



# Environmental Defenders Office

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Department of Chief Minister  
Jobs and Economy  
GPO Box 4396  
Darwin NT 0801

By email: [DCM.Environment@nt.gov.au](mailto:DCM.Environment@nt.gov.au)

Dear Environment Team

## **Submission on draft Northern Territory Offsets Policy**

The Environmental Defenders Office (**EDO**) welcomes the opportunity to provide this submission on the draft Northern Territory Offsets Policy (**draft Offsets Policy**) and the ‘target-based outcomes implementation model’ (**Implementation Model**).

EDO is a community legal centre dedicated to protecting the environment. EDO has extensive experience with the implementation of offsets policy and practice throughout the country. As such, we are well placed to provide comment on proposals for the Northern Territory (**NT**).

While we applaud the NT Government for taking steps to develop an offsetting system, as this will support the application of the ‘mitigation’ hierarchy in environmental impact assessment (noting offsets are a key component of that hierarchy), we are very concerned that key details regarding the implementation of the draft Offsets Policy and Implementation Model are missing from the current consultation materials.

In our view, it is not possible for experts in this field, or the community more broadly, to consider the full implications of the proposed policy in the absence of critical detail on how it will be implemented. The Implementation Model itself identifies a number of areas where further work is required to determine whether an appropriate model can be developed. This approach is entirely inconsistent with the draft Offsets Policy’s goal to provide “certainty and transparency for industry and the community”.

Of particular concern is the fact that the Implementation Model is dependent on the existence of NT-wide biodiversity conservation policy and targets being in place – which to our knowledge, do not currently exist. Moreover, the length of time required to establish such targets, given the existing gaps in baseline data across the Territory, calls into question the feasibility of delivering on the proposed approach in the timeframes required (particularly if the draft Offsets Policy is intended to commence concurrently with the *Environment Protection Act 2019*, which we understand to be in April 2020).

In our view, there is a clear risk that the proposed approach to ‘offsetting’ (i.e. targets-based ecological compensation) in current circumstances would simply be used to displace or shift the

resourcing of biodiversity conservation and management activities that should be undertaken separate to any offsetting activity.

Finally, the draft Offsets Policy and Implementation Model is heavily focused on biodiversity offsetting, with limited provision in relation to offsetting of greenhouse gas (**GHG**) emissions. As a result, it is currently not fit for purpose to deliver an appropriate framework for offsetting GHG emissions. It will not deliver on an approach that will ensure recommendation 9.8 of the *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory (Fracking Inquiry)* will be satisfactorily implemented, nor that offsetting GHG emissions from other sectors (including agriculture and land clearing, and industrial activities) will be appropriately implemented.

Given these fundamental issues, we strongly recommend that the draft Offsets Policy is not finalised until the process by which offsets are proposed to be implemented in the NT have been clarified and made available for public consultation.

Nevertheless, we provide the following comments on the current consultation materials. We note that, given the emphasis on biodiversity offsetting in the material, our comments are assumed to be focused on these types of offsets (unless otherwise specified).

## **1. Preliminary matters**

### ***Purpose***

The purpose of the draft Offsets Policy, namely, to ensure that economic development continues while environmental values are protected in the long term, does not place appropriate emphasis on sustainable development. An offsets policy that is designed to facilitate development, rather than protect biodiversity and deliver a safe climate, is immediately compromised.

### ***Offsets and offsetting principles***

EDO has significant concerns about how offsetting may be implemented in the NT, and some of the assumptions that appear to underpin the draft Offsets Policy.

While we agree with the observation in the Implementation Model that “the conventional offsets model has recently been subject to significant academic criticism,” it is important to note that much of this criticism relates to the fact that offset models rarely comply with the clear principles, targets and standards that have been identified as being necessary for offsets to be appropriate, and often measure offsets against a baseline of ongoing decline, rather than current or future biodiversity health.

These principles include that:

- a. Biodiversity offsets must only be used as a last resort, after consideration of alternatives to avoid, minimise or mitigate impacts;
- b. Offsets must be based on sound ecological studies and principles, such as ‘like for like’;
- c. Indirect offsets must be strictly limited;
- d. Offsetting must achieve benefits in perpetuity;
- e. Offsets must be based on principles of “net gain”;
- f. Offsets must be additional;
- g. Offset arrangements must be legally enforceable.

