing their offsets.<sup>29</sup>

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

25 Ms Georgina Woods, Policy Coordinator, Lock the Gate Alliance, *Committee Hansard*, 5 May 2014, p. 6.

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

27 Mr Dean Knudson, First Assistant Secretary, Environment, Assessment and Compliance Division, Department of the Environment, *Committee Hansard*, 6 May 2014, pp 27 and 30.

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

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

4.25 The department acknowledged in its submission that its compliance audits have identified issues with delays in securing offsets, and in particular in 'ensuring protective mechanisms are attached to the title of a property in a timely fashion':

There are a number of causes of these delays, including the complexities and sensitivities of negotiating with land owners for the protection and management of areas as offsets as well as the legal complexities of registering a restrictive covenant on title.<sup>30</sup>

4.26 The department identified this as an area where there is opportunity for improvement, including 'for the Commonwealth to work with states and territories to streamline covenanting arrangements to achieve better outcomes for approval holders and the environment'.<sup>31</sup>

### ***Failure to find and/or secure offsets***

4.27 However, submitters and witnesses noted that in situations where approval is given to proceed with a project without the offsets in place and secured prior to the development commencing, there is a risk that offsets may not be found, or be able to be secured, to meet the requirements in the conditions of the approval.<sup>32</sup> Indeed, the committee received evidence of examples where conditions of approval were being amended because, for example, the offsets that were required by the approval have been unable to be secured.<sup>33</sup>

4.28 Ms Higginson, Principal Solicitor with the Australian Network of Environmental Defender's Offices (ANEDO) noted that, in this situation, 'there are some provisions in the EPBC Act to remedy' the situation 'by either penalty to the proponent, modification of the approval or ultimately revoking the approval'. However, as she pointed out, there is not much point in revoking the approval if a development has already occurred.<sup>34</sup>

4.29 Mr Sydes of Environmental Justice Australia explained that the difficulty in finding suitable offsets 'is a reflection of the fact that...you are dealing with rare and threatened species'. He noted that the 'difficulty of finding offsets puts enormous pressure on the offsetting system' which results in calls to make the regime more

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30 Department of the Environment, *Submission 79*, p. 14. The committee notes also that the department is in discussions with QGC about delays in relation to the Curtis LNG Project, outlined further in Appendix 5.

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

32 See, for example, Mr Brendan Sydes, Chief Executive Officer, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, pp 18–19; Ms Sue Higginson, Principal Solicitor, NSW, ANEDO, *Committee Hansard*, 5 May 2014, p. 34; Friends of Grasslands, *Submission 13*, p. 2; Lock the Gate Alliance, *Submission 20*, p. 10.

33 See, for example, Ms Georgina Woods, Policy Coordinator, Lock The Gate Alliance, *Committee Hansard*, 5 May 2014, p. 5.

34 Ms Sue Higginson, Principal Solicitor, NSW, ANEDO, *Committee Hansard*, 5 May 2014, p. 34.

flexible, and in turn 'undermines the integrity of the scheme'. He argued that 'something has to give':

...where approval is granted conditional on finding an offset some time later on, only to find later on, despite the best will in the world, that offsets are just not available...the commitment has already been made and the development of the project has already started. If you genuinely cannot find an offset, then you will need to introduce some sort of flexibility into the conditions, and that is often to the detriment of the objective behind granting the offset in the first place...<sup>35</sup>

4.30 However, Ms Doherty from the NSW Minerals Council argued that 'if your approval is conditioned to allow you further time to look for offsets, it is usually in very low risk areas'.<sup>36</sup> She suggested that, in the case of some of the examples put forward in this context, the modifications were to allow more time 'in order to get their legal mechanism in place, but that has not stopped them going ahead and implementing their biodiversity offset strategy'.<sup>37</sup>

4.31 Dr Anita Foerster and Professor Jan McDonald submitted that:

...where there is evidence from monitoring to suggest that initial predictions about the adequacy of offset arrangement are in fact inaccurate, proponents should be required to secure additional offsets. Arrangements should be made for the establishment of environmental bonds or other forms of financial guarantee to facilitate such an approach.<sup>38</sup>

4.32 In response to questioning as to what happens if an offset approval condition is unable to met due to the unavailability of a suitable offset, a representative of the department advised that 'that circumstance is unlikely to arise, due to the extensive analysis that is done before the project is approved in the first place'.<sup>39</sup>

## Transparency

4.33 Another key concern raised in evidence was the need for greater transparency in relation to environmental offsets. The EPBC Act Offsets Policy states that, in assessing the suitability of an offset, government decision-making will be 'conducted in a consistent and transparent manner'.<sup>40</sup> The department submitted that:

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35 Mr Brendan Sydes, Chief Executive Officer, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, pp 18–19.

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

37 Ms Claire Doherty, Director, Community Development, NSW Minerals Council, *Committee Hansard*, 6 May 2014, p. 8.

38 Dr Anita Foerster and Professor Jan McDonald, *Submission 23*, p. 7.

39 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 33 and see also p. 34.

40 EPBC Act Offsets Policy, p. 6.

Where a project proceeds to assessment and potentially requires the provision of offsets, this information is published along with other relevant assessment documentation for public comment. Public comments are then addressed and summaries provided to decision makers to inform any approval decisions.<sup>41</sup>

4.34 The department submitted that 'any requirements for delivery of offsets are attached as conditions of approval' and that:

Certain types of conditions attached to approvals require the consent of the proponent prior to being attached, and these can include offset conditions. This requires the Department of the Environment to consult closely with project proponents on prospective offset requirements.<sup>42</sup>

4.35 However, submitters and witnesses argued that there could be improved transparency, including public consultation and reporting in both the development and implementation of offsets.<sup>43</sup> Many were concerned that the approach of requiring offsets to be developed after approval (as discussed in the previous section) undermines the transparency of the process. It was suggested that often this means that offsets are negotiated between the department and proponent, with little opportunity for public input or scrutiny.<sup>44</sup>

4.36 Greenpeace, for example, complained about a lack of transparency of negotiations between the department and the proponents in relation to offsets. Mr Walters from Greenpeace noted that the current approach makes it difficult to scrutinise the process due to a 'lack of transparency':

...the offsets are often developed after the approval is given under the EPBC Act. So the approval document says that the offset plan must be developed; it does not really allow us to fully scrutinise these projects. So there may very well be cases where there has been some good practice, but we would not be aware of it because the actual offsetting plan is developed—at least the final version is developed—after the EPBC approval is given.<sup>45</sup>

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

42 Department of the Environment, *Submission 79*, p. 3.

43 See, for example, Mr Jan Arens, President, Gladstone Conservation Council, *Committee Hansard*, 7 May 2014, p. 53; Mr Geoffrey Penton, Chief Executive, Queensland Murray-Darling Committee, *Committee Hansard*, 7 May 2014, p. 7; Regional Development Australia Hunter, *Submission 11*, p. 5; Urban Bushland Council WA, *Submission 53*, p. 4; Watson Community Association, *Submission 54*, p. 4; Dr Yung En Chee, *Submission 57*, p. 11; Conservation Council ACT region, *Submission 78*, pp 2–3.

44 See, for example, Ms Georgina Woods, Policy Coordinator, Lock the Gate Alliance, *Committee Hansard*, 5 May 2014, p. 6; Watson Community Association, *Submission 54*, p. 4; Friends of the Earth, *Submission 58*, p. 6.

45 Mr Adam Walters, Research and Investigations Coordinator, Greenpeace, *Committee Hansard*, 5 May 2014, p. 22.



4.37 Ms Woods of the Lock the Gate Alliance similarly expressed concern that that work is done and negotiations undertaken between bureaucrats and proponents 'outside of the public's view':

...it is only scrutiny that protects the process—that gives the process any transparency and rigour. If it is allowed to go on behind closed doors, as it so often is, it seems to be the case that there is no check or balance to ensure that the environment is being protected.<sup>46</sup>

4.38 In the same vein, Friends of the Earth Australia agreed that, in terms of the process used to develop and assess proposed offsets, 'basic tenets of transparency and accountability aren't being met'. Friends of the Earth described the practice of imposing a condition to develop an offsets strategy or plan post-approval as 'black box politics'. They argued that this approach means that the public are excluded from participating in this process. Mr Tager from Friends of the Earth Australia explained that work that 'needs to be done up-front', and made subject to public consultation, 'is now being moved to the back end of the process where it is in-house behind closed doors'.<sup>47</sup>

4.39 Mr Walters from Greenpeace noted that, in relation to one particular project that is in the final stages of EPBC approval:

...the offsetting properties that are being proposed there, the actual locations of those properties, are considered commercial information and are being withheld. There is absolutely no scrutiny possible of the quality of those offsets.<sup>48</sup>

4.40 The committee notes that the department advised in its submission that, in relation to the Curtis LNG Plant (discussed further in Appendix 5):

As the proposed offset is under commercial negotiation involving private landholders and the Queensland Government, it is currently classified as commercial-in-confidence at the request of the approval holders. The department is advised that commercial negotiations are expected to be completed by June 2014.<sup>49</sup>

4.41 Some witnesses and submitters further complained that offset plans and reports are not being made publicly available, even when they are finalised. For example, the ACT Conservation Council lamented the lack of public access to offsets

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46 Ms Georgina Woods, Policy Coordinator, Lock the Gate Alliance, *Committee Hansard*, 5 May 2014, p. 6.

47 Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth Australia, *Committee Hansard*, 7 May 2014, p. 40; see also Friends of the Earth Australia, *Submission 58*, pp 6–7.

48 Mr Adam Walters, Research and Investigations Coordinator, Greenpeace, *Committee Hansard*, 5 May 2014, p. 23; see also p. 27.

49 Department of the Environment, *Submission 79*, Attachment A, p. 11.

management plans or reports required in relation to Commonwealth approvals under the EPBC Act.<sup>50</sup>

4.42 Indigenous groups also called for increased public consultation in relation to the development of offsets. For example, the Indigenous Advisory Committee called for improved engagement of Indigenous peoples in developing offsets proposals.<sup>51</sup> The Gomeroi Traditional Custodians noted that the EPBC Act requires consultation with Indigenous peoples, but submitted that they 'cannot see this consultation in practice'.<sup>52</sup>

4.43 Ms Pethybridge of the Indigenous Land Corporation agreed:

...there is not a whole lot of consultation with Indigenous people in the design and development of offsets and the identification of potential offsets projects...they should be participating in those steps in that process, because there is a lot of value that they can add and a lot of opportunities that can be realised by Indigenous people in that space.<sup>53</sup>

4.44 The Department of Environment advised that it has been 'working constructively' with the Indigenous Advisory Committee to improve consultation with Indigenous peoples through environmental assessment processes, including consultation about the delivery and appropriate use of offsets.<sup>54</sup>

4.45 Other submissions also identified the difficulties in identifying areas that have already been used as offsets, and discussed the need for a public register of offsets. This is discussed further in the next chapter.

4.46 In contrast, other submitters noted that the publicly available EPBC Act Offsets Policy and accompanying Offsets Assessment Guide have made the development of offsets, and in particular the associated calculations and assumptions, more transparent and predictable.<sup>55</sup> For example, the Environmental Decisions Group submitted that the EPBC Act Offsets Policy 'is one of few that is accompanied by a transparent and logical accounting approach'.<sup>56</sup>

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50 Conservation Council ACT region, *Submission 78*, pp 2–3; see also, for example, Friends of the Earth Australia, *Submission 58*, pp 6–7.

51 Indigenous Advisory Committee, *Submission 82*, p. 6; see also Indigenous Land Corporation, *Submission 19*, p. 1; Gomeroi Traditional Custodians, *Submission 93*, p. 4.

52 Gomeroi Traditional Custodians, *Submission 93*, p. 10.

53 Ms Emma Pethybridge, Manager, Environment, Carbon and Heritage, Indigenous Land Corporation, *Committee Hansard*, 7 May 2014, p. 35.

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

55 See, for example, Dr Martine Maron, *Submission 7*, p. 2; Minerals Council of Australia, *Submission 35*, pp 5–6; Dr Su Wild-River, *Submission 38*, p. 5; Environmental Decisions Group, *Submission 50*, p. 3; Business Council of Australia, *Submission 81*, p. 1; Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, p. 18.

56 Environmental Decisions Group, *Submission 50*, p. 3.

4.47 David Hogg agreed that the Offsets Assessment Guide and 'calculation process is easy to use and is transparent, making it relatively easy for other people to review the offset calculations and test their own variations'.<sup>57</sup>

4.48 Witnesses from the Minerals Council of Australia concurred that the EPBC Act Offsets Policy and guide have resulted in 'much clearer policy' and greater transparency around the science being used for offset determinations.<sup>58</sup> Those witnesses also suggested that this had resulted in greater certainty, as well as better coordination and less fragmentation of offsets.<sup>59</sup>

4.49 A representative of the department told the committee that 'the development of the EPBC Act environmental offsets policy and Offsets Assessment Guide represents substantial progress in establishing robust policy settings for regulating offsets in Australia'. The representative further advised that, prior to the development of the EPBC Act Offsets Policy, the department had received complaints 'related to the fact that expert judgement was being exercised by assessment officers in a way that was not transparent and obvious to industry'.<sup>60</sup>

### **Methods for assessing and calculating offsets**

4.50 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'.<sup>61</sup> Submitters and witnesses were generally supportive of the principle that robust science should form the base of the development of offsets.<sup>62</sup> However, a number of concerns were expressed in this regard, including:

- the independence of scientific advice and information underpinning the assessment process;
- issues with the methodology for identifying and developing offsets; and
- whether there is sufficient data and certainty in relation to the science underpinning offsets.

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57 David Hogg Pty Ltd, *Submission 16*, pp 5–6.

58 Ms Melanie Stutsel, Director, Health, Safety, Environment and Community Policy, Minerals Council of Australia, *Committee Hansard*, 6 May 2014, p. 4.

59 Mr Chris McCombe, Assistant Director, Environmental Policy, Minerals Council of Australia, *Committee Hansard*, 6 May 2014, p. 4; Ms Melanie Stutsel, Director, Health, Safety, Environment and Community Policy, Minerals Council of Australia, *Committee Hansard*, 6 May 2014, p. 4.

60 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 26.

61 EPBC Act Offsets Policy, p. 6.

62 See, for example, Ms Rachel Walmsley, Policy and Law Reform Director, NSW, ANEDO, *Committee Hansard*, 5 May 2014, p. 31; Queensland Murray-Darling Committee, *Submission 22*, p. 5.

### ***Independence of advice and information***

4.51 In terms of the independence of the process for the assessment and development of offsets, some submitters and witnesses noted that it is the proponent who is responsible for the preparation of environmental assessment documentation and the identification and development of offset arrangements.<sup>63</sup>

4.52 Several submitters and witnesses suggested that this resulted in an inherent conflict of interest for proponents in relation to the assessment of impacts and the identification and development of offsets.<sup>64</sup> For example, Mr Philip Spark, of the Northern Inland Council for the Environment, suggested that the offsets policy and planning process is 'open to abuse and manipulation by developers, their consultants and government' and that 'there is a major problem with conflicts of interest: consultants working for developers mostly prioritise the client's project ahead of the environment'.<sup>65</sup>

4.53 Greenpeace agreed that there is 'a conflict of interest inherent in the assessment process' if proponents commission and pay for the scientific assessments:

This is because consultants are open to the risk that, should they make a scientific finding that does not serve the best interests of their client, then the potential for future work may be compromised.<sup>66</sup>

4.54 Birdlife Australia concurred, noting that it is:

...aware of a number of examples where data has been interpreted or omitted in a manner that may deliver more favourable outcomes for the project proponent. That this process is unregulated and underpinned by financial motivations of both proponent and consultant represents a conflict of interest and must be addressed...<sup>67</sup>

4.55 Ms Beverley Smiles, Central West Environment Council, was similarly concerned at the 'lack of an independent body of consultants that are not influenced by proponents of major developments to provide the information on which decisions are

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63 See, for example, Ms Beverley Smiles, Secretary, Central West Environment Council, *Committee Hansard*, 5 May 2014, pp 9 and 12; Ms Anna Christie, *Committee Hansard*, 5 May 2014, p. 40; EIANZ, *Submission 88*, pp 7–8.

64 See, for example, Mr Philip Spark, President, Northern Inland Council for the Environment, *Committee Hansard*, 5 May 2014, p. 50; Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth Australia, *Committee Hansard*, 7 May 2014, p. 39.

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

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

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

made'.<sup>68</sup> Some even described the assessment document as 'promotional material' for proponents.<sup>69</sup>

4.56 On a similar note, the Environment Institute of Australia and New Zealand (EIANZ) noted that proponents are required to prepare offsets management plans and strategies but that 'proponents are not in the business of conserving biodiversity values'. They submitted that, as a result, offsets are 'generally developed on an ad-hoc basis, often under extreme time pressures and with little strategic planning'.<sup>70</sup> The need for a more strategic approach to offsetting is discussed later in this chapter.

