

21 October 2011

Department of Sustainability, Environment, Water,
Population and Communities
GPO Box 787
Canberra ACT 2601



Via email: EPBC.reform@environment.gov.au

Re. Consultation Draft – EPBC Act Environmental Offsets Policy

Dear [REDACTED],

The Minerals Council of Australia (MCA) welcomes the opportunity to provide feedback on the Consultation Draft for the Environmental Protection Biodiversity Conservation Act (EPBC Act) Environmental Offsets Policy. The MCA recognises the commitment of the Department of Sustainability, Environment, Water, Population and Communities (DSEWPac) to effectively engage with the Minerals Industry, among other stakeholders in the development of the draft policy.

As you are aware, the Minerals Council of Australia (MCA) represents over 85% of minerals production in Australia. The MCA's strategic objective is to advocate public policy and operational practice for a world class industry that is safe, profitable, innovative, environmentally responsible and attuned to community needs and expectations.

MCA members commit to continuous improvement in their performance, beyond regulatory requirements, as signatories to *Enduring Value – The Australian Minerals Industry Framework for Sustainable Development*. A key element in this Framework is the commitment to 'contribute to conservation of biodiversity and integrated approaches to land-use planning'.

Unlike many other industries, the area in which the minerals sector operates is constrained by the location of the target resources. The Industry applies significant effort to firstly avoiding (where possible), mitigating and minimising its impacts and invests heavily in the continuous improvement of rehabilitation practices. However, the ability to develop appropriate science based environmental (biodiversity) offsets to compensate for significant residual impacts remains an important management tool for many projects.

The attached document provides specific feedback with respect to the Consultation Draft of the EPBC Act Environmental Offsets Policy and the Assessment Framework.

The MCA would encourage Government to provide a clear understanding of the conditions and any transitional arrangements associated with the release of the final Environmental Offsets Policy. Such an approach is critical to ensuring that proponents understand how the Policy applies to their project currently under review or recently approved.

The MCA would welcome the opportunity to discuss these issues further, including participation in any future stakeholder workshops. Should you have any questions regarding this submission, please do not hesitate to contact [REDACTED] who has carriage of this matter in the MCA Secretariat.

Yours sincerely

A handwritten signature in black ink, appearing to read "Melanie Stutzel".

MELANIE STUTSEL

Director – Health, Safety, Environment and Community Policy



MINERALS COUNCIL OF AUSTRALIA

SUBMISSION ON THE EPBC DRAFT ENVIRONMENTAL OFFSETS POLICY

21 OCTOBER 2010

SUPPORTED BY:

CHAMBER OF MINERALS AND ENERGY WESTERN AUSTRALIA

NORTHERN TERRITORY DIVISION OF THE MINERALS COUNCIL
OF AUSTRALIA

NEW SOUTH WALES MINERALS COUNCIL

SOUTH AUSTRALIAN CHAMBER OF MINERALS AND ENERGY

QUEENSLAND RESOURCES COUNCIL

VICTORIAN DIVISION OF THE MINERALS COUNCIL OF
AUSTRALIA

Minerals Council of Australia Submission on Draft EPBC Act Environmental Offsets Policy

Specific Comments

1. Draft Offsets Policy

The aims and approach of the draft environmental offsets policy are generally supported. The Draft Policy provided is a significant improvement on earlier approaches and provides much needed clarity on the application of environmental offsets.

Section 1 - Introduction

The introduction suggests that while the policy focuses on terrestrial impacts, aspects of the approach may also be relevant to the marine environment. Should this be the case, it is important to clarify this point within the policy to avoid uncertainty.

Section 2 – Aims of the Policy and Overarching Offset Requirements

The Box 1 Offset requirements are generally supported with the following proposed amendment (in bold) under '...Government Decision Making will be...2. conducted in a consistent, **reasonable, fair** and transparent manner'.

In addition, in Box 1, Point 2 under 'Suitable Offsets must', clarification is required on the term 'efficient'. Otherwise, this term may be considered unnecessary.

Section 4.1 – What are Environmental Offsets

MCA supports the revised definition of environmental offsets with minor modification. The inclusion that offsets are designed to provide counterbalance for residual impacts, after the avoid-mitigate hierarchy has been applied is considered appropriate, however it is important to clearly articulate within the policy wording that offsets are aimed at '**significant** residual impacts' and not those impacts which may be considered trivial, transient or inconsequential in nature. It is important to ensure that this is clearly defined throughout the Policy.