Further, while we acknowledge that the NT “has a unique set of environmental characteristics,” it remains unclear to us why this means that a conventional offset approach cannot be implemented in the NT.

In addition, we do not agree that land tenure presents any special obstacles to offsetting in the NT. Indeed, simple amendments to the *Pastoral Lands Act* to enable offsets on pastoral leases would facilitate a potential new income stream for pastoralists to support conservation and diversification of the pastoral estate. Similarly, it would be open for owners of Aboriginal freehold land to determine that offsetting could be a positive economic use of their land.

## **2. Assessment of the draft Offsets Policy against offsetting principles**

We now provide comment on the draft Offsets Policy and Implementation Model in the context of the principles listed above.

We submit that the draft Offsets Policy should be re-considered and revised to take into account the matters raised below, and to ensure that it properly implements offsetting principles.

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

We welcome Principles 2 and 3 in the draft Offsets Policy, namely that “offsets will not always be available or appropriate” and “the mitigation hierarchy must be rigorously applied”.

However, we recommend the draft Offsets Policy be amended to explicitly provide for the upfront development of ‘red flag’ or ‘no go’ areas to make it clear when offsetting cannot be an appropriate strategy. This could be achieved, for example, through the use of the ‘protected environmental areas’ mechanism established under the *Environment Protection Act 2019*.

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

The proposed Implementation Model is not based on the principle of ‘like for like’. Any ecologically credible offset scheme must enshrine the requirement of like for like offsets, to ensure that the environmental values being used as an offset are equivalent to the environmental values impacted by the proposed action. Otherwise, the resulting action is not an offset.

While we agree with the draft Offsets Policy that offsetting exists within a broader strategy of conservation and must be based on sound landscape conservation principles (noting, however that neither of these exist in NT policy frameworks at present, to our knowledge), if an offsetting system is to be implemented, it must be done without eroding the like for like principle. Language such as:

*“In general, these targets should be chosen to be most relevant to the type of residual impact associated with the development, such as the regional location and the ecosystems affected”*  
(per the Implementation Model)

suggests that even at a landscape scale, like for like requirements may be relaxed.

The timing of offsets is also important. Developments relying on offsets should not be approved until appropriate offsets have been identified. Otherwise, there is no guarantee that the offsets will be delivered, despite the impact it is intended to have offset, already having taken place. This issue is illustrated by the fact that Inpex has yet, to our knowledge, fulfilled its obligations to establish marine and terrestrial protected areas in accordance with its EPBC Act approval for the

impacts of the Ichthys Gas processing facilities in Darwin harbour, despite the approval having been granted in 2011.

It is notable that Gibbons et al (2017)<sup>1</sup> estimated that no net loss of native vegetation under the NSW biodiversity offset policy will not occur for 146 years.

This concept is equally important for any offsets related to GHG emissions. The Climate Council report *Land Carbon: No Substitute for Action on Fossil Fuels*<sup>2</sup> identified significant concerns with offsetting carbon emissions produced by fossil fuels with what they call 'land carbon' offsets. Land carbon offsets can include protecting and increasing regrowth; increasing soil carbon; changed fire management regimes; and protecting carbon stored in coastal ecosystems. Land carbon offsets operate within the 'active' carbon cycle – this is carbon that moves between the land, ocean and atmosphere. While land carbon can be increased, it is vulnerable to loss from activities such as bushfires, droughts, insect attacks and heatwaves, all of which can release significant amounts of land carbon into the atmosphere, returning it to the 'active' carbon cycle.<sup>3</sup>

In contrast, carbon in fossil fuels has been locked away for millions of years. Therefore, burning fossil fuels and releasing carbon dioxide to the atmosphere introduces a store of carbon that is additional to the current 'active' carbon cycle. While the land and ocean will absorb some of this extra carbon, almost half of the carbon dioxide emitted from fossil fuel combustion remains in the atmosphere, driving global warming.<sup>4</sup> According to the Climate Council report, current annual global carbon emissions from fossil fuels are ten times greater than the annual amount of carbon that could be stored by sustainable land carbon mitigation methods.<sup>5</sup>

The reference to the Australian Carbon Credit Units (**ACCUs**) in the draft Offsets Policy fails to recognise this distinction. If the draft Offset Policy is progressed, it must be clear how the policy will ensure like for like offsets for GHG emissions.