4.57 However, Ms Stutsel from the Minerals Council of Australia disagreed with the assertion that there is an inherent conflict of interest in the assessment process:

Just because someone pays the bill of an independent scientist does not necessarily mean that they have influence over the science. I am a scientist by training and I would hate to think that, if I were undertaking science on behalf of a third party, the professional norms around my expectations as a scientist would be in any way compromised in that process.<sup>71</sup>

4.58 Mr Chris McCombe from the Minerals Council of Australia further told the committee that:

Ultimately, government agencies are responsible for vetting and checking proposals, including the science behind it, as part of their assessment and approval process.<sup>72</sup>

4.59 Dr Martine Maron similarly observed that 'the role of the Department in checking the information used to assess offsets is crucial'.<sup>73</sup>

4.60 However, Mr Philip Spark of the Northern Inland Council for the Environment queried whether departmental staff have 'the knowledge and understanding of the landscape to question consultants' findings'.<sup>74</sup>

4.61 For these reasons, several submitters and witnesses called for a more independent assessment process. In particular, it was suggested that that assessment

68 Ms Beverley Smiles, Secretary, Central West Environment Council, *Committee Hansard*, 5 May 2014, p. 9.

69 Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth Australia, *Committee Hansard*, 7 May 2014, p. 39; see also, for example, Ms Beverley Smiles, Secretary, Central West Environment Council, *Committee Hansard*, 5 May 2014, p. 9.

70 EIANZ, *Submission 88*, pp 7–8.

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

72 Mr Chris McCombe, Assistant Director, Environmental Policy, Minerals Council of Australia, *Committee Hansard*, 6 May 2014, p. 5.

73 Dr Martine Maron, *Submission 7*, p. 3; see also Mr Philip Spark, President, Northern Inland Council for the Environment, *Committee Hansard*, 5 May 2014, p. 56.

74 Mr Philip Spark, President, Northern Inland Council for the Environment, *Committee Hansard*, 5 May 2014, p. 50 and see also pp 56–57.

documentation and information and calculations relating to offsets should be independently verified.<sup>75</sup> Birdlife Australia suggested that the Commonwealth establish a 'tender process by which environmental assessments are conducted in an impartial manner so as project proponents are unable to influence the outcome or result'.<sup>76</sup> Other witnesses suggested that there needs to be a register or pool of independent consultants.<sup>77</sup>

4.62 The Whitehaven Coal Maules Creek Project (as outlined in further detail at Appendix 3) case study was put forward by some submitters and witnesses as an example of the need for such independent verification.<sup>78</sup>

### ***Methods for assessing and calculating offsets***

4.63 As noted in chapter 2, the EPBC Act Offsets Policy is accompanied by an Offsets Assessment Guide, which is described as a 'decision support tool' used to determine the suitability of offsets for listed threatened species and ecological communities. The department's submission states that 'the offsets policy and guide were developed to systemise the judgments that go into determining suitable offsets'.<sup>79</sup>

4.64 Several submitters were very positive about the Offsets Assessment Guide. In particular, as noted elsewhere in this report, it was suggested that the guide has greatly improved transparency in relation to the methodology underlying offsets.<sup>80</sup>

4.65 At the same time, some submitters and witnesses identified some weaknesses and limitations in the application of the Offsets Assessment Guide.<sup>81</sup> As Dr Su Wild-River cautioned, tools such as the Offsets Assessment Guide 'necessarily over-simplify complex ecosystems':

An offset may look perfect on the spreadsheet, but still fall short of acceptable in real life.<sup>82</sup>

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75 See, for example, Mr Des Boyland, Policies and Campaigns Manager and Secretary, Wildlife Queensland, *Committee Hansard*, 7 May 2014, p. 14; Regional Development Australia Hunter, *Submission 11*, p. 4; Birdlife Australia, *Submission 77*, p. 9.

76 Birdlife Australia, *Submission 77*, p. 9.

77 Ms Beverley Smiles, Secretary, Central West Environment Council, *Committee Hansard*, 5 May 2014, p. 9; Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth Australia, *Committee Hansard*, 7 May 2014, p. 39.

78 See, for example, Mr Philip Spark, President, Northern Inland Council for the Environment, *Committee Hansard*, 5 May 2014, p. 50; The Australia Institute, *Submission 37*, p. 9.

79 Department of the Environment, *Submission 79*, pp 7–8.

80 Association of Mining and Exploration Companies, *Submission 40*, p. 5; see also, for example, Mr Chris McCombe, Assistant Director, Environmental Policy, Minerals Council of Australia, *Committee Hansard*, 6 May 2014, p. 4; David Hogg Pty Ltd, *Submission 16*, p. 5.

81 See, for example, Dr Martine Maron, *Submission 7*, p. 3; David Hogg Pty Ltd, *Submission 16*, pp 5–7; Association of Mining and Exploration Companies, *Submission 40*, p. 5; Environmental Decisions Group, *Submission 50*, p. 4.

82 Dr Su Wild-River, *Submission 38*, p. 5.

4.66 The Environmental Decisions Group were concerned that there are cases where implausibly high assumptions have been made in the calculation of offsets. For example, several submitters were critical of a development in the ACT where an existing protected area was assumed to have a 70% likelihood of loss.<sup>83</sup>

4.67 The Victorian National Parks Association (VNPA) discussed concerns in relation to the offsets calculations in the recently completed strategic assessment for Melbourne's Urban Growth Boundary.<sup>84</sup> They claimed that 'due to the use of simplified assessment methodologies, the offsets in the case of grasslands, are not the same ecologically as those used as offset' nor are they of the same quality. The VNPA further expressed concern that there are often 'various, often unsupported, criteria or weightings used in calculation of offsets'.<sup>85</sup>

4.68 NELA submitted that:

The assessment methodologies and tools currently used under Commonwealth, state, and territory offset schemes assume that it is possible to objectively measure biodiversity values, effectively compare losses and gains, and demonstrate the "ecological equivalence" of offset sites and lost values. They attempt to make offset calculations as objective and scientifically defensible as possible, but in doing so they risk underplaying the ultimately subjective value judgments involved.<sup>86</sup>

4.69 At the same time, Mr David Hogg submitted that:

The assessment of biodiversity offsets should also include a subjective process based on sound scientific knowledge of the relevant species or ecological community in its full context, rather than just 'number-crunching'.<sup>87</sup>

4.70 Mr Philip Stark of the Northern Inland Council for the Environment told the committee that the offsets calculator is 'particularly open to manipulation and abuse'. He claimed that, in the Maules Creek development (discussed further in Appendix 3):

The existing threats to the offset habitat were overstated to achieve greater gain through management. The confidence of achieving the conservation gain was unrealistically high. The risk of failure was underestimated. There was no application of the precautionary principle, particularly in relation to compensating for loss of known habitat for endangered species and the

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83 Environmental Decisions Group, *Submission 50*, p. 4; see also Dr Martine Maron, *Submission 7*, p. 3.

84 See further, Department of the Environment, *Strategic assessment of Melbourne's urban growth boundary*, <http://www.environment.gov.au/node/18604> (accessed 30 May 2014).

85 VNPA, *Submission 9*, p. 2.

86 NELA, *Submission 31*, p. 6.

87 David Hogg Pty Ltd, *Submission 16*, p. 7.

critically endangered ecological community. The starting value was often underestimated to increase the conservation gain.<sup>88</sup>

4.71 However, Ms Stutsel from the Minerals Council rejected suggestions that environmental offsets are a 'magic pudding' calculation rather than based on sound science and expert opinion. She suggested that such comments 'are dismissive of the significant work of experts and leading institutions in the development of the Commonwealth's offsets calculator'.<sup>89</sup>

4.72 The need for independent verification of offsets calculations, as well as greater transparency, again arose in this context. For example, Dr Philip Gibbons submitted that there needs to be:

...greater instruction and oversight on the figures that are used in the Offset Assessment Guide. Assessments under this Guide should be made available to the public for all decisions to improve transparency and ultimately ensure that a greater level of rigour is applied to assessments.<sup>90</sup>

4.73 Mr David Hogg similarly suggested that the use of the Offsets Assessment Guide be subject to peer review, particularly, for example, in relation to the estimates of the probability of extinction for each relevant species or ecological community.<sup>91</sup>

4.74 A representative of the department explained that the Offsets Assessment Guide 'uses a balance sheet approach to quantify the benefit that an offset may provide' and was 'developed in close collaboration with academic experts'. She further told the committee that the guide:

...provides a robust and transparent means to calculate gains and losses from offsets and development activities. The guide is available, with relevant instructional material, for use by the public and proponents in estimating any potential offset requirements.<sup>92</sup>

4.75 The department's submission further states that:

Since its release the guide has been highlighted as one of the only offset metrics globally that explicitly accounts for 'additionality', uncertainty, and time lags in calculating an offset requirement.<sup>93</sup>

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88 Mr Philip Spark, President, Northern Inland Council for the Environment, *Committee Hansard*, 5 May 2014, p. 51.

89 Ms Melanie Stutsel, Director, Health, Safety, Environment and Community Policy, Minerals Council of Australia, *Committee Hansard*, 6 May 2014, pp 1–2.

90 Dr Philip Gibbons, *Submission 21*, p. 3; see also Dr Philip Gibbons, *Committee Hansard*, 6 May 2014, p. 23.

91 David Hogg Pty Ltd, *Submission 16*, p. 7.

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

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



### *The science behind offsetting*

4.76 Several submissions and witnesses were concerned about the uncertainties involved in the science of environmental offsetting. For example, Greenpeace described the related science of restoration ecology as a relatively new and evolving area of research and practice.<sup>94</sup> Mr Adam Walters of Greenpeace told the committee that:

... offsetting and restorative ecology generally is quite an infant science, yet it is being used in a very significant way to allow very large developments that will have a very significant impact on matters of national environmental significance...the state of the science does not really seem to be up to the task of providing a certain mitigation of that damage.<sup>95</sup>

4.77 Greenpeace concluded that, 'given the current state of the science', it is:

...at best misleading, and at worst, incorrect to claim that the BOP [EPBC Act Offsets Policy] can deliver a 'robust' environmental outcome. In general, the approval decisions using offsets is based on a science that is either non-existent or insufficient to the task.<sup>96</sup>

4.78 However, a representative of the department told the committee that the EPBC Act Offsets Policy is 'based on the best available scientific literature'.<sup>97</sup>

### *Offsets in the marine environment*

4.79 A particular issue raised in this context was offsetting in the marine environment, and whether it is appropriate for the EPBC Act Offsets Policy to apply to both land-based and marine ecosystems.<sup>98</sup> For example, Dr Megan Saunders and Dr Justine Bell submitted that it needs to be recognised that 'marine ecosystems are fundamentally different to those on land'. They recommended that:

...offsets not be used widely in marine habitats until the science underpinning restoration in these important ecosystems is developed further, particularly with regard to seagrass ecosystems.<sup>99</sup>

4.80 In particular, Dr Justine Bell told the committee that:

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94 See, for example, Greenpeace, *Submission 61*, p. 4.

95 Mr Adam Walters, Research and Investigations Coordinator, Greenpeace, *Committee Hansard*, 5 May 2014, p. 22.

96 Greenpeace, *Submission 61*, p. 5.

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

98 See, for example, Dr Megan Saunders and Dr Justine Bell, *Submission 24*, p. 1; NELA, *Submission 31*, pp 10–11; Australian Institute of Marine Science, *Submission 43*, p. 1; Mr Chris Walker, *Submission 47*, p. 2; Environmental Decisions Group, *Submission 50*, p. 4; Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth Australia, *Committee Hansard*, 7 May 2014, p. 41.

99 Dr Megan Saunders and Dr Justine Bell, *Submission 24*, p. 1.

...techniques for rehabilitating marine environments are still being developed. There is significant uncertainty as to whether offset outcomes and requirements can be achieved.<sup>100</sup>

4.81 The Environmental Decisions Group similarly submitted that there should be a separate offsets policy approach to adequately protect marine ecosystems for a number of reasons, including that:

- marine environments are subject to larger scales of ecological connectivity, are highly prone to environmental disturbance;
- marine environmental restoration techniques, such as those used for seagrass habitats, are in early developmental stages, with highly variable success rates; and
- the influence of diffuse impacts from activities occurring on land, which are currently not accounted for in offset accounting.<sup>101</sup>

4.82 NELA recommended that the EPBC Act Offsets Policy be revised to include 'separate requirements for marine habitats'.<sup>102</sup> NELA further noted the Abbot Point project (outlined in further detail at Appendix 6) as an example of issues with offsets in the marine environment. In that case, the offsets plan is required to address the direct loss of seagrass and indirect losses as the result of the dredge plume.<sup>103</sup>

4.83 The Minerals Council of Australia also acknowledged that 'there are important distinctions to be drawn between land-based offsetting and marine offsets' and noted the difficulty in the context of the marine environment of 'defining and quantifying the impacts at an ecosystem level'.<sup>104</sup>

4.84 The Australian Institute of Marine Science (AIMS) similarly highlighted problems in developing offsets in the marine environment, and suggested that, in the case of marine ecosystems, 'greater consideration needs to be given to the value that targeted, independent research programs can provide as an offset'.<sup>105</sup> Such 'indirect offsets' or 'compensatory measures' were discussed in the previous chapter.

#### *Uncertainty and availability of data*

4.85 Others pointed to a lack of data and information underpinning offsets, such as vegetation mapping or species for which there is little data available. For example, NELA submitted that:

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100 Dr Justine Bell, *Committee Hansard*, 7 May 2014, p. 1.

101 Environmental Decisions Group, *Submission 50*, p. 4; see also Dr Megan Saunders and Dr Justine Bell, *Submission 24*; NELA, *Submission 31*, pp 10–11.

102 NELA, *Submission 31*, p. 11; see also Mr Chris Walker, *Submission 47*, p. 2.

103 NELA, *Submission 31*, p. 11.

104 Minerals Council of Australia, *Submission 35*, p. 8.

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

Vegetation mapping is typically used as the basis for calculating the standard and quantum of offset required, yet there is considerable debate about accuracy, scale and quality of vegetation maps. Inadequate mapping means that areas identified for offsets may not in fact meet the attributes or condition of the area being destroyed.<sup>106</sup>

4.86 In this context, Mr Tager of Friends of the Earth illustrated this point by pointing a development where the conditions of approval required an offsets strategy which included funding for research relating to the snubfin dolphin. He noted that the snubfin dolphin is a relatively newly-discovered species about which there is little data. He queried 'how can you have an offset when you know so little about the species that you are trying to protect in that offset?'.<sup>107</sup>

4.87 The committee also heard evidence that the principles that underpin the use of offsets should also 'factor in climate change...and the ecological viability or conservation importance of the offset in changing environmental conditions'.<sup>108</sup>

4.88 As Dr Yung En Chee concluded:

The concept of offsets is simple. But their function is to address complex, imperfectly understood ecological characteristics and processes to improve or maintain the viability of impacted protected matters. The difficulty of this task is compounded when the protected matters in question are poorly known and/or subject to a range of dynamic threatening processes. This makes offsets complex to design, assess, and successfully deliver in practice, particularly given the attendant risks and uncertainties.<sup>109</sup>

4.89 Other submitters pointed to the Whitehaven Coal Maules Creek Project (as outlined in further detail at Appendix 3) as an example of the problems of insufficient data, and in particular accurate vegetation mapping, relating to suitable offsets.<sup>110</sup>

4.90 Dr Foerster and Professor McDonald also commented that offsets schemes are based on a number of assumptions, which are 'not borne out in the published research on offsets'. They emphasised the need for a precautionary approach was emphasised in this context. They submitted that:

...there is growing evidence that the quality of existing biodiversity at project sites is not well understood, that restoration activities often achieve

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106 NELA, *Submission 31*, pp 6–7; see also, for example, Ms Beverley Smiles, Secretary, Central West Environment Council, *Committee Hansard*, 5 May 2014, pp 9 and 12.

107 Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth Australia, *Committee Hansard*, 7 May 2014, pp 40–41; see also Friends of the Earth Australia, *Submission 58*, p. 7.

108 Humane Society International, *Submission 28*, p. 2; see also Ms Sonya Duus, *Submission 67*, pp 3–4.

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

110 NELA, *Submission 31*, pp 6–7; see also Interdisciplinary Conservation Science Research Group, *Submission 34*, p. 3; Response from Ms Alison Martin, Greenloaning Biostudies, to comments made in Northern Inland Council for the Environment, *Supplementary Submission 90.1*, p. 11.

limited success, and a wide range of environmental and institutional uncertainties can affect the attainment of the 'no net loss' objective... In this context, a precautionary approach to the use of offsets is appropriate.<sup>111</sup>

4.91 However, a representative of the department advised that the EPBC Act Offsets Assessment Guide deals with uncertainty:

...there is a calculation specifically derived from the offsets policy into the offsets calculator, which looks at the likelihood of the success of the proposed offsets for being effective with respect to the desired environmental outcomes. So explicitly that is built into the calculator in terms of determining the likely value of the proposed offsets.<sup>112</sup>

### **Strategic and consistent approaches to offsets**

4.92 Another key issue raised during the committee's inquiry was the need for more strategic and consistent approaches to environmental offsetting. In particular, a number of submitters recommended that offsets should be considered in the broader context of strategic planning.<sup>113</sup> Dr Gibbons recommended 'a more holistic strategy' to the use of offsets, advising that 'there are bigger things happening that are affecting the loss of biodiversity':

It is incorrect to blame offsets for ongoing loss in matters of national environmental significance. It is like blaming the fuel gauge when the tank is empty.<sup>114</sup>

4.93 The EIANZ submitted that 'project-specific offsets are generally developed on an ad-hoc basis, often under extreme time pressures and with little strategic planning'. The EIANZ therefore called for 'government to provide greater strategic planning for the identification and delivery of offsets that provides proponents with greater certainty of their required contributions'.<sup>115</sup>

4.94 Several submitters and witnesses, such as the Wentworth Group, commented that there is a need to consider the cumulative impacts of individual projects:

Most offsets schemes operate at an individual project scale. The major flaw of this system is that it does not effectively manage biodiversity, nor does it effectively manage the cumulative impact of multiple developments. Individual developments, when considered in isolation, may have a minor

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111 Dr Anita Foerster and Professor Jan McDonald, *Submission 23*, p. 5; see also Nature Conservation Society of South Australia, *Submission 89*, p. 3.

