

# New Environmental Offsets Regime for Queensland



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## Introduction

The proposed new environmental offset regime for Queensland has commenced. The overarching framework for the new offsets regime will be established by the *Environmental Offsets Act 2014 (EOA)*, which was assented to on 28 May 2014 and the bulk of the operative provisions were proclaimed into force on 1 July 2014. The EOA aims to simplify and streamline the assessment, approval and delivery of environmental offsets in Queensland.

Earlier this year, we published an [article](#) which examined the EOA by detailing the context in which it was developed and highlighting its key features.

The purpose of this article is to provide an update on the implementation of the new environmental offsets framework. In particular, we examine two key supporting documents for the EOA which have subsequently been released, specifically, the draft *Environmental Offsets Policy (Policy)* and the draft *Environmental Offsets Regulation 2014 (Regulation)*. While the Regulation and the Policy have only been released in draft form, they provide important detail and insight about how the new environmental offsets regime will operate in practice.

## Environmental Offsets Regulation

The EOA defines an environmental offset to mean an activity undertaken to counterbalance a significant residual impact of a prescribed activity on a prescribed environmental matter.

These terms are discussed in our earlier article and the Regulation sheds further light on what they mean. It also sets out a number of important matters and processes for environmental offsets.

### Prescribed activities

Schedule 1 of the Regulation sets out a list of prescribed activities. This includes, for example, a resource activity or prescribed ERA under the Environmental Protection Act 1994 (Qld). Development for which an environmental offset may be required under a local planning instrument (such as a planning scheme) is also a prescribed activity.

It is important to note that the Regulation does not change the prescribed activities for which environmental offsets are currently required under the existing environmental offsets regime.

### Prescribed environmental matters

Under the EOA, there are three categories of prescribed environmental matters: namely, matters of national environmental significance (**MNES**), state environmental significance (**MSES**) or local environmental significance (**MLES**). These matters are intended to be prescribed under the Regulation.

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There are currently no MNES listed under the Regulation. However, if the Queensland offset framework is accredited by the Commonwealth under the *Environment Protection and Biodiversity Conservation Act 2000 (Cth)* (**EPBC Act**), it is expected that MNES will be prescribed. An update on this accreditation process is provided below.

The Regulation lists MSES in Schedule 2. This list comprises a range of matters that are protected under State legislation, including regulated vegetation, high preservation areas of wild river areas, protected wildlife habitat and fish habitat areas.

In relation to some (but not all) MSES, exclusions apply where the MSES is located in an urban area and a State agency is the administering agency for the applicable prescribed activity. The definition of 'urban area' is the same as the definition in the *Sustainable Planning Act 2009 (Qld)* (**SPA**).

A MLES is defined under the Regulation as a matter for which an environmental offset is required under a local planning instrument. This may include, for example, "koala bushland habitat" (as defined under the Queensland State Planning Policy).

### **Reviewable decisions**

The Regulation provides for a dispute resolution process in the event that an authority holder wishes to review either of the following decisions (called **reviewable decisions**):

1. the decision to provide notice to the authority holder under section 19(3) of the EOA that an offset condition should be delivered in a way different to the way stated in the authority holder's notice of election and any offset delivery plan; or
2. the decision to refuse the authority holder's application under section 18 or 19 of the EOA. This would include matters with respect to a notice of election such as the type of offset proposed (i.e. proponent-driven offset, financial settlement offset or a combination of the two) and the delivery of the offset (e.g. offset delivery plan).

The Regulation provides that every reviewable decision must first be reviewed by way of an application for internal review. The relevant administering agency then makes a decision to either confirm or amend the reviewable decision or substitute another decision for the reviewable decision.

An application for internal review does not of itself stay a reviewable decision. In order to obtain a stay, the applicant must apply to the relevant Court (e.g. Planning and Environment Court of the Land Court) or administrative tribunal (Queensland Civil and Administrative Tribunal (**QCAT**)) for a stay of the reviewable decision using the process set out under section 12 of the Regulation. The choice of Court or tribunal will depend upon which legislation imposed the particular offset condition. For example, for an environmental offset condition imposed under SPA, an application for a stay is made to the Planning and Environment Court. For an environmental offset condition imposed by the *Nature Conservation Act 1992 (NCA)* or the *Marine Parks Act 2004*, a stay application is made to QCAT.