*c. Indirect offsets must be strictly limited*

We support the NT Government's position that allowing a financial payment into an offset fund as an alternative to implementing on-ground offsets is not the preferred approach.

However, the draft Offset Policy and Implementation Model effectively propose that all offsets would be indirect offsets. While the measures identified as potential targets, such as the reduction of pervasive threats such as inappropriate fire, weeds and feral animals at a landscape scale, are important environmental outcomes, they do not sit well within an offset framework.

This is because these measures suffer from four key concerns relevant to all indirect offsets: environmental gain is very difficult to measure; the relationship between the activity and the environmental gain is dependent on external and uncertain factors; the level of additionality is difficult to quantify; and like for like offsetting is not required.

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<sup>1</sup> Gibbons, Philip & Macintosh, Andrew & Constable, Amy & Hayashi, Kiichiro. (2017). Outcomes from 10 years of biodiversity offsetting. *Global Change Biology*. 24. 10.1111/gcb.13977.

<sup>2</sup> Steffen, W., Fenwick, J. and Rice, M. (2016) *Land carbon: no substitute for action on fossil fuels* Climate Council of Australia. Available at: <https://www.climatecouncil.org.au/resources/land-carbon-report/>.

<sup>3</sup> *Land carbon: no substitute for action on fossil fuels*, p 12-15.

<sup>4</sup> *Land carbon: no substitute for action on fossil fuels*, p 11.

<sup>5</sup> *Land carbon: no substitute for action on fossil fuels*, p 40.

Based on this consideration, EDO does not accept that the draft Offsets Policy and Implementation Model meet the requirements of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) and the Commonwealth's Environmental Offsets Policy.

Activities related to GHG that comply with the Safeguard Mechanism under the EPBC Act should only be considered consistent with the draft Offset Policy where they also address the issues of like for like, as discussed above.

*d. Offsetting must achieve benefits in perpetuity*

The draft Offsets Policy indicates that proposed offsets *don't* need to provide protection in perpetuity, while the Implementation Model expressly notes that "securing land for conventional offsets, especially in perpetuity, is very problematic for many potential offset scenarios".

Thus, the consultation materials directly contradict a key principle of offsetting.

*e. Offsets must be based on principles of "net gain"*

The draft Offset Policy must be based on requirements to maintain or improve environmental outcomes, consistent with the principles of ecologically sustainable development as integrated into the *Environment Protection Act 2019*. This acknowledges that positive action is required to halt and reverse current declines in biodiversity.

The mechanisms by which a net environmental gain could be measured under the draft Offsets Policy are unclear and need to be articulated in detail prior to its finalisation.

*f. Offsets must be additional*

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.

While this principle is identified in the draft Offsets Policy, arguably, some of the examples used in the Implementation Model are activities that should simply be required as part of proper environmental safeguards and management practices e.g. preventing the further spread of serious weeds or reducing their current extent.

Further, the draft Offsets Policy suggests that offsets may be implemented within existing protected areas which, *prima facie*, is unlikely to be additional, and is highly inappropriate.

*g. Offset arrangements must be legally enforceable.*

Any offset scheme must be underpinned by strong enforcement and compliance mechanisms in legislation, with adequate resourcing, established from the outset.

In this regard, we acknowledge that the *Environment Protection Act 2019* does contain relatively comprehensive compliance and enforcement provisions. However, it is not clear whether the draft Offsets Policy will be adopted for the purposes of the framework and guidelines required under s 125 of that Act, nor what 'other approval processes' the draft Offsets Policy will apply to, and whether the applicable compliance/enforcement powers in those frameworks will be suitable.

