



Comments on the biodiversity offsets components of the *Planning and Development (Bilateral Agreement) Amendment Bill 2014* relating to referral, assessment and approvals

22 September 2014

The Conservation Council notes that the ACT Biodiversity Offsets Framework delivers an improvement on how biodiversity offsets have been delivered in the past in the ACT and we support the increased transparency afforded by the proposed public offsets register and compliance provisions.

However, we have concerns regarding how the ACT Biodiversity Offsets Framework will apply practically and submit that in its current form, the ACT Biodiversity Offsets Framework will result in a net loss of biodiversity.

This is because as an overall package is geared towards development approvals not biodiversity conservation. Specifically, it doesn't adequately apply the avoid, mitigate hierarchy through a referral and assessment stage to ensure offsets are only considered when appropriate and as a last resort. Further, it doesn't consistently apply the principles of additionality, like-for-like and security of offsets. Finally, there is inadequate transparency and accountability in the legislation in regards to proponents and how and when effective offsets management and reporting will be undertaken.

In order to address these in regard to the legislative provisions relating to the referral, assessment and approval of proposals affecting protected matters we propose the *Planning and Development (Bilateral Agreement) Amendment Bill 2014* be amended to:

- 1) create an initial referral stage – similar to the current referral arrangements under the EPBC with the Conservator as the decision-maker to make a determination on significant environmental impacts
- 2) put in place mechanisms to require application and demonstration of the avoid / mitigate hierarchy including through differentiating between significant adverse environmental impacts and significant residual environmental impacts to be considered by the Conservator at the referral stage
- 3) require that if a biodiversity offset is proposed that an Offset Management Plan be mandatory and require consideration of the draft Offset Management Plans as part of the assessment process.

Our expectation has always been that the legislative provisions relating to an ACT Biodiversity Offsets Framework would be undertaken as part of consideration of the Nature Conservation Bill. Therefore we will put forward additional commentary as part of that process now that the *Nature Conservation Bill 2014* has been tabled.

In this context while we place importance on the role for the Conservator here, we maintain this role can only be adequately fulfilled if the Conservator is a dedicated position, is fully independent and has appropriate qualifications and experience in biodiversity conservation. Please note the Conservation Council policy on offsets at [Attachment One](#).

The Conservation Council has prepared a flowchart – [Attachment Two](#) which depicts how a

referral process could occur and a role for the Conservator earlier in the process. We submit that these recommendations will go a long way to strengthen how significance is determined and how the 'avoid, mitigate and offset' hierarchy is applied in the framework. Mechanisms in the flow chart largely use the existing mechanisms and roles with the PD Bill, Planning and Development Act and the Nature Conservation Act. In addition we submit this will make the process more efficient and streamlined. The major change is the sequencing of input and a decision-making role for the Conservator at the proposed referral stage.

The Conservation Council wishes to remain engaged with the ongoing development of improved management of biodiversity, landscape permeability, and ecological processes within the ACT.

1. Initial Referral Stage

Outcome:

Create an initial referral stage – similar to the current referral arrangements under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC) allowing for early public consultation on proposals affecting Protected Matters. Allows early consideration of Avoid / Mitigate hierarchy.

Rationale:

Under the current (PD Bill) arrangements, there is no referral stage with public consultation for determining whether a proposal has a significant adverse environmental impact. This is guided by the development tables in the Territory Plan and Schedule 4 of the Planning and Development Act; the decision is largely proponent driven, does not include public consultation and does not reflect the current arrangements under the EPBC Act.

Under current EPBC arrangements our first formal engagement of a proposal is at this referral stage and we find it beneficial in many ways. If this step is removed via the new arrangements under the existing PD Act our first formal input will only arise at the point when an EIS is put out for public consultation or under the PD Bill if an EIS exemption is sought. There is no provision for input on Environmental Significance Opinions and / or on Conditional Significance Opinions. There is also no requirement for input at the EIS scoping stage.

In addition a safeguard is required to protect matters that may be considered borderline 'significant' resulting in a decision to deem the impacts insignificant and placing the proposal in the merit track via an ESO. The cumulative impacts of such decisions could result in the threatening an as yet to be identified species and so the long term impacts of this policy needs to be considered. The Conservation Council submits that a safeguard such as Conservator involvement prior to the assessment process will avoid such risks and will also protect matters of NES.

It is our view that the decision of whether there is a significant impact should be made prior to the assessment stage as part of a referral stage, be subject to public consultation (minimum 10 working days) and the Conservator should be the decision maker. Our suggestion of how a referral stage might work using existing mechanism and roles in the Planning and Development Act is in Attachment Two (flowchart).

Further, it should be at the referral stage when determining significance that the decision is made that a development is clearly unacceptable, and an offset is not appropriate and therefore the proposal is not referred on for assessment. This would provide a clear mechanism by which development proposals which should not proceed because of the

nature of their impacts are rejected. Without this mechanism the PD Bill does not reflect the primary objectives of the offsets policy, namely that environmental offsets cannot be used to make inappropriate actions appropriate.

