



Australian Network of Environmental
Defender's Offices Inc

Submission on the draft EPBC Act Environmental Offsets Policy

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The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Introduction

The Australian Network of Environmental Defender's Offices Inc (**ANEDO**) is a network of nine community legal centres specialising in public interest environmental law and policy. ANEDO welcomes the opportunity to comment on the *EPBC Act Environmental Offsets Policy Consultation Draft (Draft Policy)*.¹ In recent years ANEDO has had involvement with a range of law reform and policy matters relating to the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, including offsets policies.²

ANEDO is also pleased to provide comment on the draft *Environmental Offset Assessment Guide (Assessment Guide)*. The majority of these comments appear at **Appendix A**.

We note the aims of the Draft Policy are to:

1. Ensure the efficient, effective, transparent, proportionate, scientifically robust and reasonable use of offsets under the EPBC Act;
2. Provide proponents, the community and other jurisdictions with greater certainty and guidance on how offsets are determined and applied under the EPBC Act;
3. Deliver improved environmental outcomes by consistently applying offsets policy;
4. Explain the Government's position on a range of issues, including:
 - a. When it is appropriate to consider offsets as part of a project;
 - b. The appropriate nature and scale of offsets;
 - c. The use of market-based instruments for the delivery of offsets.

The Draft Policy would apply to actions likely to have a significant impact on protected matters (including Matters of National Environmental Significance (**MNES**), activities on Commonwealth land, and activities of Commonwealth agencies) under the EPBC Act.³

Accordingly it is important that the Offsets Policy is consistent with the objects of the EPBC Act, the first of which is "to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance" (section 3(1)(a)).

As ANEDO has previously noted, the idea that impacts on such unique matters of national environmental significance can simply be offset, is deeply concerning. In many cases it will not be possible to offset impacts on specific unique places and species. However, we provide these comments recognising that offsets do form a part of Australian jurisdictions' policies.

¹ See <http://www.environment.gov.au/epbc/publications/consultation-draft-environmental-offsets-policy.html>

² See, for example, ANEDO, *Submission on the Use of environmental offsets under the EPBC Act 1999 – Discussion Paper*, 3 December 2007, http://www.edo.org.au/edonsw/site/pdf/subs/071204epbc_offsets.pdf; and ANEDO, *Submission to the 10 Year Review of the Environment Protection and Biodiversity Conservation Act 1999*, January 2009, <http://www.edo.org.au/policy/090219epbc.pdf>.

³ More specifically, these protected matters are: World Heritage properties; wetlands of international importance (Ramsar wetlands); listed threatened species and ecological communities; listed migratory species protected under international agreements; the Commonwealth marine environment; the whole of environment on Commonwealth land; the whole of environment where it relates to actions carried out by a Commonwealth agency; the whole of environment where it relates to nuclear actions; National Heritage places; the Great Barrier Reef Marine Park.

Executive Summary

To the extent that Australian governments are committed to the use of offsetting, ANEDO seeks to ensure that positive biodiversity outcomes are maximised based on rigorous science, their likelihood increased, and that achieving those biodiversity outcomes is placed at the centre of offsetting schemes and policies.

Underpinning ANEDO's submission is the firm view that the Australian Government should be setting a high bar for the approval of offsets based on best practice, rather than a 'low common denominator' approach that may be designed to gel with various state-based offset schemes.

Strategies to ensure these aims should include:

- Concerted policy action and long-term strategic planning to contextualise offsetting within a broader strategy of environmental conservation;⁴
- Appropriate use of a mitigation hierarchy – with appropriate guidance and emphasis on 'avoid' and 'mitigate' aspects prior to considering offsets;
- The use of 'red flag' areas, to make clear that there are certain matters in relation to which offsetting cannot be an appropriate strategy (particularly important for MNES);
- A goal of *enhancing environmental outcomes* (posited in WA and Victoria), instead of 'improving or maintaining' environmental outcomes – to acknowledge past human impacts on biodiversity loss, and that action is required to halt and reverse this trend;
- A 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;
- A requirement of 'additionality' based on clear criteria – to ensure that offsets are not approved unless they provide a conservation benefit additional to what would otherwise occur;
- No use, or minimal use, of indirect offsets – due to higher uncertainty of linkages with impacts, and higher risk that biodiversity outcomes may not be achieved;
- Appropriate incorporation of State and other offsetting schemes;
- Strong enforcement and compliance mechanisms, with adequate resourcing, established from the outset.

We believe the Draft Policy should be amended to better reflect these strategies prior to its finalisation.

⁴ Such that we "base decisions on the level of development compatible with the conservation of biodiversity, rather than asking how we can the maximum level of biodiversity consistent with development." (Farrier 2005).

