



Environmental Defender's Office
AUSTRALIAN CAPITAL TERRITORY

11 July 2013

Manager – Natural Environment
ESDD
GPO Box 158
Canberra ACT 2601

Via email: environment@act.gov.au

Dear Manager,

Re: EDO ACT Submission – ACT Environmental Offsets Policy¹

The Environmental Defender's Office (ACT) Inc (the EDO) is a community legal centre specialising in public interest environmental law. We provide legal representation and advice, take an active role in environmental law reform and policy formation, and offer educational publications and programs designed to facilitate public participation in environmental decision-making.

This submission responds to the *ACT Environmental Offsets Policy and Delivery Framework Position Paper* (Position Paper) and *ACT Environmental Offsets Draft Guidelines* (Guidelines) in general terms by identifying the fundamental principles that we recommend need to be applied to any offset scheme.

Executive Summary:

In summary, EDO (ACT) recommends that:

- The ACT government places at the centre of the offsetting scheme the achievement of positive biodiversity outcomes based on robust and objective science.
- The ACT government takes the recommendations of the Senate (Environment and Communications Committee) Environmental Offsets Report into account when developing the offset framework and that the ACT waits until any subsequent changes are made to the Commonwealth Government's Offset policy before finalising the ACT offset scheme.

¹ The author of this submission is grateful for the input of Nari Sahukar, EDO (NSW).

- The following fundamental principles underpin the ACT offset scheme:
 - Biodiversity offsets must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts;
 - The development of the offset model must combine strategic conservation planning with the 'mitigation hierarchy' and the strategic plan must address the greater issue of diminishing biodiversity in favour of economic development;
 - 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;
 - Offsetting must achieve benefits in perpetuity and the principle of permanence be explicitly referred to in the legislation;
 - Offsets be based on the principles of "net gain"
 - 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;
 - Indirect offsets be strictly limited.
- A robust assessment methodology is developed and based on the best available science; assessment tools consistently implement the above fundamental principles; 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;
- Unanticipated events that destroy the value of the offset site must be addressed and the responsibilities of the various parties should be particularised; and
- 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.

Introduction:

The EDO 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.² We provide these comments recognising 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, we would recommend 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. We also attach at **Annexure A** a summary of the IUCN's Independent Report on Biodiversity Offsets recommending best practice activity for biodiversity offsetting.

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 does not recommend the offsets regime is developed expeditiously. Rather the ACT government ought to aim to develop rigorous standards based on robust and objective science as well as applying the fundamental principles as outlined in this submission.

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.³ Further, ANEDO has previously submitted that there is a lack of consistency, ecological credibility, rigour, enforceability and standard legislative parameters for offsetting in Australia and that offsetting regimes are improved when the relevant legislation implements fundamental principles discussed below.⁴

In the development of the offset strategy we urge the ACT government to also closely examine the Senate (Environment and Communications Committee) Environmental Offsets Report, June 2014.⁵ The Senate Committee made 21 recommendations, including that the EPBC Act Environmental Offsets Policy be revised. We note the ACT government is developing its offsets policy based on the Commonwealth Government's Offset policy⁶ and we are of the opinion that it ought to assess what the outcomes of the

² ANEDO Submission on the draft EPBC Act Environmental Offsets Policy 21 October 2011, p 2. Available at: <http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/302/attachments/original/1380674370/111021epbc_offsets.pdf?1380674370>

³ See:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Environmental_Offsets/Submissions

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

⁵ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Environmental_Offsets/Report/~media/Committees/Senate/committee/ec_ctte/enviro_offset/report/report.pdf

⁶ <http://www.environment.act.gov.au/environment/environmental-offsets-policy>

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 and future-proofing, scientific rigour and community confidence in the ACT scheme, we urge the ACT government take the Senate Committee's recommendations into account when developing the offset framework.

Offsetting regimes are improved when legislation implements the following fundamental principles:⁷

- i) *Biodiversity offsets must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts.*

The 'mitigation hierarchy' should be clearly set out in the PD Act as a mandatory pre-condition before any offsetting option is considered. The ACT offsetting regime must provide appropriate guidance and emphasis on how a proponent can demonstrate its endeavours to genuinely 'avoid' and 'mitigate' aspects of the proposed development prior to considering offsets.

