



## Premier & Cabinet

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Dear Ms Middleton

I am pleased to provide the NSW Government's submission to the EPBC Act  
Environmental Offsets Policy – Consultation Draft.

Should you require any further information on this matter, please contact [REDACTED]

[REDACTED]  
NSW Department of Premier and Cabinet on [REDACTED]

Yours sincerely

**Vicki D'Adam**  
Deputy Director General



**NSW Government Submission  
to the EPBC Act Environmental Offsets Policy – Consultation Draft**

**October 2011**

# **NSW GOVERNMENT SUBMISSION**

## **TO THE EPBC ACT ENVIRONMENTAL OFFSETS POLICY – CONSULTATION DRAFT**

### **GENERAL COMMENTS**

NSW supports the implementation of a Commonwealth Environmental Offsets Policy (draft Policy), recognising the potential benefits in ensuring consistency in decision making and providing certainty for proponents. There are many areas of consistency in principles between the draft Policy and draft NSW Government offset principles and several of the main considerations for making offset decisions have been included. However, NSW has a number of concerns with the draft Policy and would welcome the opportunity for further discussion and to work closely with the Commonwealth to assist in developing the detail of the final Commonwealth Environmental Offsets Policy and the principles which underpin it.

The draft Policy would benefit from a clearer expression of the offsetting principles that underpin it. This would assist in its consistent interpretation and application. The eight principles presented in the 2007 "Draft Policy Statement: Use of environmental offsets under the *Environment Protection and Biodiversity Conservation Act 1999*" would provide an appropriate starting point for the current draft policy.

NSW has developed a number of draft principles to underpin offsetting requirements under NSW planning systems (these are outlined in more detail in the specific comments section under heading 6). These principles, along with the Commonwealth principles from the 2007 draft policy, could form the basis for discussions between States and the Commonwealth to agree on a set of national offsetting principles. In particular, NSW supports avoidance and mitigation measures to avoid the potential impacts of actions as this directly reduces the scale and intensity of the potential impacts.

NSW also supports the principle that offsets can be avoided or discounted where significant social and economic benefits accrue to the public as a consequence of the proposal. To that effect NSW strongly suggests that the draft Policy needs to be clearer on how socioeconomic factors will be considered (i.e. where in the assessment process) so that operational guidelines can be developed to incorporate discounting of offset areas for development projects that have significant benefits to the community (e.g. major infrastructure projects).

NSW recommends the adoption of a clearly defined standard for offsetting in the draft Policy. NSW supports the use of the hierarchy of avoid, mitigate, offset as outlined in the draft Policy. However, the use of the Improve or Maintain standard outside of the NSW statutory definition and without the underpinning of a scientifically based methodology is not supported. The use of this standard by the Commonwealth is problematic as Improve or Maintain has a specific statutory meaning under a number of pieces of NSW legislation.

NSW urges a greater recognition of state offset standards and assessment methodologies in the Policy. In some jurisdictions, there are existing state-based methodologies that calculate offset requirements, based on scientifically robust assessment of losses and gains, for example, the BioBanking Assessment Methodology in NSW.

Offsets should not be artificially derived or based solely on land area, which is not an accurate surrogate for biodiversity value. The assessment and calculation method used must be repeatable and be able to be consistently applied by different assessment officer to ensure consistent requirements are imposed. The methodologies used in NSW calculate offset requirements using an objective and scientific methodology to determine the gain in biodiversity values required as offsets to counter the impacts of a development.

Further clarification is needed in the draft Policy outlining how the size, scale and offset ratio is determined, who the determining authority is and when an offset can be submitted as part of a mitigation strategy for a project.

NSW has significant concerns with the Environmental Offset Assessment Guide (the Guide) presented as an Appendix to the draft Policy. It does not link directly to the principles and content of the draft Policy, nor does it adequately incorporate socioeconomic considerations. It appears arbitrary in nature and without a scientific basis and it is difficult to see how the Guide could be practically applied. The methodology as currently presented is not transparent and would provide no insights for proponents as to the likely offset requirements for their development. As such the opportunity to give certainty to proponents and provide clarity on offsetting requirement has not been realised. NSW would only support a metric approach where it retains flexibility to allow for the explicit inclusion of social and economic considerations; where 'like for like' direct offsets are prioritised but are not necessarily mandatory and where the opportunity to use compensatory measures/indirect offsets is made available where direct offsets cannot be found. This would allow a standard approach to calculating impacts and the value of the offsets in order for a clearer and faster assessment process without compromising the ability to take into account social and economic factors as well as practicalities and costs of finding suitable offsets.