### **3. The 'Ecological Compensation' approach**

Rather than an offsets policy, the biodiversity components of the Implementation Model appear to be proposing a new approach that is referred to in the cited research as “ecological compensation”.<sup>6</sup>

If that is the intention of the NT Government, then it is important to acknowledge that this is not an offset approach. Further, the proposed use of a system that does not, to our knowledge, have any precedents in the Australian context makes it even more important to detail upfront information on how the proposed system will operate. This is particularly true given the existing context where, in our view, it appears that the NT Government has given limited attention to the development of biodiversity conservation legislation and policy for many years, and there are likely to be significant data gaps across the NT which would be essential to underpin the new approach.

Further detail must therefore be provided before the policy is finalised and implemented.

It is also important to note that Simmonds et al (2019) identify a range of risks with an ecological compensation approach, namely that it:

- *Requires articulation of conservation targets, potentially creating incentive to ‘set bar low’ to facilitate ‘business as usual’ compensatory policy (not advocated by this framework)*
- *Requires estimate of the difference between the target state and current state of impacted biodiversity features*
- *When targets are at odds with actions occurring or planned outside the scope of the compensatory policy, target-based actions can be suboptimal*
- *Target-based ecological compensation is a relatively new concept (although similar approaches exist in some jurisdictions) and will take adjustment.*

In this context it is extremely concerning that the draft Offset Policy says:

*“Wherever possible, offsets should address identified Territory targets to the agreed quantum. If the residual impact does not relate to agreed targets, offset proposals may require independent review by a panel of relevant experts engaged on a case by case basis.”*

A strong understanding of the current environment is vital to set meaningful baselines and measurable targets for improvement, and it is not clear to us that this context exists, nor if the NT Government is willing to commit sufficient resourcing to ensure this can be properly delivered. If the NT Government does proceed with the approach set out in the draft Offsets Policy and Implementation Model, it must commit to enhanced resourcing that is adequate to deliver the data and policy support required for implementation.

#### **4. The draft Offsets Policy’s principles**

We now provide the following comments on the Principles as described in the draft Offsets Policy, drawing from our views set out above.

*1 Offsets must contribute positively to relevant Territory environmental targets*

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<sup>6</sup> Implementation Model Further Reading - *Moving from biodiversity offsets to a target-based approach for ecological compensation* - <https://conbio.onlinelibrary.wiley.com/doi/full/10.1111/conl.12695>

EDO agrees that “offsets should result in a benefit to the environment”. However, the standard that “actions with uncertain outcomes or outcomes which cannot be demonstrated to contribute to the delivery of the Territory’s environmental targets should not be accepted” is insufficient.

Before any Offsets Policy is finalised, the NT Government must develop the outcome-based environmental targets and guidelines that specify the type and amount of compensation required for identified significant residual environmental impacts which are identified as being required in the Implementation Model. This should comprise the framework and guidelines identified in the provisions of Part 6 of the *Environment Protection Act 2019*, which can then be applied to other legislative frameworks, as appropriate.

### *2 Offsets will not always be available or appropriate*

As noted above, we strongly support Principle 2. However, further guidance must be provided on what would constitute an unacceptable impact that is not amenable to being offset.

We are also concerned with use of the term “appropriate period”, which also appears to undermine the 'in perpetuity' principle of offsetting. For example, how will the “minimum for the period of residual impact” be defined? An impact of a project may last for much longer than the project itself. This matter must be clearly defined.

### *3 The mitigation hierarchy must be rigorously applied*

EDO supports Principle 3, and notes that this is consistent with the ‘environmental decision-making hierarchy’ established in the *Environment Protection Act 2019*.

We agree that “where there is substantial uncertainty in relation to impacts or measures implemented to avoid, minimise and offset impacts, offsets should not be available”.

### *4 Offsets to be designed to deliver maximum benefit to the Territory*

The suggestion that offsets could be generated outside of the NT (particularly for biodiversity offsets) is highly concerning. This approach removes any semblance of ‘like for like’, even at a landscape scale.

While EDO acknowledges that the idea of maximising benefits is appropriate, if an offset is required to compensate for specific environmental harm, the scale of that offset should not be compromised by any social benefits.

As a result, we submit that any Offsets Policy should make clear that maximising non-environmental benefits should be additional to, and not instead of, achieving minimum environmental standards.