An entity, with ecological qualifications, such as the Conservator should be the decision maker on significant impacts rather than the planning authority.

Recommendation 1:
Ensure that there is a referral stage for development proposals during which there is public consultation, the Conservator is the decision maker on determining significant adverse environmental impacts, including unacceptable impacts.

2. Avoid / mitigate hierarchy and significant residual environmental impacts

Outcome:

Require mechanisms for early application and demonstration of the avoid / mitigate hierarchy including through differentiating between significant environmental impacts and significant residual environmental impacts with Conservator having a key role in providing initial advice.

Rationale:

The Conservation Council submits that proposed way the 'avoid, mitigate, offset' hierarchy will be applied throughout the assessment process is not adequate to ensure biodiversity offsets are only required for significant residual impacts and as a last resort.

Our view is that for all development proposals which impact on protected matter, proponents should have to demonstrate avoid/mitigate measures at the very first stage of the referral process. This guarantees that the proponent has considered avoidance/mitigation strategies before a development proposal is put forward.

Through the PD Bill the stages at which a proponent has to demonstrate avoidance or mitigation strategies for environmental impacts is through Form 1M [Part 9.5, for ESO and s211 applications] and as a requirement of an Environmental Impact Statement [s50(2)(f)(v) PD Reg]. This requirement is buried in the Planning and Development Regulation and it appears that any matter not raised in a scoping document need not be raised by an EIS.

The Conservation Council proposes that this information be a requirement of Form 1M which can be utilised as part of a referral stage, rather than assessment. In our view, this form can be used for all development proposals which have an impact on protected matter, for providing preliminary documentation to the Conservator for a determination of significance.

It is critical that there is an assessment of avoidance/mitigation strategies and analysis of any significant *residual* impact during the assessment stage of the process. This is a step which is not distinctly provided for in the PD Bill and is crucial for ensuring offsets are considered for residual impacts only.

The Conservation Council submits that the appropriate mechanism for this assessment to occur is through the Conservator's advice, as an attachment to the significance decision in the referral stage (see [Attachment Two](#) – flowchart). It is important that this assessment is undertaken by the Conservator and prior to the drafting of the scoping document, to ensure

this advice feeds into the EIS process. This ensures that if there are likely offset requirements, the proponent is informed early and can begin factoring this into their processes.

We submit that the Conservator concurrence provisions in the PD Bill should relate to advice provided by the Conservator at this point in the process.

The PD Bill doesn't differentiate between significant adverse environmental impacts and significant *residual* environmental impacts. This is particularly important when defining an offset or referring to offset conditions in the Bill, as it clarifies that offsets should only be conditioned as a last resort in the 'avoid, mitigate, offset' hierarchy. Without this terminology, it can be interpreted that offsets can be conditioned for any significant impact, rather than as last resort and when appropriate.

A significant *residual* impact is an impact on all or part of a protected matter that:

- a. remains, or is likely to remain (whether temporarily or permanently) despite on-site mitigation measures for the proposed development; and
- b. is, or will or is likely to be significant.

Furthermore, it is our view that the requirements for the Conservator's advice [s91D NCA] must refer to significant *residual* impacts, and needs to be amended to ensure the Conservator undertakes a more rigorous analysis of avoidance and mitigation strategies and provides a determination on if an offset is likely.

As mentioned previously, the scoping documentation is crucial for guiding the development of an EIS. As such, the Conservation Council feels that it is critical that the Conservator's advice as above should be required to be included as part of the scoping document. This ensure that any public consultation which occurs on the EIS includes a copy of the Conservator's assessment of the avoid/mitigate strategies and residual impacts. This provides assurance to the public that these aspects have been considered appropriately and are carried through the EIS process.

***Recommendation 2:
Ensure rigorous application of the Avoid /Mitigate hierarchy in the referral stage for development proposals during which there is public consultation.***

Offset Management Plans

Outcome:

Require that if a biodiversity offset is proposed that an Offset Management Plan be mandatory and consideration of the draft Offset Managements Plans be part of the assessment process.

Rationale:

It is of great concern that Offset Management Plans are not a mandatory requirement of an offset condition. Given that the only provisions for measuring the effectiveness of the offset and any monitoring or reporting in relation to offsets are included in the Offset Management Plan, it seems to be a significant loophole that proponents are not legally required to produce one.

The Conservation Council notes that the reasoning behind this provision being discretionary is that an Offset Management Plan might not need to be prepared in all cases, for example,

when a land management plan already exists for the land or for indirect offsets. The Conservation Council does not support this view. A distinct Offset Management Plan should have to be provided in every single case an offset is required. If the offset management provisions are simply included within an existing land management plan then the actions are not being treated as additional. If funds are being quarantined for the delivery of an offset, then the plan which measures and dictates that delivery must also be distinct. Furthermore there needs to be a distinct plan which captures specific measuring, monitoring and reporting requirements which have been approved.