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

113 David Hogg Pty Ltd, *Submission 16*, p. 1; Dr Anita Foerster and Professor Jan McDonald, *Submission 23*, p. 5; Mr Gary Middle, *Submission 27*, p. 2; NELA, *Submission 31*, p. 9; Chamber of Minerals and Energy of Western Australia, *Submission 33*, pp 3–4; Canberra Ornithologists Group, *Submission 36*, p. 2; QGC, *Submission 74*, p. 1; NSW Minerals Council, *Submission 76*, p. 11; Wentworth Group, *Submission 85*, p. 2; EIANZ, *Submission 88*, p. 5.

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

115 EIANZ, *Submission 88*, pp 7–8.

impact on the environment, but when combined, their cumulative impact can result in long term damage to Australia's land, water and marine ecosystems. Therefore, by far the most effective way to promote development and deliver better environmental outcomes is to invest in long-term, landscape-scale planning to determine where, and under what conditions, development can safely occur.<sup>116</sup>

4.95 The department submitted that it 'considers whether offsetting is possible and appropriate on a case-by-case basis'.<sup>117</sup> However, the Wilderness Society submitted that this 'case-by-case approach':

...reinforces an ineffective piecemeal approach to the conservation of important national environmental values and community assets.<sup>118</sup>

4.96 Mr David Hogg similarly observed that 'it appears that most offsets are based on a piecemeal approach and lack a strategic context'.<sup>119</sup>

4.97 The EPBC Act Offsets Policy states that a registration system for offsets, will 'allow strategic planning, and streamline processes with state and territory requirements and schemes'.<sup>120</sup> However, as discussed in Chapter 5, the department advised that this register has not yet been implemented.<sup>121</sup>

### ***Consistency in offsetting regimes***

4.98 Another issue raised was the variability across state, territory and local government regimes in terms of offsets policies, and the need for greater consistency across all Australian jurisdictions.<sup>122</sup> For example, Mr Martin Fallding of Lake Macquarie City Council told the committee that 'biodiversity offsetting arrangements are different and inconsistent between the three levels of government'.<sup>123</sup> As such, he

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116 Wentworth Group, *Submission 85*, p. 2; see also Dr Peter Cosier, Director and Founding Member, Wentworth Group, *Committee Hansard*, 6 May 2014, pp 11 and 15; Ms Beverley Smiles, Secretary, Central West Environment Council, *Committee Hansard*, 5 May 2014, p. 9; Lock the Gate Alliance, *Submission 20*, p. 14.

117 Department of the Environment, *Submission 79*, p. 5. Although as noted in Chapter 2, offsets can also be considered as part of strategic assessments.

118 The Wilderness Society, *Submission 84*, p. 3.

119 David Hogg Pty Ltd, *Submission 16*, p. 3.

120 EPBC Act Offsets Policy, p. 24.

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

122 See, for example, Tasmanian Farmers and Graziers Association, *Submission 10*, p. 5; Ms Rachel Walmsley, Policy and Law Reform Director, NSW, ANEDO, *Committee Hansard*, 28 May 2014, p. 29; ANEDO, *Submission 60*, p. 1; Mr Martin Fallding, Environmental Planner, Lake Macquarie City Council, *Committee Hansard*, 5 May 2014, p. 42; NELA, *Submission 31*, pp 2–3; Alliance to Save Hinchinbrook, *Submission 85*, Attachment 2; Wentworth Group, *Submission 86*, p. 1. Note that a brief summary of some aspects of state and territory offsetting regimes is contained in Chapter 1.

123 Mr Martin Fallding, Environmental Planner, Lake Macquarie City Council, *Committee Hansard*, 5 May 2014, pp 42–43.

identified the need for a consistent, legislated set of offset principles to apply at Commonwealth, state and local government level.<sup>124</sup>

4.99 The NSW Minerals Council told the committee that its members operate under two different systems for offsetting under the EPBC Act and also under the NSW Offsets Principles and that 'frequently different offsets are required to achieve the outcomes required by the two different jurisdictions'.<sup>125</sup>

4.100 The ACT Conservation Council also expressed concern about the lack of clarity as to responsibility and coordination between the ACT government and the Commonwealth government, particularly in relation to compliance with offsets required under the EPBC Act.<sup>126</sup>

4.101 There was therefore some discussion during the committee's inquiry about the government's proposal for a 'one stop shop' for environmental approvals in Australia. As outlined in Chapter 2, under the proposal the Commonwealth will accredit state and territory planning processes under the EPBC Act. The department submitted that, under the 'one stop shop' proposal, states and territories 'will be required to meet the published Standards for Accreditation of Environmental Approvals under the EPBC Act'. According to the department, these standards:

...specify that any offsets delivered through an accredited process must achieve long-term environmental outcomes for matters protected under the EPBC Act and be consistent with either the EPBC Act Environmental Offsets Policy, or another policy accredited by the Minister as achieving the objects of the EPBC Act to an equivalent or better level.<sup>127</sup>

4.102 Other submitters expressed support for the 'one stop shop' proposal. For example, the National Farmers' Federation submitted that it 'is an opportunity to further align the offset policies' of the states and the Commonwealth and that 'such alignment will avoid the current confusion of separate offset requirements by the different jurisdictions'.<sup>128</sup>

4.103 For example, the Minerals Council of Australia called for 'greater alignment and accreditation of offsets processes between the Commonwealth and the State/Territory jurisdictions'.<sup>129</sup> The Chamber of Minerals and Energy Western Australia agreed, and suggested that 'any offsets requirements imposed under both

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124 Mr Martin Fallding, Environmental Planner, Lake Macquarie City Council, *Committee Hansard*, 5 May 2014, p. 43; see also Lake Macquarie City Council, *Submission 17*, p. 2.

125 NSW Minerals Council, *Submission 76*, p. 7.

126 Conservation Council ACT region, *Submission 78*, p. 3.

127 Department of the Environment, *Submission 79*, p. 13; see also Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 25.

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

129 Minerals Council of Australia, *Submission 35*, p. 7; see also, for example, Chamber of Minerals and Energy Western Australia, *Submission 33*, p. 6.

State and Commonwealth legislation should be complementary and should not impose additional costs on industry'.<sup>130</sup>

4.104 NELA suggested that the 'one stop shop' proposal provides an opportunity to address the different approaches to offsets across the Commonwealth and states and territories. As with other submitters, NELA supported the development of a national standard to 'facilitate alignment' between the different schemes. NELA noted that the EPBC Act Offsets Policy is a 'benchmark' for discussions between the Commonwealth, states and territories. However, NELA suggested a more comprehensive national standard that 'affords high levels of protection for Australia's biodiversity', and that the Commonwealth take 'a leadership role' in coordinating the development of this standard.<sup>131</sup>

4.105 However, other submitters and witnesses were very concerned about the 'one stop shop' proposal.<sup>132</sup> For example, ANEDO suggested that standards might be lowered as a result of the proposal, and submitted that the 'Australian Government must retain a leadership and approval role to protect and enhance matters of national environmental significance'. They further submitted that:

Now is not the time to rush through State policies that are based on reducing approval timeframes rather than robust science.<sup>133</sup>

4.106 The Wentworth Group were concerned that state environmental planning laws are not able to 'satisfy national standards' and submitted that:

...it is irresponsible for the Commonwealth government to hand over national EPBC assessment and approval powers to state governments without a transparent science-based national standard.<sup>134</sup>

4.107 Other witnesses suggested that the 'one stop shop' proposal could actually make matters more complicated. For example, Mr Sydes of Environmental Justice Australia described the 'one stop shop' as 'effectively eight or nine one stop shops':

...if you think about it, we are displacing the current Commonwealth leadership role to state and territory governments all around the country.

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130 Chamber of Minerals and Energy Western Australia, *Submission 33*, p. 6.

131 NELA, *Submission 31*, pp 3–4.

132 See, for example, Mr Des Boyland, Policies and Campaigns Manager and Secretary, Wildlife Queensland, *Committee Hansard*, 7 May 2014, p. 14; Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth Australia, *Committee Hansard*, 7 May 2014, p. 39; Wildlife Queensland, *Submission 39*, p. 2; Blue Mountains Conservation Society, *Submission 52*, p. 2; ANEDO, *Submission 60*, p. 1; WWF-Australia, *Submission 73*, p. 3; BirdLife Australia, *Submission 77*, p. 12; The Wilderness Society, *Submission 84*, p. 4; Nature Conservation Society of South Australia, *Submission 89*, p. 2.

133 ANEDO, *Submission 60*, p. 1; see also BirdLife Australia, *Submission 77*, p. 12.

134 Wentworth Group of Concerned Scientists, *Submission 85*, p. 2; see also Mr Peter Cosier, Director and Founding Member, Wentworth Group of Concerned Scientists, *Committee Hansard*, 6 May 2014, p. 11.

We really need to think about whether or not that fragmented approach is the best way to go about protecting biodiversity, because I think it is not.<sup>135</sup>

4.108 Mr Martin Fallding of Lake Macquarie City Council suggested that the 'one stop shop' proposal was a good idea 'in principle' but cautioned that 'it is probably going to make things more complicated' and added that:

...the fact that there are different legislative frameworks which have different responsibilities means that it is very difficult to achieve that without significant legislative reform. The fact is that, particularly at the state and Commonwealth level, there are conflicts of interest between those two levels of government, and between the legislative requirements that they are facing, that mean that it is not actually going to simplify things.<sup>136</sup>

4.109 Mr Fallding also noted that 'local government is a significant player in offsets because of its on-the-ground relationship to land and the capacity to manage land'. He was concerned that local councils 'are more likely to be excluded' from the offsetting process under the 'one stop shop' proposal, which he described as a 'retrograde step'.<sup>137</sup>

4.110 Ms Rachel Walmsley from ANEDO described the proposed one stop shop as 'a very piecemeal approach', confusing and unclear. She gave the example of the disparity in the approach to the use of indirect offsets across different jurisdictions, and queried, for example, how the Commonwealth could accredit state systems that do not meet the national policy of a 10 per cent cap on the use of indirect offsets.<sup>138</sup>

4.111 In this context, some submitters and witnesses identified concerns about proposed reforms to offsetting arrangements in Queensland and New South Wales.<sup>139</sup> For example, ANEDO were concerned that Queensland and New South Wales are 'lowering offset standards by relaxing the fundamental principles' and placing greater emphasis on the use of indirect offsets.<sup>140</sup> Ms Walmsley of ANEDO suggested that, given the imminent accreditation of state standards under the one stop shop policy, 'these changes are of serious concern'.<sup>141</sup>

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

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

137 Mr Martin Fallding, Environmental Planner, Lake Macquarie City Council, *Committee Hansard*, 5 May 2014, pp 43 and 45.

138 Ms Rachel Walmsley, Policy and Law Reform Director, NSW, ANEDO, *Committee Hansard*, 28 May 2014, p. 29.

139 See, for example, Mr Des Boyland, Policies and Campaigns Manager and Secretary, Wildlife Queensland, *Committee Hansard*, 7 May 2014, p. 14; Wildlife Queensland, *Submission 39*, p. 3; Friends of the Earth Australia, *Submission 58*, p. 6; ANEDO, *Submission 60*, p. 1; BirdLife Australia, *Submission 77*, p. 12.

140 ANEDO, *Submission 60*, p. 7 and see further pp 7–13; see also BirdLife Australia, *Submission 77*, p. 12.

141 Ms Rachel Walmsley, Policy and Law Reform Director, NSW, ANEDO, *Committee Hansard*, 28 May 2014, p. 29.



4.112 Mr Sydes of Environmental Justice Australia told the committee that any concerns about problems of offsets under the EPBC Act' can be multiplied tenfold when it comes to state based offsetting regimes'. He further advised that:

In Queensland, in New South Wales and in Victoria there are, under development or in fact already being implemented, offset regimes that are even further from the really important principles that the ecologists in particular say are essential to a credible offsetting regime. And yet it is these very state based regimes that the government is currently looking to accredit as approvals regimes under its one stop shop policy.<sup>142</sup>

4.113 In contrast, the Minerals Council of Australia described the new Queensland legislation as a 'significant advance in ensuring offsetting conditions are not duplicated between multiple levels of government'.<sup>143</sup>

4.114 Several submitters and witnesses expressed support for a clear national standard for offsets, and noted the recent Productivity Commission recommendations, as outlined in Chapter 2. ANEDO suggested that, consistent with the recent recommendations of the Productivity Commission, a comprehensive independent review of offsets be conducted, with a view to developing a rigorous, best practice national standard. ANEDO suggested that state standards and relevant legislation should be amended to meet the national standard, and that accreditation of state processes should not occur until this happens.<sup>144</sup>

4.115 WWF-Australia also expressed support for the Productivity Commission's recommendations, and agreed that a nationally consistent offsets framework is needed which will 'not only ensure better outcomes for the environment but a more streamlined and consistent process'.<sup>145</sup>

4.116 In response to questions as to the status of the EPBC Act Offsets Policy under the one stop shop proposal, a representative of the department explained that it will remain the Commonwealth's offset policy and that states and territories 'will be expected to deliver equivalent or better outcomes' in relation to offsets. However, she advised that if the states introduced equivalent legislation 'then there would not be a need for a Commonwealth offsets policy'. However, the representative also explained that 'the Commonwealth would continue to undertake some assessments even after the one stop shop' in relation to actions on Commonwealth land and that the 'current policy would be the baseline for that'.<sup>146</sup>

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142 Mr Brendan Sydes, Chief Executive Officer, Environmental Justice Australia, *Committee Hansard*, 5 May 2014, p. 15 and see also p. 16.

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

144 ANEDO, *Submission 60*, p. 2; Ms Rachel Walmsley, Policy and Law Reform Director, NSW, ANEDO, *Committee Hansard*, 28 May 2014, p. 29; see also, for example, Birdlife Australia, *Submission 77*, p. 2.

145 WWF-Australia, *Submission 73*, p. 2.

146 Dr Kimberley Dripps, Deputy Secretary, Department of the Environment, *Committee Hansard*, 6 May 2014, pp 28–29.



## Chapter 5

### Monitoring and evaluation of environmental offsets

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

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

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

#### Monitoring and compliance issues

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 EPBC Offsets Policy, p. 24.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

was published in June 2014.<sup>24</sup> As also noted in Chapter 2, the ANAO's report identified a number of concerns with the Department of the Environment's compliance monitoring activities and made a number of recommendations to address these shortcomings.

### **Evaluating the success of offsets**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.31 Some suggested there needs to be an audit or review of 'all offsets to date, to inform future offset proposals and inform the public of capacity for offsets to meet their objectives'.<sup>44</sup> Several submitters and witnesses pointed to the recent Productivity Commission report (outlined in Chapter 2) which recommended an independent and public national review of environmental offset policies and practices to report by the end of 2014.<sup>45</sup>

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

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

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

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

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

5.35 At the same time, the department noted that:

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

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

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

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

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

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

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

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

### **Monitoring and evaluation: need for a public register of offsets**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Security and enforceability of offsets**

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

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

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60 EPBC Act Offsets Policy, p. 24.

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

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

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

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

### *Mechanisms for securing offsets*

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

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

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

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

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

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

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

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

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

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

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

68 EPBC Act Offsets Policy, p. 18.

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

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

71 EPBC Act Offsets Policy, pp 18–19.

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

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

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

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

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

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

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

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

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

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

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

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

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

5.56 The North Queensland Conservation Council similarly submitted that:

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

5.57 Dr Yung En Chee agreed:

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

5.58 Indeed, the committee heard examples of areas that were protected under conservation agreements where developments have subsequently been approved. Several submitters and witnesses highlighted the Waratah Coal Galilee Basin project which has impacted upon the Bimblebox Nature Refuge, which was, in theory, protected under a conservation agreement and as part of the Australian National Reserve system. This case study is outlined further at Appendix 4.<sup>82</sup>

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

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

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

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

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

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



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

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

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

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

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

5.62 The department submitted that:

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

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

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

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

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

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

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

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

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

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

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

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

5.67 The department's submission acknowledges that:

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

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

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

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

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

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

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

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

### *Security of funding*

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

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

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

### *Advanced offsets and biobanking*

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

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

94 EPBC Act Offsets Policy, p. 19.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### ***Enforcement of offsets***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In June 2010 a reparations package totalling \$658,500 was agreed and implemented through a variation of conditions attached to EPBC 2002/569 for Anglo Coal (Callide Management) Pty Ltd's coalmine near Gladstone. A potential breach of EPBC approval conditions was identified after 420m<sup>2</sup> of spoil was dumped onto an area of Semi-evergreen vine thicket ecological community which was protected under the approval.

