



Submission to the Agriculture, Resources
and Environment Committee

On

Environmental Offsets Bill 2014

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NATIONAL ENVIRONMENTAL LAW ASSOCIATION

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1. INTRODUCTION – ABOUT NELA

The National Environmental Law Association (**NELA**) is Australia's leading environmental law organisation with a membership base of professionals in environment and resources law and related disciplines.

NELA's vision is that ecological sustainability is a guiding principle in regulating energy and resources, utilities, pollution control, protecting biodiversity and cultural values, and land use planning and infrastructure.

We seek to protect the environment by shaping the law through information sharing, analysis and debate.

NELA supports a national environmental offset standard to promote transparency and certainty in offset practices. NELA proposes that the standard would be adopted under the bilateral approval agreements between the Federal State and territory governments under the *Environment Protection and Biodiversity Conservation Act 1999* (Clth). In this way, a national standard would support the goal of improving and maintaining Australia's biodiversity. Further details are available at www.nela.org.au/NELA/Projects

2. ABOUT THIS SUBMISSION

In general, NELA supports the Environmental Offsets Bill 2014 (**Bill**) as a positive step towards streamlining the environmental offsets regime in Queensland and across the country.

However, the success of the new regime is dependent upon the clarity and transparency of yet-to-be-released regulations, incorporation of a principle requiring biodiversity to be improved or maintained, improving the link between financial settlement offsets and the relevant impact, and some improvement in the processes contained in the Bill.

NELA also expresses concern that members of the public, including peak organisations such as NELA, will not be invited to make submissions on the Queensland Environmental Offsets Policy before it comes into effect.

3. SUPPORT FOR STREAMLINING ENVIRONMENTAL OFFSETS

NELA supports the Bill as a positive step towards the streamlining of the environmental offsets regime in Queensland. Currently, environmental offsets are regulated by five separate State offsets policies, which has

delivered fragmented outcomes for the environment. The Bill will replace these policies with a single Queensland Environmental Offsets Policy (**State Offsets Policy**). The State Offsets Policy will be prescribed under a yet-to-be-released regulation and, in the interests of certainty, may only be amended or repealed by regulation.

NELA also supports the alignment of the Bill and State Offsets Policy with the policies, principles and processes contained in the Environmental Offsets Policy 2012 under the *Environment Protection and Biodiversity Conservation Act 1999* (**Federal Environmental Offsets Policy**).

4. **BEST PRACTICE IMPROVEMENTS TO THE ENVIRONMENTAL OFFSETS BILL 2014**

Notwithstanding the Queensland Government's stated intention to align the Bill and State Offsets Policy with the Federal Environmental Offsets Policy, NELA believes there should be greater alignment between the policy approaches of the two jurisdictions.

4.1 **Absence requirement to improve or maintain biodiversity**

NELA believes the Bill and State Offsets Policy should be amended to incorporate a principle requiring all offsets to achieve at least "no net loss" of biodiversity, and preferably to 'improve or maintain' biodiversity.

Under the Federal Environmental Offsets Policy, overarching principles are applied by the Department of the Environment to determine the suitability of offset proposals. The first principle is an overall conservation outcome that improves or maintains the viability of the aspect of the environment that is protected by national environment law and affected by the proposed action. Within that principle offsets are only available for unavoidable offsets. Proponents must demonstrate that they have taken steps to avoid and minimise impacts on 'matters of national environmental significance' before offsets are available. Offsets must then deliver the 'improve or maintain' outcome.

Under clause 18 of the Bill, a proponent whose election to deliver an offset condition includes a proponent-driven offset must provide an offset delivery plan to the administering agency. The offset delivery plan must describe, among other things, how the "conservation outcome" will be achieved. A conservation outcome is achieved by an environmental offset for a prescribed activity for a prescribed environmental matter if the offset is selected, designed and managed to maintain the viability of the matter (see clause 11 of the Bill).

The term "viability" is not defined in the Bill or State Offsets Policy. The policy provides on page 12 that maintenance of the viability of a prescribed environmental matter is relative to the status quo (i.e. what

would have happened had the development and offset not occurred). The policy does not include any overarching policy principles.

NELA expresses concern that "viability" may set a lower threshold than the preferred improve or maintain principle.

RECOMMENDATION

NELA recommends that the Bill and State Offsets Policy incorporate a principle requiring all offsets to 'improve or maintain' biodiversity.