For consistency within the policy, it is proposed that the following insertion (in bold) be considered within the third paragraph of Section 4.1: 'After all reasonable avoidance measures have been put in place, **reasonable** mitigation of any impacts must be undertaken'

Accounting for Rehabilitation Measures

The treatment of rehabilitation works on impacted matters of National Environmental Significance (NES) is of key importance to the minerals industry. The MCA considers that recognition of rehabilitation in the evaluation of the 'Avoid – Minimise – Mitigate' hierarchy will promote best practice and progressive rehabilitation, with the incentive of allowing for discounting on potential additional environmental offsets required.

Based on MCA discussions with DSEWPac, it is understood that rehabilitation will be included within any impact assessment as a mitigating measure prior to the development of an offsets package. While this is supported, specific articulation of this approach within the policy or associated implementation guidance would provide added clarity for proponents.

Recognition of Voluntary Conservation Programs

In support of the social license to operate, many companies may voluntarily implement conservation programs. While it has been indicated through the consultation process with DSEWPac that this would be recognised where the matter of NES is affected, it is important to ensure that this is clearly articulated within the policy or guidance on policy implementation.

However, it is equally important to ensure that the government does not move towards making such voluntary contributions quasi-operational conditions.

Section 4.2 – Types of Offsets

The MCA considers that the definitions provided for Direct and Indirect Offsets are generally appropriate. However, to provide further certainty to proponents in assessing possible offset packages it would add value to provide further guidance, such as a non exhaustive list of examples, on which specific activities may constitute either a direct or indirect offset.

Section 4.2.1 – Direct Offsets

Within the policy text under 'These Actions May Include', the following insertions (in bold) are proposed for consideration:

- "Rehabilitation of existing vegetation **or habitat** in poor condition"
- "**enhancing habitat quality or reducing ongoing threats to the MNES, for example by removing invasive species, feral animals, waterlogging, salinisation, acidification or implementing a suitable fire management regime.**"

The MCA considers that the measures provided above should be considered as direct offsets as they are 'on-ground' activities, measurable and can greatly improve the quality of existing habitat.

Section 4.2.2 – Indirect Offsets

Given the proposed amendments to Direct Offsets in Section 4.2.1 above, it is proposed that Point 2 'enhancing habitat quality...' should be removed.

Figure 1: When to apply the Environmental Offsets Policy

The MCA suggests to the following amendment (bold) "final decision – approved or approved with conditions (**including offsets, where applicable**)"

Section 5.2 – Assessment Stage

To further clarify policy implementation, the following insertions are recommended (in bold):

- "How severe are the residual impacts likely to be? ...will it destroy an area of habitat known to be used by a threatened species? **Will the residual impact be significant?**"
- "Are offsets a suitable approach? That is, are offsets needed to help compensate for **significant** residual impacts...and are they **practical and feasible**"

Section 5.3 – Decision Stage

To remove possible ambiguity, the following insertions are proposed (in bold):

"This proposal should describe the offset and demonstrate how it will provide the appropriate benefit to compensate for any remaining **significant residual** impact on the protected matter"

"Offsets are not required where the impacts of the proposed action are considered to be minor in nature, **not significant**, or could reasonably be mitigated. In some cases.... the overall acceptability of the project will need to be made. **Such a decision may either approve the action or not approve the action.**

Section 6 – Offset Requirements

The MCA generally supports the environmental offset requirements specified in the Draft Policy; however the following changes have been put forward for your consideration:

It is proposed that the following be inserted into the existing text (in bold):

- “rehabilitating **or improving** habitat that is in a **degraded** condition, or by removing a threatening process”

In relation to the paragraph “These types of direct offsets must...securing the land on title in an enduring way for conservation”. Given there are few, if any, ways that a company can secure title under Commonwealth laws, given our dependence on State legislation, how does the Commonwealth government propose to manage the possible difficulties associated with delays in State processes which are beyond the control of companies and may impact on Commonwealth approvals for a project. The MCA considers that the policy should state how the practicalities of this issue will be managed.

