

Response to Question on Notice in the Senate Environment and Communications Legislation Committee Inquiry into the *Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021* (“the Bill”) on Tuesday 4th May

Megan C Evans, 18th May 2021

Senator HANSON-YOUNG: Could take on notice what would be the most important things to have in this bill to ensure that dubious offsets could not be just ticked off by the departments, either state or federal?

In this response to Senator Hanson-Young’s question on notice, I first briefly list my recommended changes to the current Bill to ensure the credible use of offsets under the EPBC Act. I provide further details and justification below.

Recommendations for immediate effect

1. Subsections 65H(2) and 65H(3) are **removed from the Bill**
2. Subsection 65H(7) is limited to exceptional circumstances, confined to things that disrupt the normal functioning of society, ie. defence, national security or natural disasters and other emergencies. These are *national interest* issues within the jurisdiction of a federal government, as per the existing exemption provision 158(5) of the Act.
3. A national environmental standard for offsets (or a standard for restoration that includes offsets) is developed and released by Government prior to the Bill being considered by the Parliament, as per Recommendation 27a) of the Final Report of the Independent Review of the EPBC Act.
 - a. A **draft Mitigation and Offsets Standard**, developed as part of Consultative Group of the Independent Review of the EPBC Act, is provided below.
4. The full suite of Standards provided in the Final Report of the Independent Review of the EPBC Act, including Compliance and Enforcement and Data and Information, are released by the Government prior to the Bill being considered by the Parliament.

Recommendations for the second tranche of reform

5. As per Recommendation 27b) of the Final Report of the Independent Review of the EPBC Act, the Act should be amended or standalone legislation passed to legislate the revised offsetting arrangements, providing the certainty required to encourage investment in restoration.
6. Implement a long-term environmental monitoring strategy and mechanisms to leverage private investment in environmental restoration (Recommendation 28).

Explanation of recommendations

The Bill introduces two new provisions into the EPBC Act that would provide scope for a Minister or decision maker from another jurisdiction to allow offsets or offset-like measures as part of an approval decision. Specifically:

1. Subsection 65H(2) provides that:

In considering whether the decision or thing is not inconsistent with a national environmental standard, the person may take into account the following matters:

- (a) policies, plans or programs of the Commonwealth, a State or self-governing Territory;*
- (b) funding by the Commonwealth, a State or self-governing Territory of activities related to the environment;*
- (c) funding by the Commonwealth, a State or self-governing Territory of activities related to the promotion, protection or conservation of heritage.*

Subsection 65H(3) further stipulates that

Subsection (2) does not limit the matters the person may take into account.

This means that “a person making a decision” could feasibly justify that a decision is “not inconsistent” with a national environmental standard, by considering the presence of any kind of policy, plan or program or funding by any jurisdiction. For example, a State delegated authority could be satisfied that a decision that impacts a critically endangered Matter of National Environmental Significance (e.g the regent honeyeater) is not inconsistent with a national environmental standard because another jurisdiction spends money on carbon capture and storage research. **This is an offset-like measure that effectively justifies an unacceptable decision under the Act through the provision of a perceived beneficial or “balancing” mechanism, but which does not satisfy several of the EPBC Act Environmental Offsets Policy (2012) requirements¹**, namely those of additionality, proportionality to level of statutory protection and size and scale of impact, like for like, transparency, and that offsets do not make unacceptable impacts acceptable.

Despite the very broad range of “*matters the person may take into account*” enabled by the wording in the above subsections of the Bill, the Explanatory Memorandum narrows this slightly with an example:

“For example, provided it can be shown that the impacts on the values of a National Heritage place are balanced by mechanisms that promote those values (which may, for example, be delivered through funding of activities by a state relating to the promotion of those values), a decision will not be inconsistent with a relevant National Environmental Standard.”

¹ Australian Government, 2012. Environment Protection and Biodiversity Conservation Act 1999 Environmental Offsets Policy. <https://www.environment.gov.au/epbc/publications/epbc-act-environmental-offsets-policy>

This is still extremely broad, as a National Heritage place could be the Great Barrier Reef, and a decision that impacts one aspect of this MNES (e.g area of extent) might be deemed as not inconsistent with a national environmental standard by pointing to State funding to an agricultural extension program that aims to reduce sediment load in the GBR lagoon, or an educational program that engages school children in monitoring sea turtle hatching on shore.

Subsection 65H(2) and (3) effectively enables any decision maker with unlimited discretion to approve a decision, regardless of the assessed impacts to MNES. No transparency or accountability is required – unlike with Subsection 65H(7) (public interest exception, detailed below), there is no requirement under this provision to publish a statement explaining why a decision that is inconsistent with national environmental standards is appropriate. **I strongly recommend that Subsection 65H(2) and (3) are removed from this bill.**

2. Subsection 65H(7) provides a “public interest exemption” whereby the Minister can make a decision or do a thing that is inconsistent with a national environmental standard if the Minister is satisfied that the decision or thing is in the public interest.