NELA also recommends that the term 'viability' be defined in the Bill and State Offsets Policy to supports the 'improve or maintain' principle.

4.2 Financial offsets may not have a strong link to the impacted environmental matter

The Bill enables proponents to elect to satisfy their offset conditions by means of a financial settlement offset, which may be delivered as the entire offset or in combination with a proponent-driven offset.

A financial settlement offset is a payment of an amount of money by the proponent to either the relevant local government or the department administering the Bill, depending upon whether the offset condition relates to a matter of local or other environmental significance.

The calculation of the financial settlement offset will then be in accordance with an offsets calculator prescribed under a regulation.

On receipt of the financial settlement offset, the money must be paid into the local government's trust fund or the relevant State department's Financial Offset Account. Responsibility for delivery of the offset then transfers to the local government or the department.

NELA expresses concern that financial settlement offsets may be delivered in accordance with the Bill without there being a strong link to the restoration of the particular prescribed environmental matter impacted by the particular prescribed activity.

RECOMMENDATION

NELA recommends that the Bill be amended to ensure financial settlement offsets are delivered with a clear link to the restoration of the particular prescribed environmental matter impacted by the particular prescribed activity.

4.3 Offsetting marine and coastal development

This section of the submission draws on research by NELA member Dr Justine Bell of the University of Queensland as part of an interdisciplinary research project researching how environmental offsets work in marine environments.¹ The team examined the Federal Environmental Offsets policy, and considered how it could be applied to the marine environment. The research team concluded that it may not adequately protect vulnerable marine ecosystems, and without amendments to the offsets policy, iconic habitats such as coral reefs, seagrass and mangroves, could all pay a heavy toll.²

The Federal Environmental Offsets Policy was developed in the context of offsetting impacts on terrestrial ecosystems, but is expressed to also apply to marine ecosystems. The federal government, for example, recently used it to guide the environmental approval for the expansion of the Abbot Point coal terminal in the Great Barrier Reef World Heritage Area. As part of the *Environment Protection and Biodiversity Conservation Act* approval for this project, the proponent will be required to offset impacts on seagrass meadows.

The research team expressed concern about a 'one size fits all' approach to offsetting impacts on marine and terrestrial ecosystems, given that marine ecosystems are fundamentally different to terrestrial ecosystems in a number of key areas. In comparison to terrestrial ecosystems, marine ecosystems:

- exhibit faster rates of response and higher sensitivity to environmental variability;
- have significantly larger spatial scales of ecological connectivity;
- may be further compromised if development causes 'alternate stable states': as seagrass is lost, water can become more turbid (murky), which in turn makes revegetation even more difficult. As a result, the effort it takes to rehabilitate a habitat may be significantly greater than the effort it took to destroy it; and

¹ The interdisciplinary research project is being conducted at the University of Queensland, TE Beirne School of Law, Global Change Institute, School of Biological Sciences, and the ARC Centre of Excellence in Environmental Decisions. The research was funded in part by the Australian Research Council.

² Bell J, MI Saunders, CE Lovelock & HP Possingham (2014), *Legal frameworks for unique ecosystems – how can the EPBC Act Offsets Policy address the impact of development on seagrass?*, *Environmental and Planning Law Journal*, 31: 34-46; and Decision Point #77 - March 2014 pages 4-5 available at <http://www.decision-point.com.au/>

- can be impacted by direct actions, and by indirect or diffuse actions. That is, actions occurring far away can have deleterious impacts.

The research focusses specifically on seagrass meadows which are known to provide highly valuable ecosystem services: nursery areas for commercially important fish species; grazing areas for iconic species like sea turtles and dugongs; and a range of vital ecosystem services such as the stabilization of ocean sediments and water filtration. They are also one of the most intensive carbon sinks on Earth – burial rates of organic carbon in seagrass meadows (and salt marshes and mangroves) are exceptionally high, exceeding those in the soils of terrestrial forests by 30–50 fold.

Seagrass meadows are also one of the most threatened ecosystems on Earth, with staggering rates of decline around the globe in recent years. Dredging associated with coastal development is one of the major causes of this decline. The process of dredging directly damages seagrass plants and releases sediments into the water column which obscures the light the plants require to grow.

The values of sea grass meadows are likely to be contested as other claims are made of these areas for physical development. A capacity to create appropriate offsets will be essential if the Queensland government is to effectively protect important marine biodiversity.