Context and strategic priorities of the Draft Policy

Need for strategic context and long term vision

ANEDO welcomes the commitment by the Department of Sustainability, Environment, Water, Population and Communities (**DSEWPaC**) “to move towards a more strategic approach to environmental assessments” to achieve strong environmental outcomes, as set out in the Draft Policy (p 3).

It is important that a Commonwealth Offsets Policy contextualises the use of offsets within a broader strategy of biodiversity conservation. 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. In addition, ANEDO notes previous advice to the Minister that:

... land clearance has been the most significant threatening process in Australia since European settlement. [It] continues to be a significant threatening process and ... if it is not controlled it will lead to additional species becoming endangered, to additional species being listed ... and to ecological communities being listed ...⁵.

We note that the objects of the EPBC Act include enhancing Australia’s capacity:

- to ensure the conservation of its biodiversity by including provisions to protect native species, in particular preventing the extinction and promoting the recovery of threatened species, and to ensure the conservation of migratory species;
- to protect ecosystems by means that include the establishment and management of reserves, the recognition and protection of ecological communities and the promotion of off-reserve conservation measures; and
- to identify processes that threaten all levels of biodiversity and implement plans to address these processes.⁶

ANEDO submits that implementation of these objectives in relation to the Draft Policy requires that there be an audit of existing protected matters and their respective conservation statuses. We maintain that not all protected matters should be eligible for offsetting, and that DSEWPaC should clearly define those areas prior to the commencement of the Policy. For example, we believe that any matter with the conservation status “critically endangered” should never be allowed to be offset.

As a related but separate comment, ANEDO is concerned at the lack of strategic planning for a time where offsetting schemes have operated to a point where offsetting is no longer an option, due to a lack of available offset sites. While ANEDO is aware that there is a proposal for review of the Policy every five years,⁷ we nonetheless submit that strategic planning should be implemented from the outset, to create a holistic and forward-looking policy that reflects the overall conservation goals of the Australian Government.

The Draft Policy should acknowledge that, when suitable offset sites are no longer available, serious and difficult decisions regarding land-use and conservation will need to be made. It is our opinion that those difficult decisions need to be addressed sooner rather than later, and that clear long-term strategic planning is needed to ensure that offsetting does not simply result in incremental loss of biodiversity over time, while development continues as ‘business

⁵ <http://www.environment.gov.au/biodiversity/threatened/ktp/clearing.html> Accessed 14/10/2011

⁶ EPBC Act s 2(e)(i), (iii) and (iv).

⁷ See section 1 of the Draft Policy.

as usual'. ANEDO would welcome a more fulsome Offsets Policy with a strategic plan that not only addresses the contemporary issue of offsetting, but also resolves the greater issue of diminishing biodiversity in favour of economic development. This requires a 'paradigm shift'.

As David Farrier has written:

Flexibility in the environmental context has traditionally meant placing certain conditions on projects that are allowed to proceed as distinct from simply saying "no" to a project. The focus of regulatory systems addressing environmental problems has been how we can allow development to proceed on a particular site, not whether we should allow it to go ahead. This approach may be appropriate when dealing with land degradation or water pollution, but it may be inappropriate when dealing with biodiversity conservation. It is time for a paradigm shift. We need to base decisions on the level of development compatible with the conservation of biodiversity, rather than asking how we can the maximum level of biodiversity consistent with development.⁸

While ANEDO has not made a separate submission on the draft Commonwealth Biodiversity Policy,⁹ the above comments may assist in the further development of that policy as well as the Draft Offsets Policy (and the interaction between the two).

Development of the offset model – combine strategic conservation planning with the 'mitigation hierarchy'

To be valuable, an offsets policy must be scientifically rigorous and be driven by best-available science. In addition, we believe that the primary driver for a successful offsets scheme should be the securing of environmental conservation, not a business-as-usual scenario for development.

ANEDO is concerned that the Draft Policy (and Assessment Guide) has been constructed with a focus on the 'mitigation hierarchy' of avoid, mitigate then offset (we discuss the 'avoid and mitigate' aspects of this hierarchy below). We recommend that the Policy (and its underpinning methodologies) be developed using a combination of mitigation hierarchy and strategic conservation planning. We also recommend that the hierarchy include the concept of 'minimise'; to respond to situations where total avoidance may be impossible, but there is potential for minimisation of some impacts before mitigation efforts are entered into.

Strategic conservation planning in the context of offsetting recognises that there are elements of the landscape that are critical to the success of existing DSEWPaC conservation policies,¹⁰ as well as developments that are critical to the function of the national economy.¹¹

ANEDO believes that prior to the commencement of an offsetting scheme, a strategy needs to be developed that clearly identifies:

1. at a regional scale:¹²

⁸ Farrier, David *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?* (1995) 19(2) *Harvard Environmental Law Review* 303-408.