We note it is the ACT's intention that "*environmental offsets are considered only after feasible and appropriate avoidance and mitigation measures have been taken.*" (Page 2 of the Position Paper). However, the policy currently lacks clear guidance around when offsetting is not appropriate. The policy and resulting legislation must give appropriate direction for proponents to avoid an environmental impact. Without proper guidance such as a compulsory, comprehensive assessment avoidance measures, the process might be construed as being merely a box-ticking exercise. A transparent assessment of whether appropriate avoidance measures have been undertaken is essential particularly for MNES. To do otherwise will simplify the process and will allow proponents to place undue reliance on offsetting in order to obtain project approval. Clear and transparent instruction is therefore required as to how proponents should be seeking to undertake avoidance measures.

Similarly, guidelines are needed on when it is appropriate to mitigate biodiversity impacts, and how mitigation should be undertaken. Without this direction, it will be difficult to assess whether reasonable and legitimate mitigation attempts have been made by a proponent before progressing to the offsets stage in a development approval process.

Further, there must be capacity in the legislation for a development proposal to be rejected where some impacts cannot be avoided or mitigated rendering the proposal inappropriate.

⁷ (For an analysis of current offset principles used in Australia – see: Fallding, Martin, "Biodiversity offsets: Practice and promise" (2014) 31 Environment and Planning Law Journal 11. Fallding identifies 5 generally accepted common offsets principles: (p15) (1) Biodiversity offsets will be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts; (2) Offsets must be based on sound ecological studies and principles; (3) Offsetting must achieve benefits in perpetuity; (4) Offsets must be based on principles of "net gain;" (5) Offset arrangements must be enforceable.

a) *The development of the offset model must combine strategic conservation planning with the 'mitigation hierarchy'*

The primary driver for a successful offsets scheme is the securing of environmental conservation. We recommend that the offsets policy be developed using a combination of mitigation hierarchy and strategic conservation planning. Strategic conservation planning in the context of offsetting recognises that there are considerations to be made that are critical to the success of existing conservation policies as well as to developments.

We note the intended use of ACTMAPi as described at 6.5 of the Position Paper and stress that prior to the commencement of an offsetting scheme, a strategy needs to be developed that clearly identifies at a regional scale areas of natural habitat that are unable to be offset (for example, species or ecological communities listed as critically endangered), areas of natural habitat, the conservation of which is crucial to the perseverance of species or ecological communities, areas of natural habitat that are adequately conserved within the region and areas of high development potential. A scientifically quantified risk must be determined in terms of the spatial and temporal requirements for the offset to achieve its conservation goals; and identification of benchmarks to indicate the offset is achieving its conservation goals. Identifying these areas allows for strategic offsetting that result in maximum conservation benefits.

Best-available science indicates that offsets that are selected at a location close to the development site are more successful in offsetting the loss from development than offsets that are randomly chosen, or chosen because of reasons other than environmental suitability.⁸

If offsetting is to provide an opportunity to deliver conservation goals, then it must be done with an appraisal of remaining biodiversity, coupled with an analysis of present and future conservation and development goals. In this respect, we support that part of the ACT Position Paper that considers the suitability of the location of the offset site to be as close to the impact site as possible, however we strongly disagree that a greater conservation benefit could be achieved by providing a distant offset site either within or outside the ACT as proposed in the draft Guideline 3 and page 6 of the Position Paper.

We note the amended Objects of the NC Act in the *Nature Conservation Bill 2014* to conserve, protect and enhance the biodiversity of the ACT and how this will be achieved.⁹ While offsetting is a tool often promoted as providing opportunities for conservation, we caution that the science on offsetting remains uncertain, and as yet there is little scientific evidence to demonstrate its success. Offsets ought to be developed in a strategic context with a long term vision for the achievement of the conservation objectives.

⁸ Gordon A., Langford W.T., Todd J.A., White M.D., Mullerworth D.W, Bekessy S.A. (in press) "Assessing the impacts of biodiversity offset policies", *Environmental Modelling and Software*.

⁹ *Nature Conservation Bill 2014*, s. 6(1)-(3).

Implementation of these objectives in relation to the offsets policy requires that there be an audit of existing protected matters and their respective conservation statuses. Not all protected matters should be eligible for offsetting and these areas ought to be clearly defined prior to the commencement of the offset scheme. For example, any matter with the conservation status “critically endangered” should never be allowed to be offset. This is particularly critical to the ACT with its relatively small land mass. Strategic planning should be implemented from the outset, to create a holistic and forward-looking policy that reflects the overall conservation goals of the ACT Government. We recommend a strategic plan that not only addresses offsetting, but also resolves the greater issue of diminishing biodiversity in favour of economic development.