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

### **Accountability in offsets decision-making**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

126 See further Hawke review, pp 316–317.

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

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

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



# 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.<sup>1</sup>

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

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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.

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## **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'.<sup>2</sup> 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'.<sup>3</sup>

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

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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.**

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## ***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'.<sup>4</sup> 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

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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'.<sup>5</sup>

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.**

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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'.<sup>6</sup>

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,

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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.<sup>7</sup> 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.

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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.<sup>8</sup> 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.

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8 EPBC Act Offsets Policy, p. 19.

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### *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**

# Coalition Senators' Dissenting Report

## Introduction

### *History*

1.1 The *Environment Protection and Biodiversity Conservation Act (EPBC Act)* *Environmental Offsets Policy (Policy)* and the *Offsets Assessment Guide (Guide)* were released by the former Government in 2012. The Policy and Guide outline the Federal Government's approach to offsets and how they are calculated. Since 2 October 2012, the Policy and Guide have been consistently applied to projects being assessed under the EPBC Act. The process is open, transparent and has bipartisan support, having been introduced by the former Government.

### *Current Arrangements*

1.2 The Australian Government's Environmental Offsets Policy is among the most effective and sophisticated in the world. This system has, along with State environmental approval systems, served to protect matters of national environmental significance from undue harm. While effective, the Australian Government is committed to the ongoing improvement of its environmental offsets policy and will be progressing a One Stop Shop for environmental approvals with State Governments.

### *One Stop Shop for Environmental Approvals*

1.3 The Coalition Government is committed to implementing a one-stop shop for environmental approvals. The One-Stop Shop will streamline environmental assessment and approval processes by removing duplication between the Australian Government and states and territories. Importantly, this will be achieved while maintaining high environmental standards.

1.4 The One-Stop Shop will be implemented through approval bilateral agreements under the EPBC Act. Approval bilateral agreements allow a state to conduct a single environmental assessment and approval process that satisfies both state and Australian Government requirements, but only where the state meets the high environmental standards demanded under the EPBC Act.

### *Ongoing Protections*

1.5 The Australian Government, through formal agreements with the States, will ensure there is a strong assurance framework in place to continue to maintain the high environmental standards under the current EPBC Act.

1.6 The Australian Government has a dedicated and expanding compliance and enforcement team supported by recently updated investigative and intelligence support programmes. These arrangements give confidence that any environmental approval will be monitored for compliance with conditions.

1.7 The Australian Government is committed to continuous improvement, including through an appropriate and complete review of the EPBC Act offsets policy and guide following the implementation of the one-stop shop.

### **Support for the EPBC Act Offsets Policy**

1.8 The Policy and Guide were developed following consultation with a range of stakeholders. **The Department of Environment** explained the process in their submission (Submission 79):

The policy and guide were developed following detailed research and stakeholder consultation. This included the release of a consultation draft for public comment, targeted stakeholder engagement with peak industry and environmental bodies and close collaboration with researchers from the Australian National University and University of Queensland through the National Environmental Research Program.

1.9 When this point was taken up by **Senator Williams (Hearing, 6<sup>th</sup> May)**, the **Minerals Council** noted there was a **high degree of consensus in relation to the Policy**.

**Senator WILLIAMS:** Looking back at the changes to the EPBC Act in 2012, as far as offsets go, were you happy with the amount of consultation carried out then with the businesses you represent?

**Ms Stutsel:** We were certainly very happy with the consultation process. We sat at many round tables face to face with scientific organisations, academia and environmental NGOs. It was a well run and collaborative process. We thought that the organisations that participated were very transparent around their expectations and what they thought the opportunities were with the policy process. Indeed, I think we ended up with a very high degree of consensus between the business organisations that the environmental NGOs that it was a good, strong policy for the Commonwealth to have.

### ***The use of the Policy and Guide continue to have broad support.***

1.10 **Dr Gibbons (Hearing, 6<sup>th</sup> May)** gave evidence that:

I think the offset assessment guide by the Commonwealth, even though it has its rough spots, is an improvement. We are probably having this discussion today because of the increased transparency in offset related development decisions. If implemented properly, the policy will result in less net loss of biodiversity, I believe. I believe 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.

1.11 **The Business Council of Australia (Submission 81)** noted that:

This new policy and associated calculator represents a major step forward – it clarifies that offsets should only be used to correct for residual impacts, and provides a transparent, predictable, science-based method for establishing required offsets.

1.12 **Rachel Walmsley from the Environmental Defender's Office (Hearing, 5th May)** stated that:

Even though none of these schemes is perfect, certainly ANEDO would support having in place robust scientific methodologies that are consistent, repeatable and transparent so that a proponent could pick them up, go and look at them and get an idea of what kinds of credits and what kinds of impacts might apply. A community member or a farmer could use these tools, and the same standard is applied and those standards are based on science.

1.13 **It was widely recognised that, although a useful tool, environmental offsets cannot make an unacceptable project acceptable. The Minerals Council** noted the 'fundamental principle in the application of environmental offsets is that an offset cannot make a project with unacceptable impacts acceptable. An offset proposal is no guarantee that a project will be approved'.

1.14 **The Department explained that (Submission 79):**

...the policy explicitly states that the provision of offsets does not mean that proposals with unacceptable impacts will be approved; they are another tool that operates through the impact assessment process to deliver environmental outcomes and sustainable development.

1.15 **Evidence was also presented that offsets can provide opportunities to improve conservation outcomes. The NSW Minerals Council (Submission 76)** noted that:

Whilst the use of environmental offsets should remain the final option, where offsetting is appropriate it can provide significant opportunities to harness private investment in conservation and make environmental gains. In the highly cleared landscapes of the Hunter Valley, Western and North Western NSW, offsetting provides opportunities to improve and connect remnant areas of vegetation, in combination with mine rehabilitation.

Government should be looking to take advantage of the opportunities provided by offsetting for environmental, social and economic gains. Any consideration of the environmental offsets policy needs to be cognisant of those opportunities and be informed by an appreciation of the importance of this tool in the continued economic growth of Australia.

### **One stop shop – applying a national environmental standard**

1.16 A number of submissions raised concerns with differences in offset approaches around Australia and the complexities that result from the application of both State and Federal policies.

1.17 **Dr Anita Foerster and Professor Jan MacDonald (Submission 23)** explained that:

In addition to offsets under the Environmental Protection and Biodiversity Conservation Act 1999 [EPBC Act], all states and territories operate various offsetting programs many of which have recently been reformed or are in the process of reform. The Commonwealth should take a leadership

role in coordinating the development of a national biodiversity offsets standard that affords high levels of protection for Australia's biodiversity.

1.18 **The NSW Minerals Council (Submission 76)** noted that:

NSWMC members operate under two different systems for offsetting: where matters of national environmental significance are proposed to be impacted, the Environment Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy (Commonwealth Offsets Policy) applies; where NSW listed species and communities are impacted, the NSW Offset Principles for Major Projects (State significant development and State significant infrastructure) (NSW Offset Principles) applies. Frequently different offsets are required to achieve the outcomes required by the two different jurisdictions.

1.19 The Coalition Government is committed to implementing a one-stop shop for environmental approvals. The One-Stop Shop will streamline environmental assessment and approval processes by removing duplication between the Australian Government and states and territories. Importantly, this will be achieved while maintaining high environmental standards.

1.20 The One-Stop Shop will be implemented through approval bilateral agreements under the EPBC Act. Approval bilateral agreements allow a state to conduct a single environmental assessment and approval process that satisfies both state and Australian Government requirements, but only where the state meets the high environmental standards demanded under the EPBC Act.

1.21 In relation to offsets, the **Department of Environment's submission (Submission 79)** notes that:

Through this process States and territories will be required to meet the published *Standards for Accreditation of Environmental Approvals* under the EPBC Act. The standards are based on requirements of Commonwealth law and will facilitate the maintenance of environmental outcomes through the one stop shop.

The standards also specify that any offsets delivered through an accredited process must achieve long-term environmental outcomes for matters protected under the EPBC Act and be consistent with either the EPBC Act Environmental Offsets Policy, or another policy accredited by the Minister as achieving the objects of the EPBC Act to an equivalent or better level.

1.22 **The National Farmers' Federation (Submission 15)** gave evidence that:

With the establishment of the one-stop shop model, there is an opportunity to further align the offset policies of the State and the Commonwealth. Such alignment will avoid the current confusion of separate offset requirements by the different jurisdictions.

1.23 The one-stop shop will deliver a single assessment process, a single approval with a single set of conditions. This means that project proponents will only need to comply with one set of offset requirements that deliver equivalent, or better, outcomes than those that would be required under the EPBC Act. In appropriate cases, states and



territories will be required to lift their standards to meet the high standards under the EPBC Act.

### **Appropriate review of the Offsets Policy**

1.24 **Some submitters questioned the motivations of the Senate Inquiry and noted that formal review of the offsets policy would be more appropriate. The Minerals Council of Australia** submitted that:

The *EPBC Act* offsets policy and guide has been in operation for less than 18 months which is a very short timeframe for the development, implementation and validation of environmental offsets. Accordingly, the MCA considers a general review of the effectiveness of this policy through the Inquiry process at this juncture, is unnecessary, premature and unlikely to reveal whether it is yet achieving its stated aims.

1.25 **The Department of Environment's** submission noted that:

The policy and offsets assessment guide were scheduled to undergo a technical review one year from release and a complete review of effectiveness against the aims of the policy every five years thereafter. The performance of the offsets policy against the stated objectives will be evaluated as part of these review processes. The one year technical review has been temporarily delayed to allow consideration of state and territory processes that may need to be accredited through the 'one stop shop' policy.

### ***Evaluating the effectiveness of the EPBC Act Policy and Guide is challenging***

1.26 **Dr Gibbons (Hearing, 6<sup>th</sup> May)** noted that there are challenges in evaluating the offsets policy:

I think it is difficult to evaluate the effectiveness of the federal offset policy to date. This is because, in terms of implementation, the Department of the Environment does not maintain in an accessible form a register containing all of the information relevant to an assessment...I acknowledge that this is very challenging task and that the policy has only been in place for just over a year. But I think that this task needs to be undertaken by a qualified, appropriate third party as it is too much to ask of a proponent to do this at the individual project level.

### **Summary**

1.27 While there are challenges in implementing the EPBC Act Offsets Policy and Guide the Coalition Government is committed to consistently applying the policy to projects being assessed under the EPBC Act. It is a transparent, open process that continues to have broad support.

1.28 The Coalition Government is also committed to implementing a one-stop shop for environmental approvals. The one-stop shop will maintain high environmental standards whilst streamlining environmental assessments and approvals by removing unnecessary duplication between the Australian Government and states and territories. The one-stop shop will be supported by a strong assurance framework to ensure that high environmental standards are maintained.

1.29 The Australian Government has a dedicated and expanding compliance and enforcement team supported by recently updated investigative and intelligence support programmes. These arrangements give confidence that any environmental approval will be monitored for compliance with conditions.

1.30 The Australian Government is committed to continuous improvement, including through an appropriate and complete review of the EPBC Act offsets policy and guide following the implementation of the one-stop shop.

**Senator John Williams**  
**Deputy Chair**  
**Senator for New South Wales**

**Senator Anne Ruston**  
**Senator for South Australia**

# Australian Greens Minority Report

1.1 Our environment laws are failing us. Australia's biodiversity is in decline. The number of threatened species has nearly tripled in the last twenty years and we are in a biodiversity crisis. Over 20% of our remaining 386 mammal species are threatened with extinction. We have lost valuable places and wildlife to the thousands of damaging developments that have already gone ahead. Our laws haven't been able to protect those parts of our environment which need protection.

1.2 For the reasons so comprehensively set out the body of the Committee's report, the Australian Greens oppose the very notion of offsetting nature. The principle is nonsensical and its implementation has shown itself to be a fig leaf for continued approvals of projects with unacceptable impacts: the evidence shows that offsets do not and cannot achieve their objectives. Nature is not tradeable because it is unique.

1.3 The Australian Greens referred this issue to the Senate to inquire into after a litany of examples where offsets were shown to be farcical – particularly Whitehaven Coal's Maules Creek Project, Waratah Coal's Galilee Coal Project, and North Queensland Bulk Port's Abbot Point Coal Terminal Capital Dredging Project. We've seen Whitehaven get away with clearing endangered box gum for their Maules Creek coal mine by buying a patch of land that's almost completely different vegetation. The Abbot Point coal port was approved with the Environment Minister saying the damage will be offset, while internal documents from the Great Barrier Reef Marine Park Authority found the offshore dumping of dredged sludge would cause irreversible damage that would be impossible to offset. And Clive Palmer's company is being allowed to destroy the Bimblebox Nature Refuge for a massive coal mine, in exchange for purporting to protect other vegetation - that hasn't even been identified, and if it even can be, will not itself be protected from being mined in future.

1.4 The Australian Greens believe that offsets cannot deliver the promised benefits and are simply being used as a smokescreen to allow irreparable damage. Offsets are being used more and more as an excuse for governments to tick and flick environmentally damaging projects for the big mining companies. Often these offsets are so unrealistic that they're impossible to deliver on. Not only are offsets often magic pudding calculations to justify irreversible environmental damage, there's also hardly any enforcement of whether offsets are met. There's often no political will and environment departments are so under-resourced that enforcement and monitoring of offsets falls by the way side. The government rarely ground truths before approving offsets so we're left to rely on the proponent's word.

1.5 The environmental effectiveness of offsets has never been proven and yet they are being used as an excuse to approve damaging developments that should instead be refused under our national environment law.

1.6 The litany of flaws with both the concept and the implementation of offsets are comprehensively set out in the Committee's report. The recommendations in the

report would address many of the concerns about the implementation of offsets, but the evidence from the case studies examined by the Committee and other projects around Australia justifies the Australian Greens' view that the Committee's recommendations will not, and indeed cannot, be implemented. Offsets have been used as a fig leaf for continued approvals of projects with unacceptable impacts, and should be opposed.

1.7 The June 2014 Australian National Audit Office report, *Managing Compliance with EPBC Conditions of Approval*, shows the federal environment department is under-resourced and failing to enforce environmental conditions – this includes offset conditions. The ANAO says:

However, nearly 14 years after the enactment of the EPBC Act, [the Department of] Environment is yet to establish mature administrative arrangements to effectively discharge its regulatory responsibilities in relation to approved controlled actions ...

The increasing workload on compliance monitoring staff over time has resulted in Environment adopting a generally passive approach to monitoring proponents' compliance with most approval conditions.<sup>1</sup>

1.8 The Abbott Government constantly approves environmentally destructive projects claiming that all of the damage will be managed by environmental conditions, including offsets, but the ANAO report shows those conditions often aren't enforced. The report shows the Environment Department doesn't have enough staff to enforce conditions and yet the Abbott Government's budget cuts hundreds of staff from the Environment Department, including 129 from the division responsible for enforcement.

1.9 Many projects, including the Abbot Point coal port expansion in the Great Barrier Reef, have been approved with conditions requiring the proponent to provide a management plan on how they will manage environmental risks – including plans detailing offsets. The ANAO report shows that the department could only provide evidence that it had checked the about 60 per cent of management plans. This means proponents often get their approval with requirements to provide details in later plans as to how they will manage environmental damage, but then those plans aren't properly scrutinised, which is a recipe for unmonitored environmental degradation.

1.10 The ANAO's is a scathing assessment of the Department of Environment's capacity to police conditions, including the identification, securing, and delivery of offsets. Together with the case studies mentioned below and explored in the Committee's report, Australian Greens are of the view that offsets are unworkable, cannot achieve their objectives, and should not be used.

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1 A summary of the report is available here <<http://www.anao.gov.au/Publications/Audit-Reports/2013-2014/Managing-Compliance-with-EPBC-Act-1999-Conditions-of-Approval/Audit-summary>>

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## Whitehaven Coal's Maules Creek

1.11 Despite a consistent stream of information from community and independent ecological experts, the Department of Environment has been unable to address the fact that Whitehaven Coal's proposed offset areas are woefully inadequate to offset their destruction of the Leard State Forest.

1.12 Whitehaven Coal was permitted to rip up endangered box gum woodland for a mine on the proviso it would protect forest elsewhere, but then tried to get away with protecting a totally different ecosystem that has only 5 per cent of the relevant endangered box gum.

1.13 Documents I received pursuant to an Order for Production of Documents included the long awaited 'independent' review of Whitehaven Coal's proposed offset, albeit commissioned and paid for by Whitehaven Coal. The documents confirm that the offsets originally proposed are not sufficient to offset the environmental damage which the mine will cause, including the clearing of endangered box gum woodland. Several other additional areas are required to be protected in order to compensate for the damage caused at the mine site.

1.14 To me, this was an admission that the original application with its assertion that adequate offsets had been obtained was false or misleading. That was what the Department had, to its credit, been investigating for the last 12 months.