NSW recommends the development of a separate implementation document explaining how to implement the offsetting principles in the Policy, rather than appending the *Environmental Offset Assessment Guide* in an incomplete form to the Policy, particularly as much of the content and the assumptions of the *Guide* are not discussed in the text of the Policy.

In order to avoid unnecessary delays in development assessment, proponents should be able to determine Commonwealth offset requirements prior to lodgement of a development application. The draft Policy indicates that the suitability of using offsets for a particular development application is determined during the assessment stage. In the opinion of NSW this is too late in the process. The ability to use or be required to use an offset should be clarified early in the planning and approval process to ensure the availability of suitable offsets and to enable proponents to accurately forecast funding required. Under the proposed process in the draft Policy a proponent can only begin the complex and time consuming process of identifying and securing offsets once an application has been assessed. Defining, through the draft Policy, principles for when offsets are appropriate and what offsets are likely to be, would allow offset arrangements to be considered and organised early in the planning process and is preferable prior to a formal controlled action referral to the Commonwealth. In addition, the draft Policy does not specify any flexibility to negotiate if the proponent is not able to meet the required offset *requirement*.

In addition, offset requirements for different types of Matters of National Environmental Significance (e.g. threatened species, world heritage areas, Ramsar wetlands) should be set out in the policy. This will provide a framework for when offsets should be considered and will provide clarity to developers on which development impacts are appropriate to be offset. NSW considers that offsets are most suitable for impacts on threatened species and ecological communities, both aquatic and terrestrial.

Impacts on many other Matters of National Environmental Significance are unlikely to be effectively offset. In particular offsetting loss of cultural and natural heritage is inappropriate. Cultural heritage should be managed in other ways than through the use of offsets. NSW would like to offer our expertise to assist in the process of examining Matters of National Environmental Significance where offsets might be useful.

The draft Policy states that it focuses on the terrestrial environment, and NSW seeks clarification as to whether impacts on freshwater or marine ecosystems are ineligible for offsets under the policy framework. As the EPBC Act also deals with estuarine and freshwater aquatic ecosystems, an offsets policy for aquatic ecosystems should also be considered or clear statements given as to why these ecosystems are explicitly excluded for the purposes of this draft Policy. Does the exclusion of freshwater and estuarine aquatic ecosystems mean that these ecosystems will not be able to be offset if they are subject to impacts (i.e. impacts must therefore be avoided or impacts mitigated only?). This is also confused in Section 6.2.1 of the policy where the "role of the site of the proposed action plays



in the environment" is discussed in formulating an offset. This section refers to "wetlands of international importance" in this consideration.

The draft Policy would benefit from a clearer definition of key terms. There is inconsistent and ambiguous language within the draft Policy that may impede consistent interpretation and application of the Policy. The draft Policy would benefit from the inclusion of a glossary. Key terms which require definition include: "environmental offset" "impact" "conservation outcome", "viability", "improve or maintain".

## **SPECIFIC COMMENTS**

More detailed comments are provided below against each of the sub-headings in the draft Policy.

### **1. Introduction**

NSW supports a more strategic, transparent and consistent process for the development of offsets under the EPBC Act, noting that the draft Policy focuses on terrestrial impacts and offsets. NSW also welcomes the draft Policy's recognition of a range of mechanisms to achieve good conservation outcomes from offsets and flexibility in the way these are applied. Regular review of the Policy is supported. It may be prudent for an interim review to be undertaken after 2 years.

### **2. Aims of the Policy and overarching offset requirements**

In general, the aims of the draft Policy are supported. The emphasis on providing greater certainty and consistency in offsetting decisions to proponents and the community is supported, as well as the need for a transparent approach, based on robust science. It will be important to ensure the Policy is implemented appropriately and consistently.

It is also important that clear guidance is given to proponents, the community and assessment officers on how the socioeconomic benefits/costs of the proposed action can be factored into the offsetting decision, particularly those benefits that do not accrue as a result of an offset. For example, employment of an Aboriginal ranger to manage an offset area is a benefit resulting from the offset itself, and this is used as an example in the Assessment Guide as a co-benefit. However, the actual benefits of the development (e.g. job creation, provision of State significant infrastructure), on and off site, also need to be factored when arriving at offset decisions. Guidance should be provided in the draft Policy on when and by how much offset requirements can be reduced based on the consideration of socio-economic benefits. The consideration of socio-economic benefits and their impact on offset requirements should be consistent, transparent and based on clear principles.