- ii) *Offsets must be based on sound ecological studies and principles, such as ‘like for like.’*

The ‘like for like’ requirement as acknowledged in the ACT Position Paper on page 5 is fundamental to the ecological integrity and credibility of any offset scheme. The PD Act must incorporate 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. To do otherwise risks the resulting actions not being a true offset. We recommend the legislation should make it clear that a proposal to offset an environmental impact through a greater amount of land with lower environmental values will not be accepted. Like for like is necessary for all proposals to ensure protected matters are not degraded over time. If like-for-like is not available then the proposal ought to be rejected. Again this must be enshrined in legislation.

- iii) *Legislation and policy should set clear limits on the use of offsets.*

The PD Act and the offsetting framework must include clear parameters. The use of ‘red flag’ or ‘no go’ areas are essential to make it clear that there are certain matters and areas 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 and to MNES. Guidance in the legislation is required so that there is certainty around on what is an unacceptable impact. Some species or vegetation may be so threatened that it is impossible to apply an offset. It is essential that the regulatory framework set out clear sites, species and communities (‘red flag areas’) where it is simply not appropriate to offset or allow any further detrimental impact.¹⁰

Further, the use of the ‘mitigation hierarchy’ as described above should not be used to override the principle of red flags/no go areas. To do otherwise is to risk all matters amenable to offsetting even where a development could cause a local extinction.

¹⁰ ANEDO, *Submission on the Use of environmental offsets under the EPBC Act 1999 – Discussion Paper*, 3 December 2007. Available at: <http://www.edo.org.au/edonsw/site/pdf/subs/071204epbc_offsets.pdf>.

iv) *Offsetting must achieve benefits in perpetuity.*

We note the Guidelines on page 5 state that the leaseholder agrees to manage values in perpetuity for developments, including land developments, which result in permanent loss of biodiversity values. We are in support of this aspect as 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. We would like to note, however that in many cases, impacts are permanent. There must therefore be a corresponding obligation to ensure that any offset site is maintained in an appropriate form, in perpetuity. Again, a legal mechanism is required in the PD Act to assure this outcome is obtained. Enforcement mechanisms must also be available and we support the use of noting the offset interest on the leasehold title (draft Guideline 2). We also support the register of offset sites (at 6.5 of Position Paper) as it is an important measure to ensure future users of offset sites are informed about the existence of the offset interest before the site is used in any way.

v) *Offsets must be based on principles of 'net gain'*

Page 2 of the Position Paper states the aim of offsetting, as part of the environmental approvals process, is to *maintain or improve* the likelihood of ecological communities and threatened species and their habitats, including matters of NES, persisting in the ACT. We submit that the *'improves or maintains'* standard is insufficient, and that the offsets policy should have the goal of *enhancing environmental quality* as posited in WA and Victoria. Enhancing environmental quality is a mechanism that could be incorporated into the PD Act and is one which acknowledges the current trajectories of biodiversity loss and that positive action is required to halt and reverse this trend.

vi) *Offsets must be additional*

It is of great concern to the EDO that the ACT is seeking to use offsets within existing conservation reserves and that the Guidelines on page 4 states 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. We strongly disagree with this statement. It appears this highly controversial policy is being taken due to the ACT's relative small land mass so as to permit, in our opinion, 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. 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.¹¹

The Senate Committee into Environmental Offsets examined the application of the principle of additionality in relation to offsets being used to protect land that it 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 (our emphasis).¹²

In our view, 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.

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. Examples of appropriate decision-making criteria for determining when an offset is additional include:

- An offset must be additional to current regulatory requirements;
- An offset must be additional to best practice on-site environmental management;
- An offset must not be currently funded / potentially funded in the future under another program.

vii) *Monitoring requirements must be specified in the legislation and offset arrangements must be legally enforceable*

We note monitoring, compliance and audit is described very briefly at 6.7 of the Position Paper.

¹¹ Dr Phil Gibbons, <http://www.canberratimes.com.au/comment/its-becoming-harder-to-see-the-trees-for-the-revenue-20140128-3112b.html>.

¹² 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.

Monitoring and evaluation of approved offsets arrangements must be established and adequately resourced to determine whether promised environmental outcomes are achieved over the short and long term and 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. The field of restoration ecology is still relatively new, and even those schemes that have been in existence for some time – such as the Wetlands Restoration Scheme in the USA – cannot show conclusive results in terms of beneficial environmental outcomes.¹³ 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.