⁹ <http://www.environment.gov.au/epbc/publications/consultation-draft-biodiversity-policy.html>

¹⁰ For example, Recovery Plans, Register of Critical Habitat, Key Threatening Processes, Threat Abatement Plans, Conservation Agreements and Listed Threatened Species and Ecological Communities. Source: <http://www.environment.gov.au/biodiversity/legislation/index.html> Accessed 14/10/11

¹¹ Kiesecker, J. M., H. Copeland, et al. (2009). "Development by design: blending landscape-level planning with the mitigation hierarchy." *Frontiers in Ecology and the Environment*, 8(5): 261-266.

¹² Setting priorities strategic conservation goals at a regional scale recognises that ecosystem functions at a large scale and that policies adopted at a property-scale should reflect the needs of the larger ecosystem, eg: Dan, v. d. H. (2011). "Adoption of payments for ecosystem services: An application of the Hågerstrand model." *Applied Geography* 31(2): 668-676.

- a. areas of natural habitat that are unable to be offset (for example, species or ecological communities listed as critically endangered, or that have reached their threshold of ‘minimum viable need’¹³),
 - b. areas of natural habitat, the conservation of which is crucial to the perseverance of species or ecological communities,
 - c. areas of natural habitat that are adequately conserved within the region, and
 - d. areas of high development potential;
2. scientifically quantified risk in terms of the spatial and temporal requirements (location and timing) for the offset to achieve its conservation goals; and
 3. benchmarks (or indicators) that can be used as a proxy to indicate the offset is currently (or is on track to) achieve its conservation goals.

Identifying these areas allows for strategic offsetting that results in maximum conservation benefits. Best-available science indicates that offsets that are specifically selected on the basis of their spatial appropriateness (so for example the offset area is located close to the development site so as to share ecological attributes) are more successful in offsetting the loss from development than offsets that are randomly chosen, or chosen because of reasons other than environmental suitability.¹⁴

In addition, temporal suitability is considered to be a key factor in the success of offsets.¹⁵ Determining temporal suitability is discussed later in this submission.

If offsetting is to provide an opportunity to deliver conservation goals, the best chance of this occurring is if it proactively seeks to protect critical habitat. It is our opinion that an offset policy that does not begin with a frank appraisal of remaining biodiversity, coupled with an analysis of present and future conservation and development goals, is sub-optimal. In contrast, a policy that addresses and applies those aspects would be more likely to achieve substantial gains for the environment, and reduce the risk of further degradation and destruction of Australia’s MNES.

The Avoidance and Mitigation Hierarchy

Avoidance

We submit that the Draft Policy lacks clear guidance around when offsetting is not (and never will be) appropriate, and guidance for industry about avoidance. ANEDO is concerned at the lack of appropriate direction for proponents who may seek to avoid an environmental impact, and notes that without such guidance, an attempt by DSEWPaC comprehensively to assess the appropriateness of ‘avoidance’ measures might be construed

¹³ See further ‘Red flag areas’, below. The concept of ‘minimum viability needs’ is related to strategic conservation planning. ANEDO is of the view that the minimum viability needs of Australia’s matters of environmental significance should be well known prior to the commencement of an offset policy that will administer the destruction or conservation of these matters. It would be counterproductive for a policy that aims to achieve conservation goals to inadvertently approve the destruction of biodiversity which would result in that biodiversity being unable to function in the landscape.

¹⁴ 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*.

¹⁵ Bekessy, S. A., B. A. Wintle, et al. (2010). "The biodiversity bank cannot be a lending bank." *Conservation Letters* 00: 1-8.

as being merely a theoretical process. Transparent assessment of whether appropriate avoidance measures have been undertaken is essential – particularly for MNES. Otherwise, it is too easy for proponents to place undue reliance on offsetting in order to obtain project approval. The development and implementation of an Offsets Policy therefore requires clear and transparent instruction on how proponents should be seeking to undertake avoidance measures.

Red Flag Areas'

The Draft Policy states (at 4) that '[o]ffsets are not intended to make proposals with unacceptable impacts acceptable.' ANEDO submits that further clarity is required on this statement. The Policy should provide further guidance on what is meant by unacceptable impacts. Some species or vegetation may be so threatened that it is impossible to apply an offset. As we have previously submitted, 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.¹⁶

Mitigation

ANEDO understands that at present, DSEWPaC does not provide guidelines on when it will be appropriate to mitigate biodiversity impacts, and how mitigation should be undertaken. In the absence of such guidelines, it would seem very difficult to assess adequately and consistently whether reasonable mitigation attempts have been made by a proponent. In this circumstance, as noted above in relation to 'avoidance', it is too easy for a proponent to progress to the offsets stage in a development approval process.