### **4. What are offsets and direct and indirect offsets?**

NSW supports the use of the hierarchy of avoid, mitigate, offset as outlined in the draft Policy. Avoidance or mitigation measures can manage the potential impacts of a development as they directly reduce the scale and intensity of the potential impacts and help reduce loss. Developers should be required to demonstrate that they have undertaken these measures at the preliminary referral stage as well as at the final assessment stage of a development.

NSW supports the concept of "direct offsets", that is those that provide on ground protection and improved conservation outcomes, such as acquisition of land and maintenance or improvement of land through conservation actions. NSW supports the preference to use direct offsets over indirect offsets and the proposal that direct offsets should be the main component of any offsets proposal.

NSW supports the use of "Indirect offsets" as a component of an offsets package. However, a clearer definition and guidance is needed on what would be considered an appropriate indirect offset. NSW also feels that the terminology "indirect offset" is confusing as they do not actually provide an "offset". NSW recommends the use of the term "supplementary conservation measures" as an alternative.

## 5. When to apply offsets

The draft Policy states that offsets requirements will only be determined during the assessment stage under Part 9 and that offsets cannot be used to make an otherwise unacceptable environmental impact acceptable. NSW recognises that offsets are not relevant in the determination of the significance of impact and therefore if an action is a "controlled action", this is because the impacts remain the same. However, in the opinion of NSW it is important that proponents are able to determine Commonwealth offset requirements prior to lodgement of a development application. The assessment stage is too late in the process for offset requirements to be determined. Further clarification is also requested as to what would constitute an "otherwise unacceptable environmental impact" and when the use of an offset becomes available as a mitigation measure.

The ability to use or be required to use an offset should be clarified early in the planning and approval process to ensure the availability of suitable offsets and to enable proponents to accurately forecast funding required. Under the proposed process in the draft Policy a proponent can only begin the complex and time consuming process of identifying and securing offsets once an application has been assessed. Defining, through the draft Policy, principles for when offsets are appropriate and what offsets are likely to be, would allow offset arrangements to be considered and organised early in the planning process and is preferable prior to a formal controlled action referral to the Commonwealth. In addition, the draft Policy does not specify any flexibility to negotiate if the proponent is not able to meet the calculated offset *requirement*.

The draft Policy indicates that offsets are not required if the residual impacts of a proposed action "are considered to be minor". However it is not clear what a definition of "minor" is and how any net loss of biodiversity will be avoided in these circumstances.

The draft Policy does not provide guidance when the scenario occurs that a "suitable offset" is not available or cannot be obtained for social or economic reasons such as prohibitive cost. NSW has significant experience in the difficulties of facilitating supply of offsets. We recommend a cascade of options for determining and sourcing suitable offsets. The first preference is to secure "like for like" offsets. If these are not available or not appropriate for socio/economic reasons then NSW recommends the following hierarchy of preferred offsets is used:

1. match offsets at a different scale of ecological classification (e.g. vegetation types within a class),  
*if these are not available then:*
2. match offsets which are dissimilar but have the same or higher conservation status (e.g. based on level of clearing),  
*if these are not available then:*
3. implement supplementary conservation measured (termed as "indirect offsets" in draft Policy)

It is essential that offsets are built into the conditions of approval and implemented prior to the completion of the development. These conditions should ensure long term protection and management of the offsets and be listed on the land title in perpetuity.

NSW queries how social and economic issues will be considered and weighted in the decision stage of the assessment process (section 5.3, page 10). NSW also seeks more specific detail about what form of security, timing and management requirements should be included in the post approval stage, or maybe cross referenced to section 6.1.5.

NSW is concerned with the extent to which the draft policy appears to rely on the discretion of Departmental officers to determine offset requirements once a matter is declared controlled. Although the draft policy presents an Impact and Offsets Calculator use of this calculator and implementation of its results does not appear to be binding on decision makers. In order to provide certainty and produce consistency in decision making the policy should define how the results of the proposed calculator will be implemented including rules for how these results can be varied.

## **6. Offset requirements**

NSW recommends the adoption of a clearly defined standard for offsetting in the draft Policy. However, the use of the Improve or Maintain standard outside of the NSW statutory definition and without the underpinning of a scientifically based methodology is not supported. The use of this standard by the Commonwealth is problematic as Improve or Maintain has a specific statutory meaning under a number of pieces of NSW legislation including the *Native Vegetation Act 2003*, the *Native Vegetation Regulation 2005* and the *Threatened Species Conservation Act 1995*.