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 is the current Warkworth Mine extension near Bulga in NSW, where a previous offset area was proposed to be mined.

Bulga Milbrodale Progress Association Inc. vs Warkworth Mining Limited & Ors

On April 7, 2014, the NSW Court of Appeal ruled in favour of the residents of the Hunter Valley village of Bulga and the protection of a rare forest containing endangered plants and animals, by upholding the refusal of an open cut coal mine expansion. Rio Tinto was seeking to open cut mine a biodiversity offset area, containing an endangered ecological community, the Warkworth Sands Woodland, and threatened animal species including the squirrel glider and the speckled warbler. This woodland is unique to the area and only 13 per cent of the original forest remains. Rio Tinto had previously promised to permanently protect this area, under an agreement with the NSW government, as part of the existing approval from 2003. The protected area also includes Saddleback Ridge which provides a buffer between the mine and Bulga.

¹³ For example see: Maron et al, “Can Offsets Really Compensate for Habitat Removal? The Case of the Endangered Red-Tailed Black Cockatoo” (2010) 47 Journal of Applied Ecology 348, at 348; Maron et al, “Faustian Bargains? Restoration Realities in the Context of Biodiversity Offset Policies” (2012) 155 Biological Conservation 141, at 144; Gibbons & Lindenmayer, “Offsets for Land Clearing: No Net Loss or the Tail Wagging the Dog” (2007) 8(1) Ecological Management and Restoration 26; Bekessy et al “The Biodiversity Bank Cannot be a Lending Bank” (2010) 3 Conservation Letters 151; Ambrose, Richard F, (2000) “Wetlands Mitigation in the United States: Assessing the success of mitigation policies”, Wetlands (Australia) 19(1) 2000; Lake, PS (2001) “On the maturing of restoration: Linking ecological research and restoration” Ecological Management and Restoration Vol 2, No. 2, August 2001; and Chapman M.G. and Underwood A.J. (2000) The need for a practical scientific protocol to measure successful restoration Wetlands (Australia) 19(1), 28-45

This case study demonstrates that environmental outcomes are uncertain and in this respect we recommend the legislation explicitly refers to the principle of permanence.

We note pages 4 and 6 of the Guidelines states 'adequate monitoring of sites would also assist.' And at page 10 of the Position Paper that 'an appropriate regime for monitoring offset sites and offset actions should be established as part of the conditions of approval for each development'.

We recommend conditions of an approval should be very clear about monitoring and compliance including, for example, specific requirements that must be met for a monitoring program such as the undertaking of research with respect to the listed threatened species and communities.

In particular, there should be 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;
- Liability issues for failed offsets (which we recommend should rest with the proponent).

A policy that cannot be adequately enforced is a policy that should not be approved. The extent to which the ACT government will be able to undertake enforcement and compliance measures will depend on its resource constraints. 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. EDO notes page 10 and 11 of the Position Paper that the legislative provisions in the PD Act and the NC Act be used to ensure compliance. The EDO supports the use of sanctions that will prevent non-compliance with offset conditions and we recommend the PD Act is specifically amended to contain offence provisions for non-compliance with the conditions of an approval (for example see s 142A of the EPBC Act). The development of policy should also look at the adoption of cost recovery options.

viii) Indirect offsets must be strictly limited.

There should be extremely minimal use of indirect offsets. Allowing expanded use of indirect offsets would result in net loss of impacted matters. The EDO opposes the use of indirect offsets or 'compensatory measures' as described at page 5 of the Position Paper to achieve the goal of enhancing, or even '*improving or maintaining*', environmental quality. This principle essentially allows a developer to buy their way out of a difficult offsetting requirement. This will be particularly detrimental for areas where there is no offset available because of the scarcity of the impacted matter. This will also be a **breach** of the like for like principle and the red flag principle. What is being suggested is a compensatory

payment, not an offset. Use of indirect offsets result in even higher uncertainty of linkages with impacts, and higher risk that biodiversity outcomes may not be achieved.

Four reasons support this position.¹⁴

1. It is very difficult, if not impossible, to measure the environmental gains when the results of indirect offsets are balanced against the losses occasioned by a development. In order for an offsets policy to be viable, the gains must be measurable with a reasonable degree of certainty. This is simply not the case when indirect offsets are deployed.