Further specific wording suggestions in this area

The Draft Policy states at 4.1 that '[o]nly after all reasonable avoidance and mitigation measures have been identified will an offset be considered'. ANEDO believes that this should be emphasised much more forcefully in the Draft Policy, including being explicitly stated at the following points:

- In 'Box 1' on page 4 of the Draft Policy;
- At 5.2 (Assessment stage), there should be a further bullet point, headed '**Should the proposal be rejected at this stage?**' between 'How severe are the impacts likely to be?' and the following point, 'Are offsets a suitable approach?' The addition of this bullet point, when considered with the point that follows it, will make clear that there are some impacts that, if they cannot be avoided or mitigated, will render the proposal inappropriate; and that the appropriate approach for the decision-maker will be to reject the proposal at this stage.

¹⁶ ANEDO, *Submission on the Use of environmental offsets under the EPBC Act 1999 – Discussion Paper*, 3 December 2007, http://www.edo.org.au/edonsw/site/pdf/subs/071204epbc_offsets.pdf.

Appropriate conservation goals

Improve or maintain' standard – or something better?

The third of the four key aims of the Draft Policy is to 'deliver improved environmental outcomes by consistently applying offsets policy'. Box 1 of the Draft Policy states that suitable offsets must 'deliver an overall conservation outcome that improves or maintains the viability of the aspect of the environment that is protected'. At 4.2.1, the Draft Policy states that direct offsets involve 'maintenance or improvement of [the relevant] land through positive conservation actions'. Similarly, at 6, the Draft Policy states that '[o]ffsets must deliver an overall conservation outcome that *improves or maintains* the viability of the aspect of the environment that is protected by national environmental law and affected by the proposed development'.

ANEDO submits that the 'improves or maintains' standard is insufficient, and that an offsets policy should have the goal of *enhancing* environmental quality. The 2008 Discussion Paper on an Environmental Offsets Policy of the Environment Protection Authority in Victoria proposes a 'net environmental benefit' standard.¹⁷ Similarly, the Environmental Protection Authority in Western Australia has proposed a 'net environmental benefit' standard, stating that 'this policy position recognises that the environment has been significantly compromised in the past and that halting and reversing the decline of the environment is now a priority'.¹⁸ ANEDO supports adoption of a standard of 'net environmental benefit' or 'enhancing environmental quality'.

Suitability of offsets

Like-for-like offsetting

The Policy should clarify, in Box 1 as well as elsewhere, that all offsetting should be 'like-for-like'. This means that any impact on land of a particular environmental value must be offset through a site of the same environmental value. The Draft Policy should make clear that a proposal to offset an environmental impact through a greater amount of land with lower environmental values will not be accepted. At present, the Draft Policy simply states (at 6) that a like-for-like approach will be adopted 'wherever possible'. ANEDO submits that offsets should always be like-for-like, in order to ensure that protected matters are not systematically degraded over time. If like-for-like offsets are not available, it should be questioned whether offsetting is appropriate, given the significance of the matters that are protected under the EPBC Act.¹⁹

Additionality of the offset

The principle of 'additionality' is a key principle in relation to the use of offsets.²⁰ At present, the Draft Policy states (at 6, emphasis original):

¹⁷ Environment Protection Authority Victoria, (June 2008) *Discussion Paper: Environmental Offsets* <[http://epanote2.epa.vic.gov.au/EPA/publications.nsf/2f1c2625731746aa4a256ce90001cbb5/cfa2d441a0e31fb7ca2574670004b739/\\$FILE/1202.3.pdf](http://epanote2.epa.vic.gov.au/EPA/publications.nsf/2f1c2625731746aa4a256ce90001cbb5/cfa2d441a0e31fb7ca2574670004b739/$FILE/1202.3.pdf)>

¹⁸ Environmental Protection Authority Western Australia (January 2006) *Environmental Offsets, Position Statement No 9*

¹⁹ See *Caruso and Ors v Sydney Water Corporation* [2008] NSWLEC 320.

²⁰ See ANEDO's *Submission on the Use of environmental offsets under the EPBC Act 1999 – Discussion Paper*, 3 December 2007, http://www.edo.org.au/edonsw/site/pdf/subs/071204epbc_offsets.pdf.

an *improved overall conservation outcome* is not achieved by an offset that simply increases the amount of habitat or ecological community that is *protected* by covenant or other mechanism. Protection must be matched by management of the protected matter that is impacted.