Given the differences between marine and terrestrial habitats as outlined above, NELA supports a separate offsets policy for marine habitats. In the case of seagrass, the policy should include:

- Avoidance of impacts where possible, and offsets only as a last resort where impacts are unavoidable;
- Clear guidelines for selecting offset project sites;
- Consideration of diffuse impacts as threats to seagrass, as many threats to seagrass come from offsite (eg, agricultural run-off);
- Allowing proponents to remedy diffuse impacts as an offset activity, as traditional replanting or protection strategies used to offset terrestrial habitats are not always appropriate;
- An adaptive management approach to allow governments to assess a small number of projects before allowing offsets to be widely used; and
- Coordination between federal and state policies.

RECOMMENDATION

Given the differences between marine and terrestrial habitats as outlined above, NELA recommends that the Bill be amended to accommodate a separate offsets policy for marine habitats with the elements outlined above.

5. IMPROVEMENTS TO THE QUEENSLAND ENVIRONMENTAL OFFSETS POLICY

While submissions on the State Offsets Policy are not strictly sought by the Committee, NELA understands that there will be no separate opportunity for public comment on these integral policy matters. NELA therefore presents its views on core principles for environmental offsets.

NELA believes the following principles should be reflected in the State Offsets Policy and the Bill:

- The policy should maintain consistency with the Federal Environmental Offsets Policy to the greatest extent possible.
- The certainty of the policy should not be undermined by broad exceptions and discretionary decision-making powers.
- The policy should be supported by effective monitoring and reporting requirements.
- The policy should employ sound metrics to appropriately value biodiversity, including by measuring biodiversity losses and gains and accounting for delay and uncertainty in the realisation of no net loss to biodiversity.
- The policy must contain rules about providing "like for like" offsets.
- It is critical that the policy appropriately reflect the hierarchy of possible responses (avoidance, mitigation and offsetting) to proposed impacts. Proponents must be required to demonstrate that they have taken steps to avoid and minimise impacts on biodiversity before offsets are available.
- The policy must deal adequately with legal security and the regulation and enforcement of required management measures. Adequate resources for compliance and monitoring activities must be provided.
- The policy must identify areas where offset delivery is prioritised in order to maximise landscape-scale benefits to biodiversity. At the same time the policy should also set aside areas designated as high conservation value over which offsets will not be permitted.

- Information about offsets secured under the policy must be publicly available.
- In specifying the types of offsets that are permitted under the policy, the policy should also address how these mechanisms address relevant impacts on biodiversity.
- The policy must require legal security for offsets and offset area management plans.

RECOMMENDATION

NELA strongly recommends that members of the public, including peak organisations such as NELA, be invited to make submissions on the State Offsets Policy before it comes into effect.

6. OTHER GAPS IN THE BILL

NELA notes that there are a number of gaps in the Bill. Notably, the Bill:

- leaves much detail to support the State offsets framework for yet-to-be-released regulations and other supporting guidelines and documents;
- does not deal with advanced offsets, other than to provide that a regulation may provide for these mechanisms, including their use and trade;
- does not refer to strategic investment corridors and direct benefit management plans, notwithstanding the critical role these so-called "shelf ready" products play in the State Offsets Policy. While NELA generally supports the Queensland Government's move towards a more strategic and landscape-scale approach, NELA nevertheless recommends that these products be given recognition in the Bill or regulations;
- does not permit proponents with undecided applications to "opt in" to the new mechanism, as the Bill only applies to an application for an authority made after the Bill commences;
- does not contain timeframes for the administering agency to give an authority holder notice that it agrees or disagrees with the proposed offset delivery method. If there is a dispute, the mechanism for dealing with the dispute is to be prescribed in a yet-to-be-released regulation;
- while NELA notes that, under clause 19 of the Bill, the administering agency must have regard to the State Offsets Policy when it considers a proponent's election for offset delivery and its offset

delivery plan, nothing in clause 14 of the Bill requires an offset condition to be consistent with the State Offsets Policy; and

- while NELA welcomes the Bill to the extent that it prevents duplication of offset conditions across multiple jurisdictions, the drafting of the Bill currently assumes that approvals will be obtained in a particular order or that there is a degree of integration in approval processes at the Federal, State and Local levels that does not currently exist.

FURTHER INFORMATION

NELA wishes to acknowledge the contribution of senior members in Queensland in preparing this submission.

For any inquiries about matters raised in the submission please contact Amanda Cornwall, President, NELA on 0432 134 936 or secretariat@nela.org.au