In NSW, whether a development or clearing proposal meets the Improve or Maintain standard is determined using either the Environmental Outcomes Assessment Methodology or the BioBanking Assessment Methodology. Both are robust, repeatable and scientifically based methodologies that provide an objective assessment of the impacts of a proposal. To avoid confusion among proponents and ensure consistency in definition and application it is preferable that Improve or Maintain is only used within the existing NSW legislative framework and underpinned by the existing scientifically based methodologies. Re-defining Improve or Maintain at the Commonwealth level is problematic and is not supported by NSW.

The draft Policy would also benefit from a clear expression of the offsetting principles that underpin it. This would assist in its consistent interpretation and application. The eight principles presented in the 2007 "Draft Policy Statement: Use of environmental offsets under the *Environment Protection and Biodiversity Conservation Act 1999*" would provide an appropriate starting point for the current draft policy.

NSW has developed a number of draft principles to underpin offsetting requirements under NSW planning systems (these are outlined below). The principles are presented in order of policy importance. These principles, along with the Commonwealth principles from the 2007 draft policy, could form the basis for discussions between States and the Commonwealth to agree on a set of national offsetting principles.

- 1 Impacts must be avoided first by using prevention and mitigation measures.
- 2 Offsets can be avoided or discounted where significant social and economic benefits accrue to the public as a consequence of the proposal.
- 3 Offsets must be quantifiable - the impacts and benefits must be reliably estimated.
- 4 Offsets must be enduring, enforceable and auditable.
- 5 Offsets must be targeted.
- 6 Offsets must be supplementary to other legal requirements.
- 7 Supplementary measures can be used in lieu of offsets in certain circumstances\*.

\*Note that "supplementary measures" are not an offset and do not meet the requirements of principles 1-6. Supplementary measures could be considered as equivalent to the "indirect offsets" discussed in the draft Policy.

Greater guidance is required in the draft Policy on what constitutes an appropriate mechanism to secure the offset. In the opinion of NSW Offsets should be secured through a voluntary planning agreement. These agreements should specify how the offset will be secured and managed in perpetuity. Options considered in NSW are:

- retiring credits under the biobanking scheme
- acquisition of land for reservation under the National Parks and Wildlife Act



- management by a private provider of conservation management services under suitable management arrangements.

NSW urges a greater recognition of state offset standards and assessment methodologies in the Policy. For example, there are existing state-based methodologies that calculate offset requirements, based on scientifically robust assessment of losses and gains, that could be recognised by the Policy. In NSW these include the Environmental Outcomes Assessment Methodology, the BioBanking Assessment Methodology and the Native Vegetation Assessment Tool.

NSW would like to see acknowledgement in the draft policy that in some jurisdictions, such as NSW, existing methodologies are available to provide a framework for the calculation of offsets. The draft policy should discuss how these existing frameworks can be used to support calculation and implementation of Commonwealth offsets.

Impacts of developments can only be offset through improvement in biodiversity values at another site through management actions or by removing a legally allowed threat at that site. The improvement in biodiversity values at the offset site must be equal to or greater than the loss in biodiversity values at the development site. Offsets must improve the biodiversity values above the minimum legislative standard already in place. Losses and gains in biodiversity at the development and offset sites must be measured and quantified using a robust, repeatable and scientifically based methodology to ensure consistency and confidence in the result.

Offset requirements should also be calculated using an objective and scientific methodology to determine the gain in biodiversity values required as offsets to counter the impacts of a development. It should not be artificially derived or based solely on land area, which is not an accurate surrogate for biodiversity value. The assessment and calculation method used must be repeatable and be able to be consistently applied by different assessment officer to ensure consistent requirements are imposed.

NSW supports the notion of an offsets register but this must also include spatial representation of the location of the offset and planned management actions. Spatial representation is essential to avoid double counting or further development of offsets and ensures a transparent process that both the community and developers have access to. It also better represents the impact at the landscape scale. The NSW Department of Planning and Infrastructure is currently developing an offsets register to help inform the Strategic Regional Land Use Planning process and development assessment processes in general.

It is difficult to understand how Figure 2 should be used. It asks a number of questions relating to effectiveness and appropriateness that do not all link to the text for Section 6, and do not lead to a decision at the end. It would be better to rely on the text rather than try and force it into a flow chart.

In Section 6.1.4, there is no definition of "perverse outcomes" and it is difficult to find meaning in the text around it.

Government decision making being conducted in a consistent and transparent manner is supported (section 6.2.2), noting comments below on the *Environmental Offset Assessment Guide*.

## **7. Links with other legislation and schemes**

Aligning referral and application processes under both Commonwealth and State laws as much as possible is supported. NSW agencies and the Commonwealth Department of Sustainability, Environment, Water, Population and Communities have made significant progress in facilitating this over the last two years.