The Conservator should determine if an offset is likely to be required when giving advice at the referral stage prior to the EIS process, and if an offset is likely, then the proponent include in their EIS a draft Offset Management Plan. The reasoning behind this view is that there must be some minimum of information provided prior to approval to ensure that the offset condition will be met.

While it is required that offset management plans 'include a plan describing how the offset may be achieved' and 'how the effectiveness of the plan is to be monitored' (s165E) these requirements are too broad and don't clearly legislate what necessary information must be provided. The following information is critical to be included in Offset Management Plans:

1. Information on how conservation gain will be measured for the offset
2. Without clearly establishing how the success of the offset will be measured, the policy is practically unenforceable. It is critical that monitoring provisions in offset management plans monitor biodiversity outcomes, rather than management actions. In particular, proponents must identify timeframes for action and performance indicators which are then made publically available through the public offsets register.
3. Specific monitoring provisions including funding information for management and ongoing monitoring of the offset

Conservation gains must be maintained in perpetuity. In this regard, there needs to be a requirement for ongoing resources for long term management and reporting (e.g. offset monies being placed in a trust/invested for long term funding generation).

It is also paramount that the Offset Management Plans be subject to public consultation. By including the draft as part of the EIS process this will occur and it will also streamline the process for proponents. It is worth noting that in an email Wednesday 20 August Shane Rattenbury MLA gives assurances that he has worked with the ACT Government to establish "*public and stakeholder input into the many steps to develop an offsets management plan*". However, the PD Bill does not include a public submission period for public or stakeholder input into draft offset management plans. Rather as outlined above it doesn't actually even require the development of offset management plans.

Recommendation 3:

Require a draft Offsets Management Plan to be formally included as part of the EIS process and require Offset Management Plans to be a legal requirement of an offset condition.

Amend [s165E(2)] of the PD Bill to ensure Offset Management Plans must include specific details regarding:

- how and when conservation gain will be measured;
- how and when offset management plans will be monitored; and
- funding arrangements for long term management and reporting.

Attachment One: Conservation Council ACT Region Offsets Policy 2014

Objective:

Noting that the Conservation Council does not support offsets but recognising that offsets are being applied in the ACT, ensure the ACT Government adopts and implements an appropriate ACT offset policy during 2014.

Such an offsets policy will use an agreed calculator or methodology for determining offsets against a strong set of principles and governance arrangements which include:

Biodiversity Offset Calculator:

- use Commonwealth calculator

* Note however there are concerns that community groups have had no training in the use of the calculator, although such training has been available to consultants and the private sector. *Note also that the calculator is very sensitive to inputs to the "confidence in result" boxes. The community needs some understanding about how these are arrived at by consultants and developers.

Biodiversity Offset Principles:

Principle for high conservation value ecological communities or habitats of listed threatened species

- no offsetting of high conservation value listed threatened ecological communities or habitats of listed threatened species

Principle for all other land

- avoid or minimise impacts on biodiversity values before considering offsets with clear criteria before considering alternatives;
- only offset as a last resort with a requirement to provide detailed reasons as to why other options are not feasible;
- like for like offsetting in the ACT, unless the offset area significantly improves connectivity on a regional scale with high conservation areas within the ACT and if it does not impact on the ecological integrity of other ecosystems for example grasslands;
- must be net gain and in perpetuity;
- scientifically assessed;
- additional or supplementary to existing reserves, funding, etc.;
- conservation actions **must be above the statutory duty of care** in place at the site, i.e. there is already a high level duty of care on managers in existing nature reserves so it is preferable that actions take place elsewhere, or else any conservation actions must be higher than the status quo duty of
- care in those areas, this also includes the duty of care provided by volunteer input of Parkcare groups;
- assurances regarding the long-term viability of offset sites (including financial resources for ongoing management)
- direct offsets should be prioritised and make up at least 90% of the offsets package – i.e. actual on ground rather than indirect via financial contributions.
- Indirect offsets should be a last resort, but if used should make up a maximum of 10% of the offsets package.

- apply principles of connectivity and high irreplaceability to decisions regarding location of offset sites.

Biodiversity Offset Governance

- a publicly available offsets register
- baseline data of development site which is being offset
- baseline data of proposed offset site
- appropriate resourcing to manage the offset site over long time frames – including transparency of funding arrangement ideally via a Trust
- liability arrangements for failed offsets
- annual monitoring and public reporting on offset outcomes
- strategic mapping of offsets sites in advance
- independent review of offset outcomes by the Commissioner for Sustainability and the Environment
- these requirements being mandatory under the new Nature Conservation Act
- there should be a clear and well-publicised role for the community in monitoring compliance. The community should be represented on relevant bodies and have a role in assessing priorities for offsetting sites and measures.

Attachment Two: Referral, Assessment and Approval Flow Chart