1.15 Yet Ministerial correspondence accompanying the documents shows that in fact the Abbott Government has taken the opposite interpretation and has called off the investigation, citing lack of evidence to justify a prosecution.

1.16 Clearly there is one rule about what constitutes 'false or misleading' for mining companies like Whitehaven and another for environmental activists like Jonathon Moylan. Jonathan Moylan is facing 10 years in jail for a fake press release that caused only a temporary dip in Whitehaven's share price. Whitehaven mistook or misled the government about the adequacy of its replacement of endangered woodlands, and they get the green light to trash the place.

1.17 What message is this Government sending the big end of town, when a company that has made a mockery of our national environmental protection laws is being let off scot-free?

1.18 The Maules Creek approval is a complete farce and should never have been granted under our national environment law.

1.19 Minister Hunt must immediately suspend the approval for the Maules Creek coal mine given this information about the gross inadequacy of the so-called 'offsets', and Whitehaven Coal should be prosecuted for providing the Government with false information in order to get approval for their environmentally disastrous mine at Maules Creek.

1.20 Australians expect that the impacts of mega coal mines will be properly scrutinised but with the Government putting the big mining companies first, it's being left to the community to point out the flaws in this shameful excuse for environmental protection.

1.21 The old parties need to stop ticking and flicking massive environmental damage for the big mining companies.

### **Waratah Coal's Galilee Coal Project**

1.22 This mega-mine proposes to swallow up the Bimblebox nature reserve which contains the last remaining significant example of the rare desert uplands ecological community and threatened species, including the critically endangered Black Throated Finch. The project was approved before offsets areas identified, and unsurprisingly none have been found.

1.23 With Tony Abbott's blessing, Clive Palmer's mine will rip up the Bimblebox Nature Refuge, an 8000 hectare patch of remnant native woodland, which provides scarce habitat for native wildlife, including the endangered Black Throated Finch. The condition attached to offset Bimblebox with another area is ridiculous – you can't offset the loss of the last remaining significant woodland in the Galilee Basin.

1.24 It's nonsensical to say that the damage of clearing Bimblebox can be offset with land somewhere else. Overall, it's a net loss for the environment. The idea that different parts of the environment can be traded off against one another is a very dangerous one, and it's threatening to destroy Bimblebox, an irreplaceable sanctuary for native woodlands and wildlife.

1.25 In the words of the co-owner of Bimblebox Ms Paula Cassoni:

In the year 2000 there was precious little remnant vegetation left in the region due to broadscale landclearing. It's ridiculous to claim that the destruction of Bimblebox can be replaced with land somewhere else, because if there ever was 'somewhere else' Bimblebox would have not been gazetted in the first place (with the help of the federal govt) and included in the protected estate of the National Reserve System.

It takes hundreds, if not thousands, of years to create a habitat like Bimblebox. It's an arrogant folly, or perhaps an outright lie, to pretend it can be replaced by land elsewhere.

### **NQBP's Abbot Point coal terminal expansion**

1.26 The recently approved Abbot Point coal terminal will dredge 3 million cubic metres of spoil and dump it in the Great Barrier Reef World Heritage Area.

1.27 The project has been approved with an offset consisting of a 150% improvement in water quality. The proponent has not identified how, when, or by whom this offset will be achieved.

1.28 The June 2014 World Heritage Committee decision to give one further year before considering placing the Great Barrier Reef on the World Heritage List of Sites in Danger specifically expressed concern about the Abbot Point dredging and dumping and singled out the offsets:

The proposed dumping of dredged material from the proposed Abbot Point development is also noted with concern. Indeed, this was approved, despite an indication that less impacting disposal alternatives may exist. It is considered that the suggested achievement of a 150% net benefit on water

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quality from compensation for the consented dredge disposal appears inappropriate without a specific timescale for its rapid and guaranteed achievement prior to development proceeding, and a clear indication of the implications for progress on water quality against the Reef Plan targets, in addition to the uncertainty about the impacts of dredge material plumes beyond the disposal site. This is of particular concern given evidence suggesting that the inshore reefs in the southern two-thirds of the property are not recovering from disturbances over the past few decades. The further approval on Curtis Island adds to concerns addressed in previous Committee decisions.

1.29 Documents released under Freedom of Information show the Great Barrier Reef Marine Park Authority internally found the dumping for the Abbot Point coal port expansion would cause irreversible damage that would be impossible to offset. Given these startling revelations, Minister Hunt must to revoke his approval of the Abbot Point coal port in the Great Barrier Reef. This precious World Heritage Area is no place for the world's biggest coal port. Our Great Barrier Reef should not be treated as a dump ground for dredge sludge, with magic pudding offset conditions nobody believes are achievable, all because it's cheaper for the big mining companies than disposing on land.

**Recommendation 1: The Government must refuse projects which have unacceptable impacts on matters of national environmental significance, rather than using offsets as a fig leaf to allow continued approvals.**

**Recommendation 2: The Government should immediately revoke the approval for the Maules Creek coal mine, and Whitehaven Coal should be prosecuted for providing the Government with false information in order to get approval for their environmentally disastrous mine at Maules Creek.**

**Recommendation 3: The Government should immediately revoke approval for Waratah Coal's Galilee Coal Project.**

**Recommendation 4: The Government should immediately revoke approval for the Abbot Point coal terminal dredging and dumping.**

**Recommendation 5: Any existing offset areas already secured must be protected in perpetuity and not subject to further development.**





# Appendix 1

## Submissions, tabled documents, additional information and answers to questions taken on notice

### Submissions

- 1 Mr Richard Sharp
- 2 Australian Orchid Council
- 3 Mr Bernard Griffin
- 4 Australian Koala Foundation
- 5 Birdlife Southern NSW
- 6 Dr Graham Zemunik
- 7 Dr Martine Maron
- 8 ALP - West Wallsend Branch
- 9 Victorian National Parks Association
- 10 Tasmanian Farmers and Graziers Association
- 11 Regional Development Australia Hunter
- 12 Ms Joan Payne AM
- 13 Friends of Grasslands
- 14 Ms Anne Makhijani
- 15 National Farmers' Federation
- 16 David Hogg Pty Ltd
- 17 Lake Macquarie City Council
- 18 North Queensland Conservation Council
- 19 Indigenous Land Corporation
- 20 Lock the Gate Alliance
- 21 Dr Philip Gibbons
- 22 Queensland Murray-Darling Committee Inc
- 23 Dr Anita Foerster and Professor Jan McDonald
- 24 Dr Megan Saunders and Dr Justine Bell
- 25 Professor Richard Hobbs and Dr Leonie Valentine
- 26 Ms Megan Evans
- 27 Dr Gary Middle
- 28 Humane Society International
- 29 Mr John Briggs

- 30 Mr Russell Fairfax
- 31 National Environmental Law Association
- 32 Batwatch Australia
- 33 The Chamber of Minerals and Energy of Western Australia
- 34 Interdisciplinary Conservation Science Research Group
- 35 Minerals Council of Australia
- 36 Canberra Ornithologists Group
- 37 The Australia Institute
- 38 Wild-River & Associates
- 39 Wildlife Preservation Society of Queensland
- 40 Association of Mining and Exploration Companies Inc
- 41 Confidential
- 42 Wildlife Preservation Society of Queensland - Sunshine Coast &  
Hinterland
- 43 Australian Institute of Marine Science
- 44 Jandakot Airport
- 45 Trust for Nature
- 46 Environmental Farmers Network
- 47 Mr Chris Walker
- 48 Queensland Seafood Industry Association
- 49 Ms Ruby Rosenfield
- 50 Environmental Decisions Group
- 51 National Parks Association of NSW, Armidale Branch
- 52 Blue Mountains Conservation Society Inc
- 53 Urban Bushland Council WA Inc
- 54 Watson Community Association
- 55 Ms Anna Christie
- 56 Ms Margaret Cameron
- 57 Dr Yung En Chee, and members of the Quantitative & Applied  
Ecology Group, University of Melbourne
- 58 Friends of the Earth
- 59 Gladstone Conservation Council
- 60 Australian Network of Environmental Defender's Offices Inc
- 61 Greenpeace Australia Pacific
- 62 Mr Peter Boulot and Mr Ross Parisi

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- 63 Ms Kathryn Kelly  
64 Wildflower Society of Western Australia  
65 Friends of Ken Hurst Park  
66 Central West Environment Council  
67 Ms Sonya Duus  
68 Australian Prawn Farmers Association  
69 Australasian Bat Society Inc  
70 Mr Barry Rowe  
71 Mr Ian Lee  
72 Environment Defenders Office (Victoria)  
73 WWF-Australia  
74 QGC  
75 Mackay Conservation Group  
76 NSW Minerals Council  
77 BirdLife Australia  
78 Conservation Council ACT Region  
79 Department of the Environment  
80 University of the Sunshine Coast  
81 Business Council of Australia  
82 Indigenous Advisory Committee  
83 Whitehaven Coal Limited  
84 The Wilderness Society Inc  
85 Wentworth Group of Concerned Scientists  
86 Alliance to Save Hinchinbrook Inc  
87 Bimblebox Nature Refuge  
88 Environment Institute of Australia and New Zealand  
89 Nature Conservation Society of South Australia  
90 Northern Inland Council for the Environment  
91 Mr Barrie Griffiths  
92 Ms Pat Schultz  
93 Gomeroi Traditional Custodians  
94 Our Land Our Water Our Future  
95 Confidential

## **Tabled documents**

### **Central West Environment Council**

Witness submission dated 5 May 2014 (at public hearing, Sydney, 5 May 2014)

Draft NSW Biodiversity Offsets Policy for Major Projects (at public hearing, Sydney, 5 May 2014)

Draft Framework for Biodiversity Assessment (at public hearing, Sydney, 5 May 2014)

### **Lake Macquarie City Council**

*Biodiversity offsets: Practice and promise*, Martin Fallding (at public hearing, Sydney, 5 May 2014)

### **Ms Anna Christie**

Environmental and Planning Law Journal – Can s 52 of the *Trade Practices Act 1974* (Cth) be involved against misleading statements by a proponent of a project in an environmental impact statement under Pts IV or V of the Environmental Planning and Assessment Act 1979 (NSW) by Anna Christie (at public hearing, Sydney, 5 May 2014)

### **Mr Jeremy Tager, Friends of the Earth**

*Digging into EIA – Failures in impact assessments*, by Jeremy Tager (at public hearing, Brisbane, 7 May 2014)

### **Additional information**

GVK Hancock Coal Pty Ltd – Correction of Misinformation: Incorrect Claim – Release of a report claiming that India's future energy demand impacts the viability of GVK Hancock's projects

Wentworth Group of Concerned Scientists – Letter, dated 23 May 2014, providing supplementary information on the status and projections of Coal Seam Gas (CSG) exploration wells across NSW and Queensland

### **Answers to questions taken on notice**

Dr Justine Bell – Answer to a question taken on notice (from public hearing, Brisbane, 7 May 2014)

NSW Environmental Defender's Office – Answer to a question taken on notice (from public hearing, Sydney, 5 May 2014)

Department of the Environment – Answers to questions taken on notice (from public hearing, Canberra, 6 May 2014)

## **Appendix 2**

### **Public hearings**

*Monday, 5 May 2014 – Sydney*

#### **Lock the Gate Alliance**

Ms Georgina Woods, Policy Coordinator

#### **Central West Environment Council**

Ms Beverley Smiles, Secretary

#### **Environmental Justice Australia**

Mr Brendan Sydes, Chief Executive Officer

#### **Greenpeace Australia Pacific**

Mr Ben Pearson, Head of Program

Mr Adam Walters, Research and Investigations Coordinator

#### **Australian Network of Environmental Defender's Offices Inc**

Ms Sue Higginson, Principal Solicitor

Ms Rachel Walmsley, Policy and Law Reform Director

#### **Ms Anna Christie, Private capacity**

#### **Lake Macquarie City Council**

Mr Martin Fallding, Environmental Planner

#### **Northern Inland Council for the Environment Inc**

Mr Philip Spark, President

*Tuesday, 6 May 2014 – Canberra*

#### **NSW Minerals Council**

Ms Claire Doherty, Director, Community Development

#### **Minerals Council of Australia**

Mr Chris McCombe, Assistant Director, Environmental Policy

Ms Melanie Stutsel, Director, Health, Safety, Environment and Community Policy

#### **Wentworth Group of Concerned Scientists**

Mr Peter Cosier, Director and Founding Member

Dr Denis Saunders AM, Director and Founding Member

**Dr Philip Gibbons, Private capacity**

**Department of the Environment**

Dr Kimberley Dripps, Deputy Secretary

Mr Dean Knudson, First Assistant Secretary, Environment, Assessment and Compliance Division

*Wednesday, 7 May 2014 – Brisbane*

**TC Beirne School of Law, University of Queensland**

Dr Justine Bell, Lecturer

**Queensland Murray-Darling Committee Inc**

Mr Geoff Penton, Chief Executive

**Wildlife Preservation Society of Queensland**

Mr Des Boyland, Policies and Campaigns Manager and Secretary

**Bimblebox Nature Refuge**

Ms Paola Cassoni, Co-owner

**Mackay Conservation Group**

Mrs Patricia Julien, Research Analyst

**Indigenous Land Corporation**

Mr Michael O’Ryan, Director of Policy and Program Development

Ms Emma Pethybridge, Manager, Environment, Carbon and Heritage

**Friends of the Earth Australia**

Mr Jeremy Tager, Nanotechnology Campaigner

**Gladstone Conservation Council Inc**

Mr Jan Arens, President

**The Alliance to Save Hinchinbrook Inc**

Ms Margaret Moorhouse, Acting Secretary/Treasurer

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*Wednesday, 18 June 2014 – Canberra*

**Gomeri Traditional Custodians**

Mrs Toni Comber, Chief Executive Officer, Red Chief Local Aboriginal Land Council

Ms Jane Delaney-John, Manager, Connect for Effect

Ms Jeanette Grozier, TO Knowledge Holder

Mr David Horton, TO Knowledge Holder

Ms Desley Matthews, TO Knowledge Holder

Mr Lloyd Matthews, TO Knowledge Holder

Mr Mitchum Neave, TO Knowledge Holder/Chairperson, Gomeri Traditional Custodians – Red Chief Local Aboriginal Land Council

Mr Cyril Sampson, TO Knowledge Holder

Uncle Neville Sampson, Senior Elder

Mr Reginal Talbott, Senior Elder Knowledge Holder

Mr Stephen Talbott, TO Knowledge Holder

Mrs Veronica Talbott, TO Knowledge Holder





## Appendix 3

### Whitehaven Coal's Maules Creek Project

#### Overview of project<sup>1</sup>

##### *Introduction*

3.1 The Maules Creek Project is in the Gunnedah Basin near Tamworth in northern New South Wales (NSW). The Department of the Environment (the department) received a referral on 9 July 2010 from Aston Coal 2<sup>2</sup> who proposed to develop and operate the Maules Creek open-cut coal mine, including a coal handling and production plant and associated facilities.

##### *Impact of the project*

3.2 The Maules Creek coal mine will impact on 1665 ha of potential habitat for listed endangered and migratory species (including the swift parrot, regent honeyeater, and greater long-eared bat) and up to 544 ha of the critically endangered White Box-Yellow Box-Blakely's Red Gum Grassy Woodland and Derived Native Grassland ecological community.

##### *Assessment of the proposal*

3.3 The project was assessed under an accredited assessment process with the NSW Government Department of Planning and Infrastructure, specifically under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act).

3.4 The NSW Government exhibited the Environmental Assessment for the project from 30 August 2011 until 11 October 2011, and received 110 submissions.

3.5 On 16 August 2011, the NSW Minister for Planning and Infrastructure requested that a merit review of the project be undertaken by the Planning Assessment Commission on the impacts on biodiversity from the project, as well as cumulative impacts within Leard State Forest and surrounding remnant vegetation. The Planning Assessment Commission found in its final determination report for the Maules Creek proposal that the proposed restoration and preservation of land for biodiversity conservation will provide a comprehensive framework for mitigation and management

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1 The following overview of the project is based on information provided by the Department of the Environment, *Submission 79*, Attachment A, pp 1–4 and also EPBC Referral 2010/5566, [http://www.environment.gov.au/cgi-bin/epbc/epbc\\_ap.pl?name=current\\_referral\\_detail&proposal\\_id=5566](http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=5566) (accessed 18 June 2014).

2 Note that Aston Resources Limited merged with Whitehaven Coal on 2 May 2012: see Whitehaven Coal, 'Whitehaven Confirms Implementation of Merger', *ASX Release*, 2 May 2012, [http://www.whitehavencoal.com.au/investors/documents\\_astonasx/2012%20ASX%20ANNOU%20NCE\\_PDF/MAY2012/WHC-%20Whitehaven%20Confirms%20Implementation%20of%20Merger.pdf](http://www.whitehavencoal.com.au/investors/documents_astonasx/2012%20ASX%20ANNOU%20NCE_PDF/MAY2012/WHC-%20Whitehaven%20Confirms%20Implementation%20of%20Merger.pdf) (accessed 18 June 2014).

of the biodiversity aspects of the Maules Creek Coal Project itself and for the cumulative impacts of this project and the Boggabri Coal Project.<sup>3</sup>

3.6 On 23 October 2012, the Planning Assessment Commission approved the Maules Creek coal mine proposal with conditions. Once the NSW Government approval was determined, the Commonwealth undertook a final assessment of the offsets with particular regard to the EPBC Act Environmental Offsets Policy and Offsets Assessment Guide.