At 6.11, the Draft Policy states '[o]ffsets must deliver a conservation outcome that would not otherwise occur'. Despite these statements, the Draft Policy does not provide clear decision-making criteria for determining when an offset is additional.

(The Assessment Guide allows for offset points to be earned where land tenure is secured and the offset maintained in current condition. This factor is discussed further below. For the present point on additionality, we note that such activity is unlikely to be additional.)

In ANEDO's view, protecting existing habitats only provides an additional conservation outcome:

- 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.

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.

ANEDO emphasises that offsets must not be used as a substitute for management and conservation practices that should rightly be the responsibility of government, for instance the development and implementation of recovery plans. For example, allowing points to be earned for recovery actions, as is currently permitted in the Assessment Guide, risks undermining the EPBC Act by making funding for recovery actions contingent on the destruction of other areas of conservation significance.

Use of indirect offsets

ANEDO continues to oppose the use of indirect offsets to achieve the goal of enhancing, or even 'improving or maintaining', environmental quality.²¹ Four reasons support this position.

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. ANEDO submits that 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.

²¹ See ANEDO's *Submission on the Use of environmental offsets under the EPBC Act 1999 – Discussion Paper*, December 2007, http://www.edo.org.au/edonsw/site/pdf/subs/071204epbc_offsets.pdf.

2. Further to the above, the relationship between many types of indirect offsets and the environmental gain sought to be achieved is dependent on many contingent and uncertain factors. The assessment guide currently contemplates, 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. 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, in ANEDO's view, should be a fundamental component of any offset strategy.

ANEDO emphasises, therefore, that indirect offsets should play no part in an offsets policy. To the extent that indirect offsets are nonetheless included, ANEDO has specific comments on the indirect offsets proposed as part of the Assessment Guide. These are set out in the discussion of the Assessment Guide contained in Appendix A to this submission.

Relationship with State offsetting and other biobanking schemes

ANEDO notes that the Draft Policy supports the use of market schemes for biodiversity offsetting, and also notes DSEWPaC's intention to continue to negotiate, via the Council of Australian Governments (COAG), a set of national standards for biodiversity banking.²²

ANEDO urges DSEWPaC (and COAG) to adhere to the highest possible standards when determining these national standards – even in circumstances where State policies might differ from such standards.

ANEDO also notes the findings of the Hawke Review²³ in relation to biodiversity banking schemes. Of particular relevance is the emphasis on a systematic approach to biobanking, which would help to alleviate some of the pitfalls of ad hoc mitigation and offsetting measures.

The Hawke Review also discusses a strategy 'that the loss of biodiversity values should only be compensated by sites on which the biodiversity offset has already been rehabilitated or re-established' (at 3.93). The Review goes on to note that in this strategy, biobanking would be used as a savings bank, such that trading of credits would only be possible once it was demonstrated that assets had matured. ANEDO strongly supports this approach.

Compliance, enforcement and responsibilities of proponents

In 2007, ANEDO noted its support for Principle 8 of the Government's previous draft offsets policy: "*Environmental offsets should be enforceable, monitored and audited.*" Despite this direct language, we understand that data on monitoring and auditing of offsets to date is limited, and not readily available.

²² Draft Policy, p 3.

²³ *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, Final Report, October 2009, <http://www.environment.gov.au/epbc/review/publications/pubs/final-report.pdf>

The language of the current Draft Policy has shifted. It is more detailed, but less directive:

6.1.5 A suitable offset must have transparent governance arrangements, including being able to be readily measured, monitored, audited and enforced (emphasis added)

More detail is needed on monitoring, auditing, enforcement and compliance measures. ANEDO strongly believes that such measures must form a part of the Policy from the outset.

The Draft Policy states: ‘[p]roponents, or their contractors, must report on the success of the offsets so that conditions of approval can be varied if the offsets are not delivering the desired outcome.’ ANEDO supports a mechanism that will allow revisiting conditions of approval. As illustrated in the case study below, compliance can obstruct the effectiveness of an offset strategy.

Case Study: *Gerroa Environment Protection Society Inc v Minister for Planning & Anor* [2008] NSWLEC 173

The EDO(NSW) acted in this proceeding for the Gerroa Environmental Protection Society Inc against the Minister for Planning’s approval of the Gerroa sand mine, under Part 3A of the *Environmental Planning and Assessment Act 1979* (NSW). In the NSW Land and Environment Court, Preston CJ made orders to improve the conditions of approval. The proponent was required to maintain a vegetation corridor until it could be established that functionality had been achieved on an approved offset site.

Contrary to these orders, the proponent commenced clearing activity on the corridor.

Gerroa Environmental Protection Society is now seeking advice on its enforcement options.