2. The relationship between many types of indirect offsets and the environmental gain sought to be achieved is dependent on many contingent and uncertain factors. Many proposed schemes currently contemplate, for instance, that funding for research may comprise part of an acceptable offset. In order to achieve an effective environmental outcome, however, research must not only be performed to an acceptable level, but it must also be implemented and there must be systems in place for evaluation of its impacts. This in turn is dependent on adequate funding. The uncertainty inherent in this process renders such forms of indirect offsetting ill-suited to achieving enhanced environmental outcomes.

3. As noted, effective offsets must be additional to activities that would have been undertaken in the normal course of events. It is difficult to demonstrate that indirect offsets comprise the requisite degree of additionality.

4. The use of indirect offsets contradicts the principle of 'like for like' offsetting that is a fundamental component of any offset strategy.

Other matters:

a) Assessment tools:

For detailed comment on the legal application and science underpinning assessment tools please refer to previous technical submissions by ANEDO listed in the Appendix of ANEDO's submission to the Senate Inquiry into Offsets.¹⁵ ANEDO supports the development of a robust assessment methodology based on the best available science that consistently implements the fundamental principles of offsetting including like for like and additionality.

In the absence of a robust tool, the criteria on which offset sites are selected is unclear. Where an assessment method does exist, it is essential that it is applied consistently and accurately. In the ACT for example, serious concerns have been raised about the choice and location of offsets.¹⁶

¹⁴ ANEDO Submission, above n 2, 9.

¹⁵ ANEDO Submission, above n 4, 22.

¹⁶ Ibid, 5.

Similarly, concerns about how proposed offsets are developed and assessed have been raised in other Australian jurisdictions. For example, in relation to offsets for BHPB Roxby Downs Olympic Dam Expansion project.¹⁷

b) Minister's Call-in Power

Page 13 of the Position Paper discusses proposals that are subject to Ministerial call in powers (s.159 PD Act) and that in these circumstances the Conservators advice would not apply to conditions of approval relating to offsets for MNES. We recommend caution is exercised as the provision potentially allows environmental concerns to be overridden by socio-economic criteria. As biodiversity has not been given a dollar value, the ledger will always tip in favour of major projects if the criteria in the decision making process are economic.

Planning policy already attempts to prioritise economic considerations in planning decision-making (s6 & 9 of the PD Act) As noted above in relation to the *Warkworth* decision, the Land and Environment Court found Rio Tinto's economic modelling deficient in many ways, including its methodology that over-estimated the benefits of the mine. The Court of Appeal found no fault with the Land and Environment Court decision that the economic benefits of the coal mine did not outweigh the significant impacts on Bulga residents and the destruction of rare forests containing endangered plant and animal species.

Such economic prioritisation policies are likely to contribute to the incremental and permanent loss of significant biodiversity and undermine the ecological credibility of the ACT offset framework.

c) Timing of offset plan requirements

We note page 9 of the Position Paper that the appropriate mechanisms to secure an offset site would need to be considered at the time the offset is assessed and included in the conditions of approval for the development. Approvals will only be made where there is a reasonable degree of certainty around the success of securing the offset. We support the ACT government's approach that an offset should be fully implemented and verified prior to a development proposal going ahead.¹⁸ The PD Act will also need to nominate the timing within which the offset plan must be submitted by the proponent as well as deadlines for securing the actual offset. Requirements to secure offsets at a late stage increases the pressure for an inadequate offset to be approved, simply because the project has already been approved or is already underway. A project that will cause a significant impact upon the environment should not be approved until an appropriate offset is secured. Otherwise, there is no guarantee that the goals of offsetting will be achieved.

¹⁷ For further detail see the submission on the draft EIS prepared by the Conservation Council of South Australia.

¹⁸ ANEDO Submission, above n 10.

d) Unanticipated Outcomes

Offset framework in the ACT must address the risk of unanticipated events that destroy the value of the offset site, such as bushfires. Responsibilities of the various parties should be made clear in circumstances where such an event were to occur and specify whether alternative biodiversity management strategies would be entered into at this stage. Consideration of unanticipated events should also take account of increased likelihood of extreme events as a result of climate change.¹⁹ In these circumstances it is all the more important that the legal and practical mechanisms in place to respond to those events are effective, particularly with regard to biodiversity outcomes.

e) Public consultation

We note changes to the PD Act and the NC Act are proposed to enable delivery of offsets (page 13 Position Paper) and we urge the government make relevant exposure drafts available for public consultation before the amendments are made.

Please do not hesitate to contact the writer at the EDO ACT should you wish to discuss any matter arising.