3.7 The project was approved by the then Commonwealth Minister for Sustainability, Environment, Water, Population and Communities on 11 February 2013.

#### *Avoidance and mitigation measures*

3.8 The department advised that 'a number of avoidance and mitigation measures were implemented prior to the consideration of offsets under the project'. These are listed on pages one and two of Attachment 1 of the department's submission.

#### *Offset requirements*

3.9 The offsets package required under the conditions of approval<sup>4</sup> included requirements to:

- register legally binding conservation covenants over offset areas of no less than 9,334 hectares of an equivalent or better quality of habitat for the regent honeyeater, swift parrot and greater long-eared bat; and 5,532 hectares of an equivalent or better quality of the White Box—Yellow Box—Blakely's Red Gum Grassy Woodland and Derived Native Grassland ecological community;
- verify through independent review the quantity and condition class of White Box—Yellow Box—Blakely's Red Gum Grassy Woodland and Derived Native Grassland ecological community and the quantity and quality of habitat for the regent honeyeater, swift parrot and greater long-eared bat within all proposed offset areas; and, if the offset areas do not meet the requirements of conditions, a requirement to secure additional offset areas until all relevant criteria under the approval conditions are met; and
- prepare and implement an approved offset management plan for all of the offset areas. The approved offset management plan must include: maps, methods and results of baseline surveys measuring ecological conditions, clear ecological management objectives, description of all ecological management activities proposed to be undertaken, details of ongoing ecological monitoring programs, performance criteria, targets and provisions for adaptive management, details of all parties responsible for management,

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3 The Boggabri Coal Project is a separate project: see EPBC 2009/5256 [http://www.environment.gov.au/cgi-bin/epbc/epbc\\_ap.pl?name=current\\_referral\\_detail&proposal\\_id=5256](http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=5256) (accessed 18 June 2014).

4 See further <http://www.environment.gov.au/epbc/notices/assessments/2010/5566/2010-5566-approval-decision.pdf> (accessed 18 June 2014).

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monitoring and implementing the management activities, and details of the funding requirements for the ongoing management activities.

3.10 The approval decision requires the mechanism/s for registering a legally binding covenant to provide protection for the offset areas 'in perpetuity' and to be registered within five years of the date of the approval.

3.11 The approval decision also sets out indirect offsets requiring the proponent to:

- within two years of the approval, submit a project plan to invest \$1 million for research that will identify effective methodologies for achieving rehabilitation and restoration of functioning White Box-Yellow Box-Blakely's Red Gum Grassy Woodland and Derived Native Grassland ecological community on mining sites; and
- provide \$1.5 million over the life of the approval (comprising \$500,000 for each of the regent honeyeater, swift parrot and greater long-eared bat), to deliver activities that implement priority recovery actions consistent with National Recovery Plans.

3.12 The Department of the Environment submitted that:

The location of the offsets have been selected to enhance existing conservation reserve and build upon natural corridors like creeks and rivers to mitigate broad-scale fragmentation. In the conditions of approval under the EP&A Act, the State required 8664 hectares of native woodland and forest be protected and enhanced. The proposed offset strategy meets the requirements of the State approval with an additional requirement of 1000 hectares of native woodland and forest to be protected and enhanced.

### ***Challenges and other issues***

3.13 In January 2013, the Northern Inland Council for the Environment and the Maules Creek Community Council raised concerns in relation to the quantity and quality of the Box Gum Woodland on the proposed offset sites for the Maules Creek Coal Mine Project. A number of reports were provided to the Department and subsequently included in the briefing to the minister before he made his decision on 11 February 2013.

3.14 In March 2013, the Northern Inland Council for the Environment requested a Statement of Reasons for the decision to approve the Maules Creek Coal Mine Project under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). The Statement of Reasons was provided on 20 June 2013.

3.15 On 18 July 2013, the Northern Inland Council for the Environment applied to the Federal Court challenging the decisions made by the then minister, the Hon Tony Burke on 11 February 2013 under sections 130(1) and 133 of the EPBC Act to approve the Maules Creek Coal Mine and Boggabri Coal Mine Extension. One of the grounds for the challenge was in relation to the offsets and a submission that, as the offsets were not yet finalised, the minister was not able to make a valid decision. The

Northern Inland Council for the Environment was unsuccessful in their applications to the Federal Court in this matter.<sup>5</sup>

3.16 A number of community organisations also made allegations about the provisions of false and misleading information in relation to the quality and quantity of Box Gum Woodland occurring on the proposed offset sites. The department advised that these were provided as part of the assessment material underpinning the Maules Creek Coal Mine approval. The department commenced a preliminary investigation to ascertain whether the allegations required a full investigation under the EPBC Act.<sup>6</sup> The department advised the committee that the investigation had subsequently been closed, explaining that 'with regard to the accusation of false or misleading information':

The test there is whether beyond a reasonable doubt there is evidence that would indicate that false or misleading information has been provided in a deliberate or negligent fashion. The reason why that investigation has been closed...is that the department is of the view that the apparent accuracy issues associated with the offsets for the project related to differing interpretations of the box gum woodland listing advice and thresholds for significance in undertaking the assessment of impacts. The fact that there is a difference of opinion or uncertainty does not meet the test of false or misleading...<sup>7</sup>

3.17 On 27 December 2013, Whitehaven Coal submitted a report of an independent review to verify the quantity and quality of the offsets for the Maules Creek coal mine project as required under the conditions of approval. The review concluded that the offsets package complies with conditions of the EPBC approval, provided that it is supplemented by three additional properties. In January 2014, verification work was undertaken in relation to the three additional properties. The Independent Review and Verification Report have been made available on the Whitehaven Coal website.<sup>8</sup>

3.18 The department confirmed at the committee's hearing that Whitehaven Coal 'is in the process of securing those additional offsets'.<sup>9</sup>

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5 See further *Northern Inland Council for the Environment Inc v Minister for the Environment* [2013] FCA 1419, 20 December 2013, <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2013/2013fca1419> (accessed 4 June 2014).

6 Department of the Environment, *Submission 79*, Attachment A, p. 4.

7 Mr Dean Knudson, First Assistant Secretary, Environment, Assessment and Compliance Division, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 29.

8 Whitehaven Coal, *Submission 83*, p. 6; see also Department of the Environment, *Submission 79*, Attachment A, p. 4 and Whitehaven Coal, *Maules Creek Environmental Management*, [http://www.whitehavencoal.com.au/environment/maules\\_creek\\_environmental\\_management.cfm](http://www.whitehavencoal.com.au/environment/maules_creek_environmental_management.cfm) (accessed 18 June 2014).

9 Mr Dean Knudson, First Assistant Secretary, Environment, Assessment and Compliance Division, Department of the Environment, *Committee Hansard*, 6 May 2014, p. 29.

3.19 In February 2014, Whitehaven Coal submitted an offset management plan as required under the conditions of approval.<sup>10</sup>

### **Submission from Whitehaven Coal**

3.20 The committee notes that Whitehaven Coal provided a submission to this inquiry. Amongst other matters, Whitehaven Coal submitted that the project was designed having regard to the mitigation hierarchy (as discussed in Chapter 3).<sup>11</sup>

3.21 Whitehaven Coal also disputed claims 'about the biodiversity significance' of Leard State Forest. Whitehaven Coal submitted that Leard State Forest is a 'mining and logging precinct' which was 'commercially logged for more than a century up until the early 1980s' and further noted that the existing Boggabri Coal Mine is within the Forest.<sup>12</sup>

3.22 Nevertheless, as outlined above, the Maules Creek coal mine required approval under the EPBC Act due to its impacts on potential habitat for listed endangered and migratory species; including the swift parrot, regent honeyeater, and greater long-eared bat the critically endangered White Box-Yellow Box-Blakely's Red Gum Grassy Woodland and Derived Native Grassland ecological community.

3.23 Whitehaven Coal's submission also detailed the information on the environmental offsets for the Maules Creek Project and how the work involved in the independent verification of the offsets.<sup>13</sup>

3.24 Whitehaven Coal concluded that it is 'committed to complying with its offset obligations under the EPBC approval and to dedicating the required offsets in perpetuity as required by condition 13'. Whitehaven Coal concluded that:

The Project is an excellent example where offsets are being used to maintain or improve the viability of protected matters under the EPBC Act, and also to enable the development of a world class mine which will provide very substantial benefits for the region and the nation.<sup>14</sup>

### **Issues with the proposed offsets**

3.25 As noted in Chapter 6, the committee does not intend to comment on particular projects. However, the committee notes that submitters and witnesses raised a number of issues in relation to the offsets conditions for this project. These included:

- whether the offsets meet to requirement to 'improve or maintain' (as discussed further in Chapter 3);<sup>15</sup>

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10 Department of the Environment, *Submission 79*, Attachment A, p. 4.

11 Whitehaven Coal, *Submission 83*, p. 4.

12 Whitehaven Coal, *Submission 83*, p. 3.

13 Whitehaven Coal, *Submission 83*, pp 5–8.

14 Whitehaven Coal, *Submission 83*, p. 8.

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

- the quality of assessment documentation,<sup>16</sup> including possible problems with the vegetation mapping in relation to the offsets (see further Chapter 4).<sup>17</sup> Due to these issues, this project was put forward as an example of the need for careful scrutiny and verification of proposed offsets, whether by the department or independent experts.<sup>18</sup> As outlined above, community concerns raised in relation to the information about the offsets areas resulted in the approval conditions including a requirement for an independent review of the offsets;<sup>19</sup>
- whether the offsets can be considered to be 'like for like'<sup>20</sup> (as discussed further in Chapter 3). For example, Ms Woods from the Lock the Gate Alliance told the committee 'it is simply not possible for them to find another example of that community of that size of that condition';<sup>21</sup>
- whether the principle of additionality (discussed further in Chapter 3) has been met, as it was argued that the offsets properties are already reasonable well secured;<sup>22</sup>
- lack of consultation (as discussed in Chapter 4), particularly with traditional owners and lack of consideration of cultural values of the area to be offset;<sup>23</sup>
- the appropriateness of clearing and offsetting an ecological community that is listed as 'critically endangered' (see Chapter 3).<sup>24</sup> In addition, Leard State Forest was described as 'irreplaceable' and 'ecologically unique';<sup>25</sup>

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16 Australian Orchid Council, *Submission 2*, pp 2–3; Lock the Gate Alliance, *Submission 20*, p. 2; The Wilderness Society, *Submission 84*, pp 7–8; National Parks Association of NSW Armidale Branch, *Submission 51*, p. 3; Northern Inland Council for the Environment, *Submission 90*, p. 12.

17 Lock the Gate Alliance, *Submission 20*, p. 11; Interdisciplinary Conservation Science Research Group, *Submission 34*, p. 3; Mr Philip Spark, President, Northern Inland Council for the Environment, *Committee Hansard*, 5 May 2014, pp 50–51.

18 Ms Georgina Woods, Policy Coordinator, Lock the Gate Alliance, *Committee Hansard*, 5 May 2014, p. 23; Lock the Gate, *Submission 20*, p. 10; The Wilderness Society, *Submission 84*, p. 11.

19 ANEDO, *Submission 60*, p. 15; Greenpeace, *Submission 61*, p. 7.

20 Ms Anna Christie, *Submission 55*, pp 1–2; Greenpeace, *Submission 61*, p. 7; The Wilderness Society, *Submission 84*, p. 8; Northern Inland Council for the Environment, *Submission 90*, pp 14–15;

21 Ms Georgina Woods, Policy Coordinator, Lock the Gate Alliance, *Committee Hansard*, 5 May 2014, p. 3; see also Ms Sue Higginson, Principal Solicitor, ANEDO, *Committee Hansard*, 5 May 2014, p. 34; Australian Orchid Council, *Submission 2*, p. 2.

22 Greenpeace, *Submission 61*, p. 7.

23 Gomerioi Traditional Custodians, *Submission 93* and *Committee Hansard*, 18 June 2014; Greenpeace, *Submission 61*, p. 7.

24 Australian Orchid Council, *Submission 2*, p. 2.

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- timing issues with the conditions of approval, including the failure to ensure the adequacy of offsets prior to approval being granted (see further Chapter 4).<sup>26</sup> The approval condition requiring an independent review of the offsets after issuing the approval was criticised.<sup>27</sup> The Federal Court case, mentioned above, confirmed that the offset conditions need not be satisfied prior to commencing the approved clearing.<sup>28</sup> However, submitters queried whether this is desirable and what the consequences would be, for example, if the forest is already cleared and then subsequently the offset conditions cannot be met.<sup>29</sup>

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25 Lock the Gate Alliance, *Submission 20*, pp 2 and 11–12; The Wilderness Society, *Submission 84*, p. 6. However, as noted earlier, Whitehaven Coal disputed claims about the biodiversity values of the Leard State Forest: Whitehaven Coal, *Submission 83*, p. 3.

26 NELA, *Submission 31*, p. 5; ANEDO, *Submission 60*, p. 15; BirdLife Australia, *Submission 77*, p. 10; The Wilderness Society, *Submission 84*, p. 9.

27 See, for example, Greenpeace, *Submission 61*, p. 7.

28 *Northern Inland Council for the Environment Inc v Minister for the Environment* [2013] FCA 1419, 20 December 2013, para 40.

29 Ms Georgina Woods, Policy Coordinator, Lock the Gate, *Committee Hansard*, 5 May 2014, p. 3; Lock the Gate, *Submission 20*, p. 12; The Wilderness Society, *Submission 84*, p. 9 and see also p. 12; see also, for example, Ms Sue Higginson, Principal Solicitor, ANEDO, *Committee Hansard*, 5 May 2014, p. 34.





# Appendix 4

## Waratah Coal's Galilee Coal Project

### Overview of project<sup>1</sup>

#### *Introduction*

4.1 Waratah Coal's Galilee coal project includes two open cut mining pits and four underground coal mines in the Galilee Basin. The mines are expected to produce over 40 million tonnes per annum over a 30 year period. The mines are to be linked by a 453 km rail line to Abbot Point State Development Area (APSDA). In order for the development to proceed, 16,520ha of vegetation for the mine and 1,731ha for the rail corridor is to be cleared. In addition, it is estimated that 25,598ha will be impacted by subsidence associated with underground mining.<sup>2</sup>

#### *Impact of the project*

4.2 The proposed was determined to be a controlled action under the EPBC Act on 20 March 2009 based on the potential significant impacts on World Heritage properties, National Heritage places, listed threatened species and communities, listed migratory species and the Commonwealth marine environment. On 24 October 2013, it was determined that water resources, in relation to coal seam gas development and large coal mining development was also a controlling provision for the project.

4.3 In particular, the key impacts of the project are on:

- listed threatened species and communities through the clearance of remnant vegetation, including: 3,628ha of primary habitat for the endangered Black-throated Finch, 3,590ha of primary habitat for the vulnerable Squatter Pigeon, and 42ha of the endangered ecological community *Acacia harpophylla* (dominant and co-dominant);
- water resources due to drawdown for mine operation; changes to surface and groundwater hydrology; the potential for inter-aquifer connectivity impacting on formations within the Great Artesian Basin; increased surface-groundwater connectivity through subsidence; and cumulative impacts on surface and groundwater resources from coal mine projects proposed in the Galilee Basin; and
- subsidence-related impacts on an estimated 25,598ha, including ponding, surface cracking and impacts to habitat for EPBC Act listed threatened species and communities.

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1 The following overview of the project is based on information provided by the Department of the Environment, *Submission 79*, Attachment A, pp 5–8 and also EPBC Referral 2009/4737, [http://www.environment.gov.au/cgi-bin/epbc/epbc\\_ap.pl?name=current\\_referral\\_detail&propos al\\_id=4737](http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&propos al_id=4737) (accessed 18 June 2014).

2 Department of the Environment, *Submission 79*, Attachment A, p. 5.

### *Assessment of the proposal*

4.4 It was determined that the project would be assessed through an Environmental Impact Statement (EIS), in parallel with the Queensland Government. The Queensland Coordinator-General completed his Assessment Report for the proposal on 9 August 2013, concluding the Environment Impact Assessment process at the state level.

4.5 On 25 June 2013, the project was varied to excise the port component at Abbot Port and coal port facilities within the APSDA, a reduction in length of the railway line from 495km to 453km, and termination of the railway line at the boundary of the APSDA. Given the variation, the assessment of the impacts of the proposed action on matters protected under the EPBC Act were limited to where the rail line intercepts the boundary of the APSDA and its surrounds.

4.6 The EIS was made available for public comment between 26 September 2011 and 19 December 2011 with 1842 submissions received by Waratah Pty Ltd, the vast majority from individuals. The proponent addressed matters raised in public submissions in the finalised EIS, which was submitted to the department on 3 September 2013.

4.7 The proponent undertook avoidance and mitigation strategies for the project including:

- re-alignment of the proponent corridor to address cross drainage issues;
- commitment to implementing environmental management systems to protect receiving waters; and
- redesign of the creek diversions associated with the mine component to minimise impacts to Malcolm Creek.