Under “Matters to be Considered” the following has been provided to reduce confusion associated with the introduction of the term ‘landscape’.

- “The importance of the site in context, whether of the **surrounding conservation** values or other values relevant to the matter protected”.

In addition to the above suggested insertion, the following should also be accounted for in Matters to be Considered (It is noted that some of these matter have been included in the Figure 2 Decision Tree, however not drawn out in the policy):

- The long term viability of the pre-impacted NES matters should also be taken into account.
- Should climate change be considered as part of the assessment of the magnitude of an environmental offset package, the effects of such changes on the viability of the pre-impacted matter and the regional context should also be taken into account.
- Cost effectiveness of the proposed offset should be considered if similar or greater benefit to the NES matter could be realised through alternative offset arrangements.
- The multiple values benefitting from the development of an environmental offset, including other NES matters, social, cultural and economic values.

Within the decision tree, ‘enduring’ is defined as benefiting the NES matter at least as long as the impact on the NES matter. This important requirement should be further defined within the body of the policy.

Section 6.1 – What Constitutes a Suitable Offset

Contribution to the existing Conservation Estate

Contributing to improving (directly or indirectly) the existing conservation estate to the benefit of the NES matter should not be discounted as a potential environmental offset. In some circumstances, contributing to, and improving the biodiversity values within the existing conservation estate and in particular private conservation areas with little to no dedicated management may provide the greatest benefits to the NES matter and significantly enhance its long term viability.

Strategic Development of Offsets and Multiple Project Approaches

The strategic development of offsets on a bio-regional basis should be encouraged. Strategically developed offsets can lead to more sustainable biodiversity outcomes, through consolidation and greater connectivity of habitat and increasing the capacity of offsets to target and host multiple environmental values (including State and Commonwealth).

The development of offsets across multiple projects for a given proponent located within the same bio-region should be also be encouraged to promote early establishment of environmental offsets and an overall strategic approach to the development of offsets. Further to this, the policy should specifically allow for the creation of 'advance offsets', whereby a company may acquire land suitable for offsetting for a range of projects.

Collaborative opportunities may also exist between the Government and proponents to contribute towards strategically developed offsets for the purposes of supporting a broader regional conservation strategy, alignment to priorities in threatened species plans, and securing arrangements for long term management.

Section 6.1.2 – A suitable offset must be of a size and scale proportionate to the impacts being offset

The minerals industry clearly supports the principle that offsets should be based on consideration of impacts and that planning of offsets needs to consider the risk of impact. If however, the impact risk can subsequently be mitigated a proponent should only be required to offset actual impacts, or if no impacts eventuate, they should not be required to proceed with the original planned offset.

Consideration should be given to providing a mechanism for staging offsets to ensure actual residual impacts are progressively (and adequately) addressed by the offset. Adopting such an approach as part of the Policy would encourage proponents to reduce the size and/or scale of actual impacts post approval. It should be noted that this approach has been specifically allowed for mining and petroleum developments in the recently released Queensland Government offsets policy, which also recognises the singular nature of resource developments.

Section 6.1.4 – Effective Management of Risk

The risk evaluation process to be developed for assessing the required magnitude of the environmental offset will be a critical factor in the development of an offsets package. One important consideration is while the proponent is responsible for delivering the specified offset and the associated risks of failure, the proponent should be absolved of reasonable responsibility in delivering outcomes if impacted by forces outside their control (extreme climate variability, wilful damage or acts of god).

Within the proposed offset calculator, it has been noted that the concept of 'increased risk with increased distance from the impact' has now been replaced by a new category 'Suitability of location of the offset'. The MCA supports this change, as penalising for distance from the impact does not necessarily equate to greater benefits for the NES matter and may drive perverse outcomes (i.e. lack of strategic approach and reduced benefit for the matter of NES or locking up of adjacent land which would otherwise be use for other purposes).

Figure 3. Relationship between scale of offset

The MCA considers that the risk vs. scale of offset relationship in Figure 3 requires further clarification in order to add value to the policy document.

Section 6.1.5 – A suitable offset must have transparent governance arrangements, including being able to be readily measured, monitored, audited and enforced

The MCA strongly supports measurable outcomes, but in some cases, measurement on an annual basis may show relatively small amounts of change from year to year. Should this data be made publicly available without context of the longer term objectives it may be misinterpreted by the community as inaction or a lack of effectiveness of the offset.

