

# ACT Draft Environmental Offsets Policy



Camilla Taylor<sup>1</sup>

## Introduction

Environmental offsets for ACT development projects have previously been given effect via the EPBC Act. An ACT offsets policy is now required by the Commonwealth Government under the new 'one stop shop' arrangement for environmental approvals. It is proposed that the *Planning and Development Act 2007* will provide for the offsets and that the ACT will seek to facilitate the implementation of EPBC Act offset requirements. The approach as described by the ACT government aims to streamline offset requirements and delivery by considering offsets that meet both Commonwealth and ACT requirements together.

The ACT government has proposed the new offset policy will provide 'environmental compensation' for development impacts on sites that contain matters of national environmental significance, such as threatened species or communities like Yellow Box–Red Gum Woodland; it will be based on the Commonwealth Government's offsets policy with supplementary information to meet the ACT's unique conditions.<sup>2</sup> It is also proposed that the Conservator of Flora and Fauna be given a key role in the governance arrangements for offsets.

The EDO (ACT) has serious concerns about the establishment of an offset policy in the ACT. As the Australian Network of Environmental Defenders Offices (**ANEDO**) has previously noted, the idea that impacts on such unique matters of national environmental significance can simply be offset, is deeply concerning and in many cases it will not be possible to offset impacts on specific unique places and species.<sup>3</sup> The EDO recognises that offsets do form a part of Australian jurisdictions' policies and to the extent that the ACT government is committed to the use of offsetting it was recommended that it seek to ensure positive biodiversity outcomes are maximised based on rigorous science and that achieving those biodiversity outcomes is placed at the centre of any offsetting scheme and policy.<sup>4</sup>

## Recommendations

Given the accreditation of the ACT's standards for environmental assessment and the imminent equivalent for approvals under the 'one stop shop' policy, it is vital that the offsetting regime is subject to legislation and not to mechanisms such as regulation or policy which are subject to changes attracting less scrutiny. In light of the as yet incomplete review of the *Nature Conservation Act 1980* (**the NC Act**) and that the introduction of an offset policy will necessitate further amendments to the NC Act as well as the *Planning and Development Act 2007* (**the PD Act**), the EDO did not recommend the offsets regime

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<sup>1</sup> Principal Solicitor, EDO ACT

<sup>2</sup> [www.environment.act.gov.au/\\_\\_data/assets/pdf\\_file/0020/607052/ACT-Offsets-Policy-and-Delivery-Framework-Position-Paper.pdf](http://www.environment.act.gov.au/__data/assets/pdf_file/0020/607052/ACT-Offsets-Policy-and-Delivery-Framework-Position-Paper.pdf)

<sup>3</sup> ANEDO Submission on the draft EPBC Act Environmental Offsets Policy 21 October 2011, p 2. Available at: [http://d3n8a8pro7vnm.cloudfront.net/edonsw/pages/302/attachments/original/1380674370/111021epbc\\_offsets.pdf?1380674370](http://d3n8a8pro7vnm.cloudfront.net/edonsw/pages/302/attachments/original/1380674370/111021epbc_offsets.pdf?1380674370)

<sup>4</sup> EDO (ACT) submission, ACT Environmental Offset Policy, 11 July 2014, [edoact.org.au/sites/default/files/EDO%20ACT%20Offset%20Policy%20sub%2011072014.pdf](http://edoact.org.au/sites/default/files/EDO%20ACT%20Offset%20Policy%20sub%2011072014.pdf)



is developed expeditiously, but rather the ACT government develop rigorous standards based on robust and objective science as well as applying the fundamental principles as outlined in the submission.<sup>5</sup>

Historically, offsets have been developed and applied in a variety of ways, with variable outcomes in Australia and internationally. Offset schemes are also widely criticised by the community and scientists as failing to protect our environment.<sup>6</sup> Further, ANEDO has previously submitted that there is a lack of consistency, ecological credibility, rigour, enforceability and standard legislative parameters for offsetting in Australia.<sup>7</sup>

In the development of the offset strategy the EDO urged the ACT government to closely examine the Senate (Environment and Communications Committee) Environmental Offsets Report, June 2014.<sup>8</sup> In its Report, the Senate Committee made 21 recommendations, including that the EPBC Act Environmental Offsets Policy be revised. As the ACT government is developing its offsets policy based on the Commonwealth Government's Offset policy<sup>9</sup> the EDO submitted it ought to first assess what the outcomes of the Inquiry and the Committee's recommendations will be rather than developing a policy on a regime that was found to be inadequate in some respects and may otherwise be outdated in the near future. Otherwise, in the interests of environmental protection, scientific rigour and community confidence in the ACT scheme, the ACT government was urged to take the Senate Committee's recommendations into account when developing the offset framework.