4.8 The Commonwealth Minister for the Environment approved the project on 19 December 2013, subject to a number of conditions, including those relating to offsets.

### *Offset requirements*

4.9 The offsets package required under the conditions of approval<sup>3</sup> included requirements:

- for direct land based offsets for impacted listed threatened species and communities consisting of:
  - 10,000ha for the Black-throated Finch;
  - 6000ha for the Squatter Pigeon;
  - 383ha for the Red Goshawk;
  - 500ha for the Northern Quoll;
  - 5800ha for the Yakka Skink,

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3 See further <http://www.environment.gov.au/epbc/notices/assessments/2009/4737/2009-4737-approval-decision.pdf>

- 270ha for the Ornamental Snake;
- 72ha for the Dunmall's Snake; and
- 199ha for the 'Brigalow (*Acacia harpophylla* dominant and co-dominant)' ecological community;
- to prepare and implement an approved offset management plan for all the offset areas consistent with the Galilee Basin Offset Strategy and include commitments that demonstrate how the offsets areas required will be met;
- that the offsets management plan be approved by the Minister within 12 months of the commencement of Project Stage 2;
- that the offsets detailed in the offsets management plan must be legally secured within three years of commencement of Project Stage 2 or as required under Queensland legislation, whichever is earlier; and
- to make a contribution of \$100,000 each year for ten years to a strategic fund (with other proponents of Galilee Basin mines) for the better protection of listed threatened species and communities and to improve the understanding of matters of national environmental significance in the remote Galilee Basin.

4.10 The department commented that the proposed offset areas were identified by the proponent as containing the necessary vegetation communities and biodiversity values to acquit the offset requirements of the project. Preference was given to properties located as close as possible to the impact areas, larger properties that allow for the co-location of offset values and the achievement of strategic conservation outcomes, as identified in the Galilee Basin Offset Strategy. The department added:

During the assessment process, the department reviewed the proposed offsets provided in the Biodiversity Offset Proposal against the requirements of the Department's EPBC Act offsets assessment guide and determined that the proposed offsets provide 90 per cent or greater required for each threatened species and community, where residual impacts had been determined in the assessment process.<sup>4</sup>

4.11 In addition, the proponent has committed to:

- offsetting the conservation values of the Bimblebox Nature Refuge, so that within three years of the commencement of breaking ground, the proposed offset areas must be secured under Queensland legislation which will provide protection from clearing and development activities, mediating the major threats to listed threatened species and communities in the Galilee Basin; and
- developing and implementing species-specific management approaches and targeting key conservation and recovery actions for threatened species and communities. For example, maintaining populations of Red Goshawk across their range and implementing key management measures to promote recovery of the species through survey, monitoring and habitat protection, vegetation

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4 Department of the Environment, *Submission 79*, Attachment A, p 7.

management, weed, pest and fire management, and implementing appropriate grazing regimes.

4.12 The Queensland Coordinator-General imposed a condition requiring that the proponent compensate the State for the loss of biodiversity, conservation and educational values from the Bimblebox Nature Refuge as a result of the proposed action. The proponent has identified a 36,000ha property within the Galilee Basin Offset Strategy to offset for the loss of State identified conservation values associated with the Bimblebox Nature Refuge. The proposed offset property will be considered as part of the package of offsets proposed to meet the EPBC Act requirements.

### **Issues with the proposed offsets**

4.13 As noted in Chapter 6, the committee does not intend to comment on particular projects. However, the committee notes that submitters and witnesses raised a number of issues in relation to the offsets conditions for this project. These included:

- development of area protected under a conservation agreement forming part of the National Reserve System;<sup>5</sup>
- lack of recognition in the approval or offset conditions of the impact of development on the representation of a bioregion as provided for in the *National Reserve System Strategy 2009–2030*;<sup>6</sup>
- lack of protection of offsets 'in perpetuity';<sup>7</sup>
- whether the offset can be considered 'like for like'. For example, the Wildlife Preservation Society of Queensland – Sunshine Coast & Hinterland commented that:
 

...to select offset land many kilometres away would negate totally the proposed value and effectiveness of any offset. The Reserve contains threatened species of both flora and fauna, and suitable land must be found as an offset, in close proximity, in order for threatened flora to be transplanted and to which the fauna may safely move;<sup>8</sup>
- whether there has been sufficient consideration of the cumulative impact of developments given that in addition to the Waratah mine, three other coal mining projects already approved for construction in the Galilee Basin, which also require offsets of habitat for the Black-throated finch;<sup>9</sup>

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5 See, for example, Ms Paola Cassoni, Co-owner, Bimblebox Nature Refuge, *Committee Hansard*, 7 May 2014, p. 22; Interdisciplinary Conservation Science Research Group, *Submission 34*, p. 4; Dr Yung En Chee, *Submission 57*, p. 11; Mr Peter Boulot and Mr Ross Parisi, *Submission 62*, p. 2; Bimblebox Nature Refuge, *Submission 87*, p. 5.

6 Interdisciplinary Conservation Science Research Group, *Submission 34*, p. 4.

7 Interdisciplinary Conservation Science Research Group, *Submission 34*, p. 4; Dr Yung En Chee, *Submission 57*, p. 11; Mackay Conservation Group, *Submission 75*, p. 3.

8 Wildlife Preservation Society of Queensland–Sunshine Coast & Hinterland, *Submission 42*, p. 2.

9 Lock the Gate Alliance, *Submission 20*, p. 14.

- timing issues in that the offsets are not required to be in place prior to the commencement of the project;<sup>10</sup> and
- transparency issues in relation to the suitability of the proposed offsets.<sup>11</sup>

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10 Lock the Gate Alliance, *Submission 20*, p. 14; ANEDO, *Submission 60*, p. 19.

11 Mackay Conservation Group, *Submission 75*, p. 4.



# Appendix 5

## QGC's Queensland Curtis LNG project

### Overview of the project<sup>1</sup>

#### *Introduction*

5.1 QGC's Queensland Curtis LNG project included the development of coal seam gas fields in the Surat Basin and associated pipeline and other facilities. The five referrals for the proposed project were received by the department in August 2008.

#### *Impact of the project*

5.2 There were five separate component proposals for the project. The key impacts of the project included:

- coal seam gas field development in the Surat Basin in Queensland of up to 6,000 production wells (EPBC 2008/4398) –
  - loss of habitat and impacts to listed threatened species and ecological communities;
- a pipeline network of about 800km between the gas fields and Curtis Island (EPBC 2008/4399) –
  - loss of habitat and impacts to migratory species and listed threatened species and ecological communities; and
  - loss of World Heritage and National Heritage values caused by pipeline infrastructure in the Great Barrier Reef World Heritage Area;
- marine facilities on Curtis Island including a construction dock and material offload facilities (EPBC 2008/4401) –
  - loss of habitat and impacts to migratory species and listed threatened species and ecological communities; and
  - loss of World Heritage and National Heritage values caused by pipeline infrastructure in the Great Barrier Reef World Heritage Area;
- LNG facility on Curtis Island (EPBC 2008/4402) –
  - loss of habitat and associated World Heritage and National Heritage values caused by the construction and operation of the LNG facility;
  - increased risks to biodiversity values of the World Heritage and National Heritage property arising from increased shipping movements and other subsequent or indirect impacts;

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1 The following overview of the project is based on information provided by the Department of the Environment, *Submission 79*, Attachment A, pp 9–12.

- impacts on vegetation, biodiversity and landscape aesthetics arising from the development and operation of the LNG facility; and
- indirect impacts including increased pressures on the Great Barrier Reef World Heritage Area, including but not limited to, pressures on populations of vulnerable species, increased risks from shipping and increased use of the area;
- shipping activities associated with construction and LNG shipments from Curtis Island (EPBC 2008/4405) –
  - loss of habitat and impacts to migratory species and listed threatened species and ecological communities; and
  - loss of World Heritage and National Heritage values caused by pipeline infrastructure in the Great Barrier Reef World Heritage Area.

### *Assessment of the proposals*

5.3 The proposals were assessed collectively through environmental impact statement (EIS) under an accredited process with the Queensland Government. Forty submissions were received in relation to the whole-of-project EIS. The proposals were approved on 22 October 2010 subject to a number of conditions, including those relating to offsets.

### *Offset requirements*

5.4 The proposals' approvals required offsets to be delivered after project commencement and are attached as conditions to the relevant project approvals. In addition, management plans for the offset areas must be submitted for approval of the minister. The offset requirements are as follows.

5.5 In terms of the coal seam gas field development in the Surat Basin, the conditions require that:

- within six months of the commencement of the action the approval holder must prepare and submit an offset plan for the minister's approval;
- the offset plan must propose an offset area for the approved habitat disturbance limits relating to matters of national environmental significance within the project area. The offset area to be secured must be an area of private land which includes specified minimum areas of the relevant species and communities and must be secured within two years of commencement; and
- within two years of commencement the approval holder must secure a Rehabilitation Area Offset of at least 700 hectares of privately held property to compensate for indirect adverse impacts on matters of national environmental significance.

5.6 The department indicated that at the time of preparation of its submission, specific offsets have not yet been approved for this component of the project. QGC has identified several potential sites to acquit their offset obligations and has engaged with the Queensland Government regarding long term protection of those sites. The



department has raised concerns with QGC concerning the delay in securing offsets and is currently discussing the timetable for meeting the requirements of the conditions.

5.7 In relation to the pipeline network, the conditions require that:

- within 12 months of the commencement of the action the approval holder must prepare and submit an offset plan for the Minister's approval; and
- offsets are required for residual impacts related to disturbed threatened ecological communities and *Philothea sporadica*, *Cycas megacarpa*, migratory birds and Water Mouse that use the Kangaroo Island wetlands. Under the approval conditions, the offset areas above must be secured within specified timeframes linked to commencement of activities.

5.8 The department again indicated that at the time of preparation of its submission, specific offsets have not yet been approved for this component of the project. QGC has identified several potential sites but the department has raised concerns with QGC concerning the delay in securing offsets and is currently discussing the timetable for meeting the requirements of the conditions.

5.9 Two other offset requirements have been met: the temporary relocation and propagation of impacted Cycads and Cycad seedlings in a dedicated nursery; and contribution of at least \$250,000 to the Gladstone Port Corporation's migratory bird research study. An offset plan for the Narrows crossing has been addressed in the approved joint offset proposal from the three CSG/LNG approvals holders for offsets within the Great Barrier Reef World Heritage Area discussed below.

5.10 In terms of offsets for the marine facilities on Curtis Island, the approval requires that the water mouse management plan include proposed offsets for any unavoidable impacts that may occur on the water mouse as a result of project activities. The department advised that 'no unavoidable impacts were identified in the approved water mouse plan, and therefore there are no offsets required for water mouse at this time'.<sup>2</sup>

5.11 For the LNG facility on Curtis Island, the approval conditions require:

- an offsets plan to offset the loss of habitat and associated World Heritage and National Heritage values caused by the construction and operation of the LNG facility. The plan must be approved by the minister. The offset under this condition is required to contain attributes or characteristics at least corresponding with those of the LNG facility site in the World Heritage Area and the QGC must use its best endeavours to secure National Park status for the offset site. As part of joint offsets in respect of LNG facilities, QGC's contribution is a minimum area of 1,375 ha. The joint approach has resulted in the approval holders proposing to secure a significant suite of properties in the Great Barrier Reef World Heritage Area which the Queensland Government will incorporate into its conservation estate;

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2 Department of the Environment, *Submission 79*, Attachment A, p. 11.

- the development of a long term turtle management plan comprising monitoring of turtles in the Gladstone Harbour region and a cash payment of \$200,000 per annum plus \$100,000 per annum per operating LNG train to support field operations within the Great Barrier Reef Marine Park.

5.12 The department indicated that the delegate of the minister has approved a joint offset proposal from the three CSG/LNG approvals holders which would result in meeting all their direct offset obligations within the Great Barrier Reef World Heritage Area. The proposed offset includes joint purchase of 700 ha of freehold land to be gifted to the Queensland Government for conservation purposes and the purchase of long-term property leases over 23,000 ha. It also includes funding for protected area management.

5.13 Information on the proposed offset is currently classified as commercial in-confidence at the request of the approval holders as commercial negotiations are taking place involving private landholders and the Queensland Government. The department was advised that commercial negotiations are expected to be completed by June 2014.<sup>3</sup>

5.14 Finally, in relation to the shipping activity component of the project, the approval conditions require a shipping activity management plan, which must include proposed offsets for any unavoidable impacts that may occur on specific species as a result of project activities. The department advised that 'no unavoidable impacts were identified in the approved shipping activity management plan, and therefore there are no offsets required at this time'.<sup>4</sup>

### ***Auditing and monitoring***

5.15 The department indicated that its staff had visited the project on seven occasions following approval with further monitoring inspections planned for 2014.<sup>5</sup>

### **Other developments on Curtis Island**

5.16 The QGC proposal is not the only project on Curtis Island: the APLNG LNG plant was approved in February 2011; and the Santos LNG terminal was approved in October 2010. The Santos and APLNG developments also included offsets conditions requiring the securing of property within the Great Barrier Reef World Heritage Area. The offsets for each project were to be 'additional to any similar offset required under an EPBC Act condition of approval for another proponent of an LNG facility on Curtis Island'.<sup>6</sup>

5.17 Lock the Gate Alliance indicated that all three proponents are now pursuing a joint offset strategy. Lock the Gate noted that Santos had reported that the offset plan

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3 Department of the Environment, *Submission 79*, Attachment A, p. 11.

4 Department of the Environment, *Submission 79*, Attachment A, p. 12.

5 Department of the Environment, *Submission 79*, Attachment A, p. 12.

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

had been submitted and approved by the Minister in September 2013. Lock the Gate went on to note that, as far as it was aware, the details were not public.

5.18 However, in August 2013, the Queensland Government announced additions to reserves on Curtis Island, purchased with funding from LNG terminal proponents, comprising a 1,912ha addition to Curtis Island National Park and a 1,000ha addition to Curtis Island Conservation Park. Lock the Gate stated that 'if this is the extent of the implementation of these conditions of their approvals, the Department of Environment have signed off on a program that is over 800ha short of the requirement in the approval'.<sup>7</sup>

5.19 QGC commented that:

When committing to the QCLNG Project in 2010, QGC initially invested \$5 million to establish the 4500ha Curtis Island Environmental Management Precinct at the southern end of Curtis Island. The precinct was declared to recognise, protect and maintain areas of high ecological significance and habitat integrity.

With other LNG developers on Curtis Island, QGC is providing financial contributions over 25 years for precinct management and maintenance, including research into native plants and animals such as dugongs, turtles and seagrass.<sup>8</sup>

5.20 In December 2013, following recommendation from the department, the Environment Minister gave approval for a fourth LNG terminal in Curtis Island to be owned by Arrow Energy. A requirement of approval is that an offset property of at least 1,400 ha on Curtis Island be transferred into the national reserve system.<sup>9</sup>

### **Issues with proposed offsets**

5.21 As noted in Chapter 6, the committee does not intend to comment on particular projects. However, the committee notes that submitters and witnesses raised a number of issues in relation to the offsets conditions for this project. These included:

- whether it is appropriate to be offsetting impacts on a World Heritage Area at all (see Chapter 3);<sup>10</sup>
- timing of offset arrangements. The UNESCO Monitoring Mission has criticised the decision to allow the projects to proceed before the offset arrangements were in place;<sup>11</sup>
- whether the offset requirement is 'like for like';<sup>12</sup>

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7 Lock the Gate, *Submission 20*, p. 5.

8 QGC, *Submission 74*, p. 2.

9 Lock the Gate, *Submission 20*, pp 6–7.

10 Lock the Gate, *Submission 20*, pp 6–7; see also ANEDO, *Submission 60*, p. 17.

11 Lock the Gate, *Submission 20*, p. 6; see also ANEDO, *Submission 60*, p. 17.

12 Gladstone Conservation Council Inc, *Submission 59*, p. 3.

- lack of transparency in offset plans<sup>13</sup> including those that are 'commercial in confidence'; and
- whether the offsets are secure 'in perpetuity'.<sup>14</sup>

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13 Mr Jan Arens, President, Gladstone Conservation Council Inc, *Committee Hansard*, 7 May 2014, p. 7.

14 Gladstone Conservation Council Inc, *Submission 59*, p. 3.

# Appendix 6

## Abbot Point Dredging Project

### Overview of project<sup>1</sup>

#### *Introduction*

6.1 On 5 December 2011, North Queensland Bulk Ports Corporation Limited referred a proposal under the EPBC Act to undertake capital dredging of approximately 3 million cubic metres at the Port of Abbot Point, and for the disposal of the dredged material (including options at sea). The proposal would facilitate the development of Terminal 0, Terminal 2 and Terminal 3 at the Port of Abbot Point in Queensland.

#### *Impact of the project*

6.2 On 6 January 2012, the project was determined to be a controlled action due to likely significant impacts on World Heritage properties; National Heritage places; listed threatened species and communities; listed migratory species; Commonwealth marine areas; and the Great Barrier Reef Marine Park.