Yours sincerely
Environmental Defender's Office (ACT) Inc

Camilla Taylor
Principal Solicitor

¹⁹ Diffenbaugh et al have found that "extreme temperature and precipitation events are likely to respond substantially to anthropogenically enhanced greenhouse forcing and that fine-scale climate system modifiers are likely to play a critical role in the net response. At present, such events impact a wide variety of natural and human systems, and future changes in their frequency and/or magnitude could have dramatic ecological, economic, and sociological consequences." See: Diffenbaugh, N. S., J. S. Pal, et al. (2005). "Fine-scale processes regulate the response of extreme events to global climate change." *Proceedings of the National Academy of Sciences of the United States of America* 102(44): 15774-15778.

ANNEXURE A

The International Union for Conservation of Nature's Independent Report on Biodiversity Offsets recommends the following principles be applied as best practice activity for biodiversity offsetting.

Fundamental Principles of Offset Design

1. **Recognise the limits of offsetting:** Not everything can be offset. Some losses are so great that no offset can sufficiently compensate for them. A common example of this is species extinction where no offsets policy can adequately compensate for losses incurred. Limits to offsetting are justified by the uniqueness, irreplaceability and vulnerability of biodiversity features. Additionally, some compensation targets may be so great a suitable offsets scheme does not actually exist.
2. **Additionality:** Offset gains are the result of additional offset actions. Gains would not have occurred in business-as-usual scenarios. If little or no additionality occurs, no offset would have occurred and the residual impacts of development remain.
3. **Equivalency:** A balance of losses and gains must represent a fair exchange. This involves quantitative measurement of losses and gains. Equivalency must be achieved in terms of the type and amount of biodiversity. There must also be equivalency in time and space. Trading systems such as like-for-like, like for better or trading up should be considered.
4. **Permanence:** Gains must last at least as long as impacts

Offset Approaches:

1. **Involve appropriate stakeholders and rights-holders in** developing offset policy. This ensures offsets policy is appropriately designed to recognise local, regional and global values. Stakeholder involvement increases the acceptance of offsets and ensures long-term support for the enduring success of offsets. Additionally, stakeholder involvement should be equitable. Rights and responsibilities should be shared. Customary and legal arrangements should be respected.
2. **Use regional or national conservation plans:** National governments should take responsibility for devising holistic plans which encompass entire ecosystems despite internal political boundaries.
3. **Use a decision-making framework.** An appropriate framework approach will help to outline a general approach, establish the evidentiary burdens of proof required to prove the appropriateness and achievability of offsets and help to articulate the varying levels of conservation concern for affected biodiversity, residual impacts, opportunities for suitable offsets and the feasibility of offset implementation in practice.

Framework for calculating biodiversity offset losses and gains

1. Prioritise and select biodiversity features to include: Consider competing stakeholder values, biodiversity value and ecosystem services. Additionally, irreplaceability and vulnerability are central tenets to judging levels of conservation concern

2. Select methods to collect data on amounts of each feature in the field: Measure quantities of biodiversity features using direct or indicative measurements.
3. Convert data into a currency: Use one or more currencies to allow comparison of biodiversity losses and gains. E.g. Extent (such as the length or volume) x Condition (quality) of the ecosystem
4. Decide on adjustments needed for a fair exchange: Use the global best-practice guidance of No Net Loss

Offset Implementation

The IUCN considers many countries' legislation, guidelines and methods for offset design and delivery to be outside a No Net Loss definition of biodiversity offsets. The IUCN recommends a corporate offset approach and flexibility in methods to suit local circumstances.

Examples of regulatory offset options include private conservation banks, government conservation banks, contracts with private organisations, partnerships or contracts with NGOs/DIY offsets by developers and in lieu fees.

Voluntary offset options include private conservation banks, government conservation banks, public-private conservation banks, contracts, partnerships, DIY Offsets by developers and in lieu fees.

Furthermore, biodiversity offsets will necessarily involve changes to land management and land use. For financial and legal sustainability, the IUCN recommends long-term financing mechanisms (such as a conservation fund) and handovers to a competent authority after gains have been achieved. Lessons about land management can be learnt from the conservation sector. Mechanisms such as protected areas, legal agreements and payments for environmental services can be extremely effective if properly implemented. Permanence (or longevity) of offsets must be ensured so that gains last as long as impacts. This can be achieved through insurance mechanisms, changing land tenure (e.g. the Bowen Basin, Qld) through stewardship or conservation agreements and third party enforcement provisions.