The EDO also recommended that:

- Environmental issues and concerns are not overridden by socio-economic criteria in planning and decision making;
- All offsets are fully implemented and verified prior to a development proposal going ahead;
- The recommendations of the International Union for Conservation of Nature's Independent Report on Biodiversity Offsets be considered and applied as best practice activity for biodiversity offsetting.<sup>10</sup>

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<sup>5</sup> <http://edoact.org.au/sites/default/files/EDO%20ACT%20Offset%20Policy%20sub%2011072014.pdf> pg 2

- Offsets must be based on sound ecological studies and principles, such as 'like for like' so as not to degrade protected matters over time and any proposal to offset an environmental impact through a greater amount of land with lower environmental values will not be accepted;
- Legislation and policy should set clear limits on the use of offsets such as 'red flag' and 'no go' areas;
- All offsets must adequately reflect the true principle of additionality so that offsets are not granted in relation to areas that are already protected under existing territory legislation or policy;
- Monitoring requirements are specified in the legislation and offset arrangements are legally enforceable; all conditions of an offset approval should be made very clear regarding monitoring and compliance;
- Conditions of offsets must be specifically enforced and the *Planning and Development Act 2007* be amended to include specific sanction provisions to prevent non-compliance.

<sup>6</sup> [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/Environmental\\_Offsets/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Environmental_Offsets/Submissions)

<sup>7</sup> ANEDO Submission to the Inquiry into Environmental Offsets, 4 April 2014, p 3. Available at: [www.edo.org.au/policy/140408-ANEDO-Submission-To-Senate-Inquiry-Into-Offsets.pdf](http://www.edo.org.au/policy/140408-ANEDO-Submission-To-Senate-Inquiry-Into-Offsets.pdf)

<sup>8</sup> [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/Environmental\\_Offsets/Report/~media/Committees/Senate/committee/ec\\_ctte/environ\\_offset/report/report.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Environmental_Offsets/Report/~media/Committees/Senate/committee/ec_ctte/environ_offset/report/report.pdf)

<sup>9</sup> [www.environment.act.gov.au/environment/environmental-offsets-policy](http://www.environment.act.gov.au/environment/environmental-offsets-policy)

<sup>10</sup> [www.icmm.com/content/download?version=preview&documentId=4934](http://www.icmm.com/content/download?version=preview&documentId=4934)

## Use of conservation reserves as offsets

It is also of great concern that the ACT is seeking to use offsets within existing conservation reserves and that the Guidelines state that the Commonwealth requirement for additionality and conservation gain does not preclude offsets within existing reserves as long as it can be demonstrated that the outcomes to be gained through the offset are additional to current requirements.<sup>11</sup> It appears this highly controversial policy is being taken due to the ACT's relative small land mass so as to permit what will eventually result in disproportionate development in the ACT. Any offset action must be additional to what is already required by law. The requirement of 'additionality' must be based on clear criteria to ensure that offsets are not approved unless they provide a conservation benefit additional to what would otherwise occur. An offset in an otherwise protected area does not provide an additional net value. It is effectively not an offset at all.<sup>12</sup> This would therefore fail to meet the principle of additionality. The application of the additionality principle (both nationally and internationally) generally prohibits use of a protected area as an offset. There is a very high duty of care by governments to conservation in nature reserves, so there is little capacity to obtain gains in biodiversity within nature reserves that are additional to existing commitments. The application by the ACT government of the offsets policy in this manner is fundamentally changing the way we go about conservation.<sup>13</sup>

The Senate Committee into Environmental Offsets also examined the application of the principle of additionality in relation to offsets being used to protect land that is already protected as a park or nature reserve. The Committee reported that this practice does not deliver a conservation gain and that it has the potential to undermine the objectives of the EPBC Act to promote the conservation of biodiversity. The Committee recommended the Commonwealth Environmental Offsets Policy be revised to provide further clarity on the principle of additionality and that the Environment Department ensures 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.<sup>14</sup> Protecting existing habitats only provides an additional conservation outcome in the following circumstances:

- if habitat is good quality – where it is under a *real threat* of clearing or significant decline in quality;
- if habitat is not of good quality – where it is *actively managed* in perpetuity to achieve a *gain in biodiversity values* equivalent to the loss.<sup>15</sup>

Neither of these scenarios apply to nature reserves in the ACT if the protected area is not left to be protected as originally intended. The criteria on which offset sites are selected must be clear and it is essential that it is applied consistently and accurately. For additionality to prosper in an offsets policy, it must provide clear decision-making criteria for determining when an offset is additional.

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<sup>11</sup> International Union for Conservation of Nature's Independent Report on Biodiversity Offsets, January 2013, available at: <[http://www.environment.act.gov.au/\\_\\_data/assets/pdf\\_file/0020/607052/ACT-Offsets-Policy-and-Delivery-Framework-Position-Paper.pdf](http://www.environment.act.gov.au/__data/assets/pdf_file/0020/607052/ACT-Offsets-Policy-and-Delivery-Framework-Position-Paper.pdf)>

<sup>12</sup> ANEDO Submission to the Inquiry into Environmental Offsets, 4 April 2014. Available at: <<http://www.edo.org.au/policy/140408-ANEDO-Submission-To-Senate-Inquiry-Into-Offsets.pdf>>

<sup>13</sup> Dr Phil Gibbons, <http://www.canberratimes.com.au/comment/its-becoming-harder-to-see-the-trees-for-the-revenue-20140128-3112b.html>.

<sup>14</sup> [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/Environmental\\_Offsets/Report/~/\\_media/Committees/Senate/committee/ec\\_ctte/environ\\_offset/report/report.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Environmental_Offsets/Report/~/_media/Committees/Senate/committee/ec_ctte/environ_offset/report/report.pdf), recommendation 2 & 3, pages 96-97.

<sup>15</sup> ANEDO Submission on the draft EPBC Act Environmental Offsets Policy 21 October 2011, p9. Available at: <[http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/302/attachments/original/1380674370/111021epbc\\_offsets.pdf?1380674370](http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/302/attachments/original/1380674370/111021epbc_offsets.pdf?1380674370)>

## Monitoring and enforcement

Monitoring and evaluation of approved offsets arrangements must also be established and adequately resourced to determine whether promised environmental outcomes are achieved over the short and long term. Offsets in the ACT must be underpinned by strong enforcement and compliance mechanisms in legislation, with adequate resourcing, established from the outset.

Evidence to show that offset schemes actually achieve the intended biodiversity outcomes is severely lacking. In most cases it is too early to say whether an offset ecosystem has been restored to an equivalent of the ecosystem that was cleared at the development site.<sup>16</sup>

Furthermore, ecological outcomes may be threatened by further development. In other jurisdictions, offset areas do not get managed in the long term as they end up being the site of new development (and further offset). An example of this issue was raised by the proposed Warkworth Mine extension near Bulga in NSW, where a previous offset area was slated to be mined and was the subject of litigation in both the NSW Land and Environment Court and the NSW Court of Appeal.<sup>17</sup> A study of this case demonstrates that environmental outcomes are uncertain and in this respect the legislation should explicitly refer to the principle of permanence.

An effective monitoring and enforcement scheme includes guidelines on:

- The period over which monitoring will be required;
- The funding for monitoring activities (funding should be built into project cost from the beginning, including on a 'cost recovery' basis as necessary);
- Circumstances in which remedial actions will be required;
- Types of remedial actions that may be appropriate; and
- Liability issues for failed offsets (which should rest with the proponent).<sup>18</sup>

In relation to the ACT offset policy, more detail is required on the proposed monitoring, auditing, enforcement and compliance measures and such measures must form a part of the Policy from the outset and later enshrined in the legislation.

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<sup>16</sup> ANEDO Submission, above n11, 6.

<sup>17</sup> *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc [2014] NSWCA 105*. The NSW CA ruled in favour of the residents of Bulga and upheld the refusal of an open cut coal mine expansion.

<sup>18</sup> ANEDO Submission, above n2, 12.