The EPBC Act reform agenda established by the Council of Australian Governments (COAG) clearly articulates the need for Commonwealth Government reforms to complement state regulatory systems. However the draft Policy recommends only that proponents/developers make a referral under the EPBC Act early in the process. It is not clear how the assessment guide aligns with current systems



used by NSW agencies and CMAs to calculate offsets, and what happens when the offsets calculation differs between the Australian Government and State jurisdictions.

## **8. Offset delivery requirements**

NSW supports the use of market based systems such as Biobanking to assist with meeting biodiversity offset requirements, noting that these are voluntary schemes in NSW.

NSW supports the proponent/developer meeting the costs of establishing the offset and long term maintenance of the offset.

NSW supports the use of third parties to deliver and manage offsets, as it is recognised that developers are unlikely to have the resources or expertise to undertake long term management for conservation purposes. However no detail is provided on how or what form of accreditation the Australian Government requires of these third parties. Contract arrangements will need to clearly articulate payment arrangements (stewardship or single payments in one year?), who is responsible for ongoing management actions, who is responsible for monitoring, evaluation and reporting, including the proposed annual reporting. If requirements are too onerous or payments have major tax implications it is unlikely that private landholders will participate. Also there is no mention of those State agencies who are major land managers, who could also participate as third party delivery agents.

## **9. Appendix 1 – Offsets Assessment Guide**

NSW has significant concerns with the Environmental Offset Assessment Guide (the Guide) presented as an Appendix to the draft Policy. It does not link directly to the principles and content of the draft Policy, nor does it adequately incorporate socioeconomic considerations. It appears arbitrary in nature and without a scientific basis and it is difficult to see how the Guide could be practically applied. The methodology as currently presented is not transparent and would provide no insights for proponents as to the likely offset requirements for their development. As such the opportunity to give certainty to proponents and provide clarity on offsetting requirement has not been realised.

NSW would only support a metric approach where it retains flexibility to allow for the explicit inclusion of social and economic considerations; where 'like for like' direct offsets are prioritised but are not necessarily mandatory and where the opportunity to use compensatory measures/indirect offsets is made available where direct offsets cannot be found. This would allow a standard approach to calculating impacts and the value of the offsets in order for a clearer and faster assessment process without compromising the ability to take into account social and economic factors as well as practicalities and costs of finding suitable offsets.

Key terms within the Guide must be clearly defined to ensure consistency in interpretation and application. Methodologies for identifying and calculating factors in the calculator must be provided. For example how will the "condition of habitat impacted" or the "type of habitat" impacted be determined?

It is the view of NSW that the factors presented in the "Impact Calculator" and "Offsets Calculation" within the Guide are not adequate for determining the level of impact or the value of an offset. For example the Impact Calculator does not currently include the number of species impacted or the number of individuals within that species, these are key factors when considering offsets for impacts on threatened species which can be Matters of National Environmental Significance.

An offset can only be created when positive management actions are applied to the land or a legally allowed threat is removed. Currently the Offset Calculator assigns a "standard number of points" to securing land for conservation regardless of whether management actions are applied or whether it was previously under threat. All land included as an offset should include an agreement for on-going management.

There is some fairly specific information on site characteristics, land tenure change and maintenance, and other actions in the Offsets Calculator which is not discussed in the text of the draft Policy. It would be better to develop an operational guideline which implements the principles in the policy and provides more explanatory information and justification of ecological concepts that earn more points, and keep the policy document as a higher level, principle based document not attached to the Offset Assessment Guide

There should be greater content on the ability to discount offset requirements where there are significant social and economic benefits (including affordable housing, state significant infrastructure, job creation, consistency with strategic planning policies) of the proposal. These should be counted whether they are realised on the development site or off site, not limited to onsite as implied by the Offsets Calculator.

The risk of management actions at an offset site not achieving the desired increase in biodiversity values should not be managed through an arbitrary increase in the offset ratio as suggested in the draft policy. It is more effective to manage this uncertainty by constraining the biodiversity credits which can be generated at an offset site according to the likelihood of achieving the aims of management actions. This should be recognised within the Offsets Calculator proposed in the draft policy.

The BioBanking Assessment Methodology is a good example of a transparent, consistent and scientifically-based method of determining offset requirements which could be used as a basis to build a similar methodology for matters of National Environmental Significance. It is the view of NSW that the implementation a scientifically based methodology is essential for the effective and efficient use of offsets, and alignment with NSW offsetting expectations.