The process for an external review of a reviewable decision is set out under section 13 of the Regulation. An applicant may apply to the relevant Court or administrative tribunal for an external review of a reviewable decision once it has been given an information notice with respect to the internal review decision (as discussed above).

### **Environmental Offsets Policy**

It is proposed under the new environmental offsets regime to replace the existing five separate environmental offset policies with a single State offsets policy. It should be noted that the EOA leaves the door open for the creation of further State and local government offset policies. The EOA provides that an environmental offsets policy can be prepared by the State government or a local

government. However, it will only become an offset policy under the EOA if the document is prescribed by regulation. According to the Explanatory Memorandum to the EOA, the rationale behind this is to ensure that the State is able to ensure consistency and to avoid the creation of multiple overlapping offset policies. To date, the Policy is the only environmental offsets policy proposed to be prescribed under the Regulation.

The Policy is designed to establish a simplified approach to determining an offset obligation and provide flexibility in offset delivery choices. It will be a statutory instrument and a “decision-making support tool” for an administering agency to “enable consistent decision making” for environmental offsets under the EOA. The Policy will also be accompanied by various supporting materials (for example, the Financial Settlement Offset Calculation Methodology (**Methodology**)) that will provide advice on how to meet requirements of the Policy.

Offset requirements under the Policy will be divided into two Chapters, specifically:

1. Chapter 2 - offsets for impacts on prescribed environmental matters other than protected areas (that is, most protected areas under the NCA, such as a national park or a nature refuge); and
2. Chapter 3 - offsets for impacts within protected areas.

Where a prescribed activity will have an impact on a prescribed environmental matter *within* a protected area, the requirements of both Chapters will be relevant (for example, an impact on an endangered species located in a national park). Therefore, any offsets required under Chapter 3 will be in addition to those required under Chapter 2.

### **Offsets for impacts on prescribed environmental matters (other than protected areas)**

As noted in our previous article, environmental offsets can be delivered using a proponent driven offset, a financial settlement offset or a combination of the two.

The Policy provides that the size and scale of the offset required can be identified using the offset area calculator on the Department of Environment and Heritage Protection (**EHP**) website. This calculator can be applied through one of two approaches to identify the offset area based on the area of impact, namely:

1. a rapid assessment which uses predetermined factors loaded onto the calculator (which will always apply if meeting the offset obligation through financial settlement); or
2. providing alternative factor scores for the calculator based on field assessment of the impact site and offset site.

The Policy provides the following standard payment formula for a financial settlement offset:

$$\text{Financial settlement} = (\text{total offset area required} \times \text{on ground cost per ha}) + \text{landholder incentive payment} + \text{administration cost}$$

Notably, this standard payment formula is subject to a maximum capped ratio of offsets to impacts of four-to-one. It is also worth noting that the Methodology contains variations to the standard formula for South East Queensland koala habitats, protected areas and marine and aquatic matters.

In terms of a proponent driven offset, the Policy provides detail about the requirements for a proposed offset delivery plan (as required under section 18 of the EOA).

The Policy will allow for the possibility of a staged offset delivery approach whereby the authority holder notifies the administering agency of the intended offset delivery approach for each stage *before* the prescribed activity for that stage commences. If an applicant seeks a staged offset delivery, it must be identified before the relevant authority is issued to allow the conditions of the authority to reflect the staged process.

The staged approach will enable offset credits from one stage to be used for the same matters and/or financial settlement in a subsequent stage. Similarly, it will also allow for an offset debit to be created (in unavoidable circumstances) where there are unforeseen impacts on prescribed environmental matters.

The Policy identifies two specific “shelf-ready products” in order to assist authority holders and offset providers with the delivery of offsets. These are:

1. Direct Benefit Management Plans (**DBMP**), which are packaged investments that provide a range of actions to benefit prescribed environmental matters. This includes options to improve knowledge, understanding and management of certain prescribed environmental matters in order to achieve improved conservation outcomes. Further detail about DBMPs is included in Appendix 3 of the Policy. Notably, the Policy specifies that DBMPs are not suitable for offsetting impacts on koala habitat in South East Queensland; and
2. Strategic Offset Investment Corridors, which identify areas where land may be suitable for management activities that provide a benefit to areas likely to be impacted by development. The purpose of the corridors is to connect conservation hubs (for example, national parks) in corridor areas that are under low development pressure. An overview map of the first Strategic Offset Investment Corridor (which is situated in the Galilee Basin area) is available on the [EHP website](#).