The minerals industry already undertakes significant regular reporting at multi-jurisdictional levels. Given this, it is important to ensure that any reporting on offsets should be cognisant of existing reporting requirements.

The MCA suggests that reporting on offsets be undertaken at minimum interval of 2 years or at longer timeframes if logical and appropriate to the offset being developed.

The MCA considers that it is critical to ensure that the register, when commenced, should be both comprehensive and be complemented by effective communication tools.

Section 7.1 – Interactions with other State Legislation and schemes

The MCA supports the proposed enhanced linkage between the Commonwealth (EPBC) and State approval processes. The alignment of environmental offset processes is of key importance to the minerals industry. Co-ordination of offsets across two levels of government is imperative to avoid overlapping or duplicative requirements for the same piece of vegetation or biodiversity (i.e. through EPBC and State legislation). While it is understood that the Commonwealth and the States differ in environmental focus, significant process/time efficiencies and cost benefit to both the regulator and proponent can be drawn from this alignment. The targeting of offsets at more than one aspect can also provide synergistic opportunities for maximising environmental and social values.

While the alignment of processes is supported, the crucial question remains what process will be put in place to allow this alignment to occur? The policy document provides advice to the proponents that early referral can facilitate the alignment of processes; however there is an absence of policy direction for Assessment Officers on how this important Commonwealth and State interaction will occur (i.e. through bilateral arrangements or accreditation of State processes).

Where reporting on the performance of offsets is required at both the State and Commonwealth levels, alignment of reporting requirements (data type and frequency) will be important in reducing the administrative burden on proponents.

To reduce confusion, the alignment of the Commonwealth and State offset policy principles (where applicable) is strongly encouraged. The forum responsible for aligning State and Commonwealth policies needs to be defined (i.e. COAG or a bipartite working group). At a project level, guidance is required on how tripartite discussions should be conducted between States, the Commonwealth and project proponents on aligning regulatory processes and requirements.

Section 8.2 – Use of third parties to deliver offsets

The MCA supports the use of third parties to deliver offsets as this can provide opportunity for additional social and economic benefits. Clarification however is required on the process to accredit these third parties, (e.g. landholders, a conservation or Indigenous group whose core business may sit outside of existing offsetting schemes such as bio-banking).

Long Term Arrangements for Environmental Offsets

The draft policy provides little guidance on arrangements for the long term management of offsets. In particular there may be a role for Government to co-operate and add lands set aside for offsets to the existing conservation estate, subject to mutual agreement between the proponent and the Government in question. For example, in line with the approach taken in the development of offsets under the strategic assessment in Victoria for urban development.

2. Environmental Offset Calculation Guide

The MCA supports the approach taken by the Draft Policy and in particular the 'semi-quantitative' approach to providing transparency and certainty for the calculation of offsets.

The supporting guidance for the assessment tool is going to be crucial for its interpretation and successful implementation and to avoid possible subjective influence on decisions. As the assessment guide presented is a general outline, it is difficult to provide specific comment without full knowledge on how it will be implemented. Overall, the MCA considers that the proposed

calculation tool should remain open for further comment and review pending inclusion of additional information on its practical application. However, the following general comments have been provided for consideration.

While it is understood that testing has been undertaken internally within the Department, given the importance of the Offsets Calculator and Weightings tool, the MCA considers further review and testing should be undertaken before it should be adopted practically. This should involve further expert peer review outside of the department and testing the calculator against a wide range of project types and scales. This review should be undertaken to identify potential weaknesses in the tool and opportunities for refinement.

To ensure consistency, the calculator provided should be gauged against existing offset 'calculators' used by the States (including the NSW bio-banking calculator or the recently commenced Queensland equivalency methodology etc).

The proposal that 75 per cent of offsets must be earned from direct offsets

While this may be presented as general objective, some flexibility should be included given circumstances could arise where 75% direct offsets may not be achievable due to factors outside the proponents control (i.e. denied access to land by third parties or suitable habitats for improvement do not exist). A 'sliding scale' could be utilised whereby a greater magnitude of indirect offsets could be applied should less direct offsets opportunities exist.