ANEDO supports the use of sanctions that will prevent non-compliance with offset conditions from becoming a cost-effective strategy for proponents. In ANEDO’s opinion, the Policy should make reference to a scale of appropriate sanctions.²⁴

ANEDO understands that DSEWPaC is investigating the options for monitoring compliance and enforceability, and that it intends to strengthen its enforcement mechanisms. As always, the extent to which DSEWPaC will be able to undertake enforcement and compliance measures will depend on its resource constraints – hence the current consultations and policy development on cost recovery options.

In ANEDO’s view, a policy that cannot be adequately enforced is a policy that should not be approved. This is especially the case for offsets under the EPBC Act, considering that these are designed to protect MNES, and that failures to comply with offset requirements can be expected to have a deleterious effect on the nation’s environment.

As ANEDO has previously noted,²⁵ the preferable approach to offsetting is that an offset should be fully implemented and verified prior to a development proposal going ahead. Absent prior implementation, ANEDO submits that performance bonds should be used to guarantee that proponents will deliver environmental outcomes. It should also be made clear that any risk of failure of an offset should rest with the proponent.

Additionally, the Policy should provide guidelines on:

²⁴ ANEDO notes that the EPBC Act presently contains an offence provision for non-compliance with the conditions of an approval – see s 142A.

²⁵ ANEDO, *Submission on the Use of environmental offsets under the EPBC Act 1999 – Discussion Paper*, 3 December 2007, http://www.edo.org.au/edonsw/site/pdf/subs/071204epbc_offsets.pdf

- The period over which monitoring will be required;
- The funding for monitoring activities – in ANEDO’s view, 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.

Duration of Offset

The Draft Policy states that an offset must be enduring. Figure 2 on page 12 states: ‘[i]s the proposed offset enduring? That is, will the benefit last as long as the impact (*not* as long as the activity)?’

ANEDO notes that in many cases, impacts will be permanent. There will therefore be a concomitant obligation to ensure that any offset site is maintained in an appropriate form, in perpetuity. There is a lack of discussion in the Draft Policy as to any legal mechanism which would assure that this outcome is obtained. ANEDO understands that the availability of enforcement mechanisms may vary between jurisdictions; for example, as to whether there is provision to note that land is used as an offset on the Certificate of Title for the site. ANEDO urges that all available mechanisms be used to ensure that users of sites are aware that they are protected as offsets. ANEDO also understands that DSEWPaC proposes to enact a register of offset sites. ANEDO encourages this initiative and supports measures to ensure that future users of offset sites are sufficiently informed about the existence of the register to consult it before undertaking any activities on the site.

Unanticipated Outcomes

The Draft Policy does not address the risk of unanticipated events that destroy the value of the offset site, such as bushfires. The Policy should make clear the responsibilities of the various parties if such an event were to occur; and note whether alternative biodiversity management strategies would be entered into at this stage. Consistently with its stated objective of avoiding perverse environmental outcomes, the Policy should ensure that it does not (inadvertently or otherwise) provide incentives for proponents to fail to take appropriate or reasonable precautionary measures against ‘acts of God’.

The consideration of these events should also take account of increased likelihood of extreme events as a result of climate change.²⁶ 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.

²⁶ 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.

Appendix A – Comments on the draft Environmental Offset Assessment Guide

General comments

ANEDO is interested in understanding in detail the process/es responsible for the development of the Assessment Guide. In order to provide relevant and meaningful comments on the Assessment Guide it will be necessary to review the methodology; in addition, ANEDO considers it a function of open and transparent governance that the methodology be provided to stakeholders for comment.

Generally, ANEDO is concerned that the level of detail of the Assessment Guide is too vague and qualitative to provide genuine guidance. We would expect to see:

- clearly worded, scientific definitions of each section of the Assessment Guide (factors, ongoing actions etc);
- quantification of the descriptions of impacts (low, moderate, high etc. – how are these derived in a practical sense in the field?); and,
- a transparent, quantified process of calculating impact points and offset points.