### *5 Benefits of offsets must be additional and secured*

While EDO supports Principle 5 conceptually, we are concerned that the types of activities proposed through the Implementation Model are likely to be very difficult to secure and maintain, for example, controlling pest species, and moreover, these are activities that should be required as a matter of standard environmental management practices.

Further, as noted above, the suggestion that offsets may occur in existing protected areas is highly inappropriate, as the additionality of the offset is compromised. All offsets must also be legally binding (as a minimum through an enforceable condition of approval, rather than private contracts between government and proponents, which undermines transparency and public

accountability for delivery). Hence, the suggestion that ‘long-term legally binding approaches will be prioritised and required where available’ is completely inadequate.

We strongly submit that further information must be provided on the proposed mechanisms for securing offsets prior to the policy being finalised, noting that offsets must be required in perpetuity.

#### *6 Disclosure and transparency is required*

We support the need for disclosure and transparency around offsetting in the NT (including monitoring and reporting on implementation), which in our view appears to have been lacking in respect of the few offsets that have been required for major projects in the NT.

EDO strongly supports the proposal for an offsets register, which is also a requirement under s126 of the *Environment Protection Act 2019* (and should therefore be constituted under this requirement). We submit that, in accordance with s126(4), the Environment Protection Regulations should specify the following matters as mandatory for inclusion in the environmental offsets register:

- Approval number/source of offset (including inclusion of the source documents themselves);
- Type of offset(s) (e.g. GHG, biodiversity);
- Date of legal imposition of offset;
- Location of offset;
- Detail of offset (e.g. volume of GHG emissions; area of habitat secured);
- Detail of species and/or communities impacted / cleared;
- Detail of offset management obligations;
- Details of any variation(s).

#### *7 Participation with communities and stakeholders is critical*

EDO supports community and stakeholder engagement in offsetting. In our view, this should occur through the public consultation processes enabled by the environmental impact assessment process (soon to be administered under the *Environment Protection Act 2019*).

Clearly, there should also be active participation with any communities and stakeholders that are involved in the supply of any offsets.

However, we are concerned about the references to ‘changes in offset management and implementation,’ as this indicates that the upfront certainty and security of offsets may not be a paramount condition.

We also emphasise that if there is a proper rules-based approach to identifying offsets (or ‘ecological compensation’) based on biodiversity-targets, this should be based largely on ecological considerations.

#### *8 Offsets must be knowledge-based and design must be responsive*

We support the requirement to ensure that best practice management is used in future management of offsets.



However, this should not be simply a mechanism for allowing offsets to be changed in the future where a proponent has failed to deliver on their requirements. Consistent with our comments directly above, the degree of flexibility of offsets foreshadowed in the section on offset design is of significant concern.

## **5. Concluding remarks**

In conclusion, we strongly submit that there must be significantly more detail provided on the proposed approach, mechanisms and rules that will implement offsetting in the NT, before the draft Offsets Policy and Implementation Model are finalised. At present, the consultation materials simply present an overview of guiding principles, but are lacking in substance and do not provide an adequate level of information to assist the community to understand how offsetting is intended to operate in the NT.

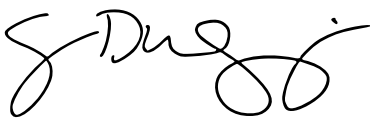
In particular, further clarification and information is required on:

- If and how the draft Offsets Policy will be adopted under the *Environment Protection Act 2019*;
- How offsets for GHG will be implemented, including to ensure that emissions from gas development in the NT will be offset on a like for like basis; and
- How strategic, landscape scale biodiversity conservation policy and targets will be developed in order to ensure the proposed 'ecological compensation' approach can realistically be implemented.

Finally, there must be enhanced resourcing for the Department of Environment and Natural Resources to ensure proper capacity exists within the NT Government to deliver and implement a comprehensive biodiversity and GHG offsetting framework. In the absence of proper resourcing to implement biodiversity and climate policy, we cannot see how any Offsets Policy can deliver effective outcomes that genuinely provide 'compensation' for the environmental impacts of development in the NT.

We would welcome the opportunity to further discuss our comments at any time.

Yours sincerely,



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