It is a requirement of the EOA that an environmental offset is capable of delivering a conservation outcome for the impacted matter. The EOA states that a conservation outcome is achieved in the offset is selected, designed and managed to maintain the viability of the particular prescribed environmental matter (section 11). In other words the Policy states that, the offset must maintain the viability of the matter relative to the status quo (i.e. the situation that would have existed if the development and the offset had not occurred).

The Policy provides some guidance in relation to what an offset must achieve in order to fulfil this standard. This can be achieved by, for example, including no more than 10% of the offset as research or education programs, being efficient, effective, timely, transparent and scientifically robust, and providing tangible benefits for the impacted matter as close as possible to the impacted site (e.g. within the same local government area or sub-region).

### **Offsets for protected areas**

The Policy deals with protected areas (e.g. national parks or nature reserves) in a different way. This is to take into account the two-fold impact on the area, namely, loss of values that have environmental significance and a loss of associated “public benefit” values such as access, open space, tourism, recreation and cultural pursuits.

The Policy provides that an offset would generally be required for any activity that impacts a protected area unless:

1. the activity is conducted as part of a management action by the administering agency consistent with the principles of the protected area; or
2. the Chief Executive determines that the offset will be waived or reduced or an alternative arrangement negotiated, noting that any alternative arrangement must be equal to or better than the agreed offset value.

The Policy specifies a ratio/multiplier to determine the quantum of impact on a protected area which is aimed to be “directly proportionate to the level of legislative protection” of the relevant protected area and to take into account matters such as lost public benefit values and likely cost of replacing the values. For example, a national park is afforded a ratio of 10 whereas a forest reserve has a ratio of 5.

An offset payment is then determined using the following formula:

*Offset liability = (area impacted in ha x unimproved land value x ratio for relevant protected area)  
+ direct impact costs to assets or infrastructure owned by the relevant administering authority.*

### **Accreditation under the EPBC Act**

As stated above, it is intended that Queensland's environmental offsets framework be accredited under the EPBC Act.

The Federal Government has released a draft bilateral agreement with Queensland for public comment under the EPBC Act, the purpose of which is to identify State authorisation processes that can be accredited under the EPBC Act. This initiative forms part of the Federal Government's broader 'one stop shop' policy, aimed at reducing duplication of environmental assessment and approval processes between the Commonwealth and the States and Territories.

The draft approval bilateral agreement provides that the Commonwealth and Queensland will 'work cooperatively towards streamlining offsets under a single Queensland offsets policy' that 'delivers an outcome equivalent to, or better than the EPBC Act Environmental Offsets Policy' within 12 months of the commencement of the agreement.

In the meantime, the draft agreement requires Queensland to apply the EPBC Act Environmental Offsets Policy, including application of the accompanying offset assessment guide where it applies.

The only exception to this is where the relevant State decision maker considers that a proposed offset is consistent with the EPBC Act Environmental Offsets Policy but not necessarily with the outcome indicated by the assessment guide because of the 'unique nature of the impact, of a proposed offset or of the project overall. Such a proposed offset will only be permitted where the Senior Officers' Committee (to be established by administrative arrangements made under the agreement) advises the Federal Environment Minister that the proposed offset would provide an acceptable environmental outcome, which is consistent with the objects of the EPBC Act. It is intended that this will only occur in exceptional circumstances.

### **Next Steps**

The EOA has passed through Parliament and was assented to on 28 May 2014. The new environmental offsets regime is expected to commence in mid-2014 on a date to be fixed by proclamation.

The following documents are also in development but have not yet been released:

1. Environmental Offsets Policy – general guideline;
2. Guideline to determining a 'significant residual impact';
3. Habitat Quality Assessment guideline;
4. Offset Assessment Guide;
5. Self-administered offset code of compliance, which is intended to apply to particular prescribed activities.

We will keep you updated in relation to these developments.