In addition,

- we consider some of the factors too simplistic to provide a meaningful understanding of the impact, especially to threatened species and ecological communities. We consider that for a secured conservation outcome, some of the listed factors in the draft Assessment Guide should be considered ‘primary’ factors, and be combined (or indexed) to provide a more meaningful indicator of impact on the site as a whole. For example, as discussed earlier, the concept of *critical needs threshold* is an important factor to consider. It could possibly be ascertained through some combination of factors, for example the first four factors in the table, weighted appropriately for the specific environment.
- ANEDO does not support a score of “zero” for any factor on the impact table. We do not agree that an area impact of <1% should be considered to have no impact, and we do not agree that an impact duration of <1 year or 1 generation should be considered to have no impact.
- ANEDO agrees that offset areas should be managed through ongoing actions. However, we do not agree that the ongoing actions should increase the offset points, such that the site seemingly offsets the protected matter to be destroyed just because the points match. We believe that the offset site should be determined primarily by its inherent similarity to the area to be destroyed.
- We are also concerned at the lack of criteria in the offset points table that would ensure that the proposed offset genuinely does offset the impact. For example if the protected matter to be destroyed is a fauna species there should be adequate protection of the same species elsewhere, and if the protected matter is an endangered ecological community (EEC), the offset area should contain the same EEC. The table is vague and generic. As it currently stands, there is potential for a highly inappropriate area to be considered suitable to offset a major loss.
- In addition, there are many areas of overlap, where double counting could increase the value of an offset without reflecting true gains. For example, the proponent automatically scores points for:
 - Securing the land; and

- The condition of the land; and
- The suitability of the land; and
- Offset occurring immediately (no time lag).

All four are considered in the ongoing actions menu, yet none is actually an ongoing action. ANEDO considers that these points are granted without adequate justification, and is concerned that this kind of calculation will result in an offset site being valued too highly relative to its merits.

- ANEDO is concerned at the use of ratios in the Assessment Guide. Points should be calculated only on the basis of suitability, rather than *per hectare*. Translating the “metric” calculation into an area raises the possibility that the size of the offset area can drive a decision that an offset is appropriate, rather than suitability driving the offset. ANEDO does not support a large, sparsely vegetated area replacing a small high condition area. We do not agree that like-for-like means impact points equaling offset points. We submit that care should be taken when calculating points *per hectare* rather than points for suitability. The offset points table should include some non-negotiable factors targeted specifically at the impact on a particular protected matter.
- As noted above under ‘indirect offsets’, ANEDO does not support indirect offsets. We submit that all destruction of a protected matter should be offset on a like-for-like basis. We do not agree that an absolute number (for example, 25%) can be subtracted from the offset points required and used to pay for actions entirely unrelated to offsetting the destruction of a matter of national environmental significance. We do not understand where 25% was derived from and, given our position that there should be no indirect offsets, submit that it is far too high a ratio.
- ANEDO submits that either additionally to, or within the Assessment Guide, provision should be made for compulsory use of modelling to predict the likely lifetime of the offset. Current computational modelling techniques are increasingly sophisticated, and ANEDO believes that these should be applied prior to any offset application being approved (see submission above, ‘*Development of the offset model...*’, point 2).

Impact points/Impact Calculator

ANEDO agrees that each of the factors in the table is important to consider when calculating the impact generated by a development. We comment against each of the factors:

1. Condition of habitat impacted

ANEDO supports comparing the condition of the habitat impacted with overall condition of the protected matter. However, as noted above, we believe that in addition to comparing the relative condition of the protected matter, the actual survival prospects of the protected matter in general, and in relation to the specific proposal should be considered as well. Our concern is that only measuring the relative condition may result in further incremental loss of degraded habitat. For example, say an early proposal removes most of the remaining protected matter that is currently in high condition. All further proposals will by definition consider all remaining protected matter to be in moderate or low condition, which has an impact on the number of impact points generated, and therefore the quality of the offset. Because future offsets will not necessarily be located adjacent to the first offset, there is the potential that the protected matter will be offset with fragmented, low or moderate quality habitat that does not reflect the true value of the original, contiguous biodiversity asset lost.

We believe that a more conservation driven approach is necessary. This would consider the minimum survival thresholds required by a protected matter. In no circumstance can ANEDO support an offset that by nature (quality, location, size etc) does not meet minimum survival thresholds.

2. Area impacted as a percentage of remaining habitat in the bioregion

We believe that there should be a cap on allowable impact of the remaining habitat in the bioregion in both relative terms for an individual proposal, and in absolute terms in relation to the Draft Policy. We also believe that the absolute limit should be based on a comparison with original extent.²⁷

For example, a succession of 5 individual projects in an area, each of which removes 5% of the protected matter, will have a cumulative impact of removing 25% of the remaining habitat. If each application is assessed individually, the degree of loss in the landscape will not be captured.

ANEDO understands that landscape-scale information such as the percentage of habitat remaining is difficult to gather and promulgate, however we stress the importance of maintaining databases with contemporary data and making this data available to stakeholders.

3. Impact on the condition of protected matter or its habitat

We have no additional comments on this factor.

4. Impacts on strategic values important for the persistence of the protected matter

ANEDO is very concerned at the lack of detail for this factor. We believe there should be a detailed list of impacts.

5. Indirect impacts on the protected matter

ANEDO is very concerned at the lack of detail for this factor. We believe there should be a detailed list of impacts.