#### *Assessment of the proposal*

6.3 The project was assessed by Public Environment Report (PER) with 103 submissions received on the draft document. The proposal was approved on 10 December 2013 subject to 41 conditions, including requirements to mitigate and manage impacts on the environment and for the provision of offsets.

#### *Offset requirements*

6.4 Condition 31 of the EPBC Act approval conditions requires the proponent to submit an Offsets Plan to the Minister for the Environment for approval prior to commencement of dredging and disposal activities. Under the approval decision,<sup>2</sup> the Offsets Plan must:

- address the loss of seagrass from the dredge area and areas of potential seagrass loss resulting from the dredge plume extent;
- outline the process to undertake actions that will result in a net benefit outcome for the World Heritage Area;

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1 The following overview of the project is based on the information provided by the Department of the Environment, *Submission 79*, Attachment A, pp 13–14. See also EPBC Referral 2011/6213 [http://www.environment.gov.au/cgi-bin/epbc/epbc\\_ap.pl?name=referral\\_detail&proposal\\_id=6213](http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=referral_detail&proposal_id=6213) (accessed 6 June 2014).

2 <http://www.environment.gov.au/epbc/notices/assessments/2011/6213/2011-6213-approval-decision.pdf> (accessed 6 June 2014).

- consider how these offsets will contribute to programs or incentives and align with the broader strategies and programs for the Great Barrier Reef, including Reef Trust 2050;
- 150% of the total amount of fine sediments, potentially available for re-suspension into the marine environment from the dredging and disposal activities, must be offset by a reduction in the load of fine sediments entering the marine environment from the Burdekin and Don catchments. This can take account of information on the sedimentation of fine sediments as it becomes available (condition 31(d));
- monitor and report on performance of the actions undertaken in relation to the targets required at 31(d);
- outline the consultation process undertaken with the Great Barrier Reef Marine Park Authority in developing the Offsets Plan;
- publish an annual public report outlining how the actions are achieving the targets in 31(d) for the duration of this approval; and
- outline contingency actions and additional management measures to address any deficiencies to meet the targets at 31(d).

6.5 Condition 32 states that 'the approved Offsets Plan must be implemented'.

6.6 The Department's submission states that:

The offsets were considered within the framework of the EPBC Act Environmental Offsets Policy and to demonstrate that the outcome would result in a net benefit. In relation to the 150% offset requirement, the proponent suggested investment in sediment reduction options in the Great Barrier Reef catchment, and the Department put forward the quantum required to get a meaningful improvement in water quality.<sup>3</sup>

6.7 The Department's submission further advises that 'an independent technical advice panel will review the adequacy of the mitigation, monitoring, research and offset requirements and whether they meet the conditions of approval, before any dredging begins'.<sup>4</sup>

6.8 The Department's submission states that:

Overall, the implementation of the conditions of approval will result in a net benefit to the health of the Great Barrier Reef and better environmental protection in the long-term.<sup>5</sup>

### **Legal challenge**

6.9 The committee notes that the Minister's approval decision is being challenged by the Mackay Conservation Group in the Federal Court under the *Administrative*

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3 Department of the Environment, *Submission 79*, Attachment A, p. 14.

4 Department of the Environment, *Submission 79*, Attachment A, p. 14.

5 Department of the Environment, *Submission 79*, Attachment A, p. 14.

*Decisions (Judicial Review) Act 1977* (Cth). The case has been set down for trial in October 2014.<sup>6</sup>

### Issues with the proposed offsets

6.10 As noted in Chapter 6, the committee does not intend to comment on particular projects. However, the committee notes that submitters and witnesses raised a number of key issues in relation to the offsets conditions for this project. These included:

- the feasibility of achieving the offset condition requiring 150% of fine sediments to be offset by a reduction in the load of fine sediments entering the marine environment from the Burdekin and Don catchments. Submitters described this requirement as 'undoable', 'impossible' and 'highly complex'.<sup>7</sup> For example, the Mackay Conservation Group calculated that this would require around 1.62 million tonnes to be offset, and argued that in the past decade the Reef Water Quality program only managed to reduce sediment loads from rivers flowing into the Great Barrier Reef World Heritage marine waters by 320,000 tonnes;<sup>8</sup>
- whether the offsets requirement is 'like for like' (as discussed further in Chapter 3) due to, for example, the differences between sedimentation from river discharges and sedimentation from dredging;<sup>9</sup>
- whether it is appropriate to be offsetting impacts on a World Heritage Area at all (see Chapter 3);<sup>10</sup>
- whether the mitigation hierarchy (as discussed in Chapter 3) has been properly followed, including whether mitigation measures and alternative options such as the disposal of spoil on land, were adequately and fully

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6 See further Environmental Defender's Office (Queensland), *Abbot Point Dredging Case Summary — Federal Court Judicial Review*, <http://www.edo.org.au/edoqld/news/mcg-v-minister-for-the-environment-and-nqbp-dredging-case/> (accessed 17 June 2014).

7 See, for example, North Queensland Conservation Council, *Submission 18*, pp 5–6; Mackay Conservation Group, *Submission 75*, p. 10; WWF-Australia, *Submission 73*, p. 4; ANEDO, *Submission 60*, p. 21.

8 Mackay Conservation Group, *Submission 75*, p. 11; see also North Queensland Conservation Council, *Submission 18*, pp 5–6; Mrs Patricia Julien, Research Analyst, Mackay Conservation Group, *Committee Hansard*, 7 May 2014, p. 26; Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth, *Committee Hansard*, 7 May 2014, p. 44

9 See, for example, Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth, *Committee Hansard*, 7 May 2014, p. 44; Mrs Patricia Julien, Research Analyst, Mackay Conservation Group, *Committee Hansard*, 7 May 2014, p. 26; WWF-Australia, *Submission 73*, p. 5; see also ANEDO, *Submission 60*, p. 21.

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

considered.<sup>11</sup> In addition, only fine sediments 'potentially available for re-suspension' are covered by the offset requirement, and as such, it was suggested that not all the residual impacts being offset;<sup>12</sup>

- whether the principle of additionality (discussed further in Chapter 3) has been met—given that the Reef Water Quality Protection Plan 2013 already aims to improve the quality of water entering the reef from broadscale land use. Given this objective, ANEDO argued that no water quality offset can be 'additional' in the sense required by the EPBC Act Offsets Policy;<sup>13</sup>
- the capacity to measure this offset in a timely and accurate way;<sup>14</sup>
- the lack of specificity in the offset conditions, for example, the method for achieving reductions in sedimentation is not detailed, nor any timeframes for meeting the catchment sediment reduction. Similarly, the requirement to 'address the loss of seagrass' was described as 'loosely framed';<sup>15</sup>
- transparency issues in relation to the process for negotiating and deciding on offsets (discussed further in Chapter 4). For example, Greenpeace advised that they had obtained documents through freedom of information requests, which they claimed:

...show that they [the proponent] were presenting very different numbers to the environment department than are available in the public documentation. The public documentation does not at all articulate what quantity of fine sediment will be available for resuspension, so you cannot scrutinise it.<sup>16</sup>

- lack of consultation with traditional owners;<sup>17</sup>
- scientific uncertainties in relation to offsetting in the marine environment, (discussed further in Chapter 4), such as the 'fundamental problems with rehabilitating seagrass';<sup>18</sup> and

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11 Mr Adam Walters, Greenpeace Australia, *Committee Hansard*, 5 May 2014, p. 24; Mrs Patricia Julien, Research Analyst, Mackay Conservation Group, *Committee Hansard*, 7 May 2014, pp 30–31; Mackay Conservation Group, *Submission 75*, p. 11; Greenpeace, *Submission 61*, pp 7–8; Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth, *Committee Hansard*, 7 May 2014, pp 43–44.

12 Mrs Patricia Julien, Research Analyst, Mackay Conservation Group, *Committee Hansard*, 7 May 2014, pp 29–30.

13 ANEDO, *Submission 60*, pp 20–21.

14 Dr Su Wild-River, *Submission 38*, p. 7; ANEDO, *Submission 60*, p. 21.

15 ANEDO, *Submission 60*, p. 21; NELA, *Submission 31*, p. 11.

16 Mr Adam Walters, Greenpeace Australia, *Committee Hansard*, 5 May 2014, p. 23; see also Greenpeace, *Submission 61*, pp 7–8; Mackay Conservation Group, *Submission 75*, p. 11.

17 Indigenous Advisory Committee, *Submission 82*, p. 2.



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- timing issues in relation to the approval condition requiring the preparation of an offset plan before dredging commences. Submitters were critical that 'no timeframe is specified for approval of the plan or implementation of offset activities',<sup>19</sup> and that there is no requirement that the actual offsets be identified or implemented prior to the commencement of dredging.<sup>20</sup> Timing issues are discussed more generally in Chapter 4.

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18 Dr Justine Bell, *Committee Hansard*, 7 May 2014, p. 4; Mr Jeremy Tager, Nanotechnology Campaigner, *Committee Hansard*, 7 May 2014, p.41; Dr Megan Saunders and Dr Justine Bell, *Submission 24*, p. 2; Greenpeace, *Submission 61*, p. 5. Note that issues with offsetting in the marine environment are discussed further in Chapter 4.

19 Mr Jeremy Tager, Nanotechnology Campaigner, Friends of the Earth, *Committee Hansard*, 7 May 2014, p. 40; NELA, *Submission 31*, p. 11.

20 ANEDO, *Submission 60*, p. 20.



# Appendix 7

## Jandakot Airport development

### Overview of the project<sup>1</sup>

#### *Introduction*

7.1 The Jandakot Airport is located to the south of Perth CBD. In 2009, a proposal was made to construct a fourth runway and associated taxiways, runway extensions, and clear land for the development of aviation and commercial precincts. The site was entered on the Interim List of the Register of the National Estate as one of the best remaining examples of Banksia woodland on the Swan Coastal Plain and was listed as a Bush Forever site by the Western Australian Government.

#### *Impact of the project*

7.2 The impact of the development project included:

- the clearing of approximately 167ha of native vegetation (Banksia woodland and a small portion of Paperbark woodland) and suitable habitat for the Carnaby's Black-Cockatoo, the Grand Spider Orchid, and the Glossy-leaved Hammer Orchid;
- the translocation of 40 Grand Spider Orchids; and
- the translocation of four Glossy-leaved Hammer Orchids.

7.3 The Department of the Environment (the department) also indicated that Commonwealth land would be affected by removal of vegetation, disturbing soil, building on a priority 1 drinking water source area for the Jandakot Groundwater Mound, removal of habitat for species of regional significance including the Quenda (and the Western Brush Wallaby noise and traffic impacts on surrounding residential areas, and removal of an area listed on the Register of the National Estate (RNE).<sup>2</sup>

#### *Assessment of the proposal*

7.4 The Jandakot Airport development was referred to the department on 17 March 2009. On 17 April 2009, the proposal was determined to be a controlled action, to be assessed by preliminary documentation. The department received 15 public comments during the referral stage and eight public comments were received by the proponent during the assessment.

7.5 The department indicated that at the time of assessment, Jandakot Airport Holdings (JAH) already had management plans for flora and vegetation,

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1 The following overview of the project is based on the information provided by the Department of the Environment, *Submission 79*, Attachment A, pp 15–16. See also EPBC Referral 2009/4796 [http://www.environment.gov.au/cgi-bin/epbc/epbc\\_ap.pl?name=current\\_referral\\_detail&proposal\\_id=4796](http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=4796)

2 Department of the Environment, *Submission 79*, Attachment A, p. 15.

environmental weeds, fauna, feral animals, dieback, ecological restoration and fire. In addition, within the Jandakot Airport lease there were several dieback affected areas which were the subject of active dieback management by JAH to contain the disease.

7.6 The proposal was approved on 25 March 2010, subject to a number of conditions of approval, including requirements for the provision of offsets.

### ***Offset requirements***

7.7 Condition 5 of the EPBC Act approval conditions required the proposed rehabilitation of a former sand extraction area, creating a continuous conservation area of approximately 657 ha.<sup>3</sup> These proposed works did not progress after the approval was issued due a lack of agreement to the rehabilitation works from the relevant third-party.

7.8 In response to Condition 5 not advancing past planning stages, JAH was required to work with Western Australian Government toward successful offsite rehabilitation of Carnaby's Black-Cockatoo habitat with use of the topsoil sourced from staged clearing at the Jandakot Airport. This was determined as a direct offset valued at \$9.2 million.

7.9 The approval decision also required:

- placement of a minimum of 1600ha of recognised Carnaby's Black-Cockatoo habitat under ongoing conservation protection;
- expenditure of a minimum of \$750,000 over five years for the research on recovery actions for Carnaby's Black-Cockatoo and the direct conservation management of the Jandakot Airport site conservation areas;
- measures to fund and provide on-site assistance for the Jandakot Rare Orchid Research Program, to be undertaken by Botanic Gardens and Parks Authority researchers, with the aim to assist the research in ensuring the continued viability and increase numbers of Grand Spider orchid.

7.10 An Offset Plan was submitted to the department in March 2010 and approved on 10 June 2010.

7.11 The department commented that the proponent had satisfied the condition in relation to the 1600 ha of Carnaby's Black-Cockatoo habitat through the provision of 2460ha to the Department of Parks and Wildlife (DPaW) for inclusion within the National Reserve System.

### ***Auditing and monitoring***

7.12 On 12 November 2012, Jandakot Airport Holdings was instructed to undertake a directed independent audit. This audit was submitted to the department in May 2013. Two potential non-conformances with the approved Offset Plan were identified, relating to a failure to meet deadlines. The department stated that 'as these non-conformances were administrative in nature (failure to make payments prior to

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3 <http://www.environment.gov.au/epbc/notices/assessments/2009/4796/approval-notice.pdf>

clearing commencing), and resulted in no materially adverse environmental impacts, the auditors did not consider this to be a significant non-compliance'.<sup>4</sup>

7.13 The department indicated that it has been actively monitoring the Jandakot development. Activities undertaken to date include:

- consideration of annual Conservation Management Plan reporting;
- project site visit and topsoil rehabilitation offset site visit in October 2012; and
- requests for amendments to management plans and variations to conditions.<sup>5</sup>

### ***Further assessment***

7.14 On 23 October 2013, JAH referred the clearing of 51 ha of high quality Banksia woodland to enable expanded aviation aircraft operations (including administration and training) and aircraft maintenance (EPBC 2013/7032). The proposed action was deemed a controlled action with the controlling provisions being sections 18 and 18A (Threatened Species and Communities) and sections 26 and 27 (Commonwealth land).

7.15 The department indicated that, as of 4 April 2014, the proposal was still under active assessment. An offsets proposal was included in the assessment information published for public comment.

### **Issues with proposed offsets**

7.16 As noted in Chapter 6, the committee does not intend to comment on particular projects. However, the committee notes that submitters and witnesses raised a number of key issues in relation to the offsets conditions for this project. These included:

- whether the mitigation hierarchy has been properly followed, given that as argued by Professor Richard Hobbs and Dr Leonie Valentine, 'there was never any suggestion that the site at Jandakot would not be developed, despite the Banksia woodland there being identified as being of high conservation value during the Bush Forever process';<sup>6</sup>
- whether the offset requirement met the requirement to 'improve or maintain' (as discussed in Chapter 3) due to problems with locating a suitable site resulting in compromises and lack of knowledge of the outcome of the proposed action (transfer of topsoil to the offset site to create Banksia woodland);<sup>7</sup>

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4 Department of the Environment, *Submission 79*, Attachment A, p. 16.

5 Department of the Environment, *Submission 79*, Attachment A, p. 16.

6 Professor Richard Hobbs and Dr Leonie Valentine, *Submission 25*, p. 1.

7 Professor Richard Hobbs and Dr Leonie Valentine, *Submission 25*, p. 1; Urban Bushland Council of WA, *Submission 53*, p. 1; Dr Denis Saunders AM, Director and Founding Member, Wentworth Group of Concerned Scientists, *Committee Hansard*, 6 May 2014, p. 17

- timing issues with the offsets in that there will be a time lag between the destruction of woodland habitat and the maturation of the offset habitat to a point that it can support the Carnaby's Black-Cockatoo;<sup>8</sup>
- failure to adequately consider the equally endangered Grand Spider Orchid (*Caladenia huegelii*) in the offset;<sup>9</sup>
- lack of transparency in relation to indirect financial offsets;<sup>10</sup>
- issues with monitoring of approval conditions;<sup>11</sup> and
- a barrier to the transfer of the offset to the conservation estate due to the offset area being seen as 'prospective' for mining under the *Mining Act 1978*.<sup>12</sup>

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8 Professor Richard Hobbs and Dr Leonie Valentine, *Submission 25*, pp 1–2; Dr Denis Saunders AM, Director and Founding Member, Wentworth Group of Concerned Scientists, *Committee Hansard*, 6 May 2014, p. 17.

9 Urban Bushland Council of WA, *Submission 53*, p. 1; Wildflower Society of Western Australia, *Submission 64*, p. 2.

10 Friends of Ken Hurst Park, *Submission 65*, p. 5; Australasian Bat Society Inc, *Submission 69*, pp 4–5.

11 Wildflower Society of Western Australia, *Submission 64*, pp 4–5; Friends of Ken Hurst Park, *Submission 65*, pp 4–5.

12 Wildflower Society of Western Australia, *Submission 64*, p. 3.