6. Duration of impact

As well as the point raised above, in not supporting any impact score of zero, ANEDO believes that the impact points for each of the described impact durations do not reflect the severity of the impact. We consider that if one generation is destroyed, this would result in a major impact, and if the duration of impact is over three generations, the impact is permanent and enduring, and must be offset accordingly. We agree that the impact points generated must continue to increase for any additional duration beyond 10-20 years or five generations. Given the severity of these impacts, and based on the limited information available, we suggest that the *relative scores* significantly increase. For example:

< 1 year or 1 generation	10
1-10 years or 3 generations	25
10-20 years of 5 generations	63
For each 10 year period of impact duration beyond 20 years	Add 38 points

7. Reduction in the conservation status of the impact status of the impact site

²⁷ In order to quantify both the goals of the offset, and measure the success of the offset at achieving those goals, a numerical comparison between historical and present extent should be calculated.

We have no additional comments on this factor.

8. Conservation status of protected matter under the EPBC Act

ANEDO does not support the offsetting of any protected matter with a conservation status of Critically Endangered in any circumstance.

Offset Points table

1. Land tenure change and maintenance

ANEDO does not agree that this is an action that should be used to calculate offset points. We do not support proponents scoring points per hectare for securing property for offsetting. In our opinion, the offsets points table should be used to ensure that offsets are appropriate to the protected matter destroyed, not to make finding an offset convenient to a proponent.

In addition, we do not support the award of points for management actions that maintain the land in current condition. We do agree that without management, degradation will occur, but we consider points for maintenance as well as points for additional management actions to be similar to double counting – how will a proponent demonstrate or distinguish between maintenance on the one hand, and gains on the other, derived from a particular management action?

2. Current condition

We have no additional comments on this factor.

3. Proposed additionality

There is not enough detail to distinguish proposed additionality from site characteristics and other actions. For example, it is possible for an offset that includes revegetation to score maximum points in proposed additionality, contribution to wildlife corridor and buffer zone creation. ANEDO is very concerned that minimal work can result in an offset that seems appropriate on paper, but that does not match the loss.

4. Risk associated with additionality

ANEDO is concerned that risk is underrepresented in the offsets points table. Risk (that the offset will not produce conservation results) is a major issue with offsetting. Factors such as lag time effect, increased competition, reduced food resources and reduced habitat affect the ability of the offset area to compensate for the loss. We submit that the values for risk should be higher.

5. Site characteristics

We do not agree that a site that has low suitability in relation to the impact site should be able to be considered an appropriate offset. As discussed earlier, we submit that suitability of offset area, not availability of private land, should drive the identification of an offset area.

ANEDO is also concerned that the length of time between an action occurring, and securing the offset, is not adequately addressed in the table. Given the severity of these impacts, and based on the limited information available, we submit that the points for length of time taken to secure the offset should be proportional to the points for the duration of impact, namely:

< 1 year or 1 generation	-10
1-10 years or 3 generations	-25

10-20 years or 5 generations	-63
For each 10 year period of impact duration beyond 20 years	Subtract 38 points

6. Other actions

- The Assessment Guide does not provide sufficient detail on these.

Indirect Offsets

As discussed above, ANEDO is of the firm view that indirect offsets are inappropriate where the goal is to secure an enhanced environmental outcome. If indirect offsets are to be included, however, ANEDO has the following specific comments on the Indirect Offset Points Menu in the Assessment Guide:

- Greater clarity is required around what constitutes ‘other priority recovery actions (not on the direct offset) developed in consultation with the department’. If the purpose of an offset is to deliver outcomes that balance the particular effects of a proposal on a protected matter, it must be made clear how recovery actions relating to other environmental features are connected with the protected matter. ANEDO submits that there should be a clear relationship between the two.
- Similarly, the Assessment Guide currently allows for points to be awarded for ‘direct offset enhances the viability of one or more other species that are not impacted by the proposed action.’ There should be greater clarity on what relevant species are taken into account here; for example, whether such species must also be threatened species under the EPBC Act.
- In ANEDO’s view, the only form of benefit that should be accepted in an offset scheme is environmental benefit. An offset proposal should not be accorded extra points for having a social or economic benefit. Additionally, awarding additional points to an offset program already awarded points as a direct offset runs the risk of double counting.
- To the extent that offset points are available for providing funding for research activities, the number of points that can be obtained through such funding must be capped. At present, the assessment guide does not provide for such capping, leaving the path open for a proponent potentially to obtain 25% of its offset requirement simply by paying for research that, as mentioned above, might never be applied to achieve an environmental gain. Additionally, as noted above, clear guidelines must be in place to ensure that research funding meets the requirement of additionality.