The Explanatory Memorandum explains that:

For example, in the context of the public interest, it may be necessary to balance environmental considerations with the social and/or economic impacts of a project, or where a Standard may not be met due to the need to balance multiple protected matters.

There are three key problems with Subsection 65H(7), namely:

- (i) “Public interest” is not defined, and so provides total discretion for the Minister to invoke this provision.
- (ii) The wording of the subsection – “*where a Standard may not be met due to the need to balance multiple protected matters*” implies there are situations where it is not possible or feasible to meet the objects of the Act for multiple listed MNES. Realistically, all controlled actions under the Act involve impacts on multiple MNES, so this opens scope for a decision to only meet the objects of the Act for only one or a handful of listed MNES. For example, a decision might impact two threatened species, but it could be deemed that 90% of the impact for one matter can be directly avoided, mitigated and offset², whereas

² “Direct offsets are an essential component of a suitable offsets package. A minimum of 90 per cent of the offset requirements for any given impact must be met through direct offsets”. Pg 8, EPBC Act 1999 Environmental Offsets Policy. Note that in practice, there is ample scope for this 90% direct offset requirement to not be met, since the Environmental Offsets Policy is a policy rather than a statutory document. This means that there are already many EPBC decisions being made that do not strictly meet EPBC Act 1999 Environmental Offsets Policy requirements (see Chapter 7, Evans 2017 <https://openresearch-repository.anu.edu.au/handle/1885/133677>), highlighting the importance of full reform of environmental offsets under the Act as per recommendations 27 and 28 of the Final Report of the Samuel Review.

Also note that the wording in the Government’s national environmental standards that “*The use of environmental offsets is consistent with section 134(3) of the EPBC Act and Schedule 2(6) of the EPBC Regulations*” is simply stating that offsets are consistent with basic condition-making provisions under the Act, e.g Section 134(1) “*The Minister may attach a condition to the approval of the action if he or she is satisfied that the condition is necessary or convenient*”. This does not require the conditions to be effective or produce a positive environmental outcome.

only 40% of the other matter's impacts can be reasonably or cost-effectively avoided, mitigated and offset. The second matter will suffer a net loss to its habitat, but the Minister can say that strong environmental standards were maintained.

- (iii) This subsection also introduces an additional avenue in the decision-making process where environmental considerations can be “balanced” with social and economic factors. **It is already a mandatory consideration under the Act for the Minister to take into account economic and social factors** (s 136 1(b)) and the principles of ecologically sustainable development (s 136 2(a)), which in practice enables environmental considerations to be “balanced” with social and/or economic impacts factors³. Under the Bill and a devolution model, this part of the Act is given effect under point 3) and 10) of Part 1 – Standard for all matters of national environmental significance. In this context, a state or territory decision maker would complete this balancing step (without the need for a public statement to justify why), so 65H(7) in practice provides scope for a federal Minister to, say, approve a project in the name of “public interest” in a situation where a state or territory Minister has rejected a project. This means that subsection 65H(7) creates an additional “balancing” step enabled by the Act and national environmental standards, and provides another “escape route” for environmental considerations to be “balanced” with social and/or economic impacts of a project. In effect, 65H(7) is only likely to be invoked by a federal Minister to override a decision that a state or territory Minister has made where there is disagreement. The state or territory Minister already has power under 65H(2) and (3) to make decisions that are inconsistent with national environmental standards, so 65H(7) would probably only be invoked in the rare circumstance where a project is rejected by a state or territory Minister due to unacceptable impacts on MNES.

As per Dr Burnett's submission, I recommend that 65H(7) should be limited to exceptional circumstances that disrupt the normal functioning of society, ie. defence, national security or natural disasters and other emergencies. These are *national interest* issues within the jurisdiction of a federal government, as per the existing exemption provision 158(5) of the Act. Ideally, any decision where environmental considerations are “balanced” with social and/or economic factors - such as decisions where environmental impacts are not at minimum 90% directly avoided, mitigated and offset – should be publicly justified on the Department's website.

³ See Figure 1, page 13 of EPBC Act environmental offsets policy for environmental impact assessment decision flow. Note that even where offsetting is **not** proposed, appropriate or feasible (e.g offsets are too costly or not available – there's not enough habitat left – typical for the most threatened matters under the Act), a proposed action can still be acceptable, “*Having regard to the likely impact on environmental matters protected, together with economic and social factors*” https://www.environment.gov.au/system/files/resources/12630bb4-2c10-4c8e-815f-2d7862bf87e7/files/offsets-policy_2.pdf

3. Draft Mitigation and Offset standard

This draft standard was developed⁴ as part of Consultative Group of the Independent Review of the EPBC Act and provided via email to the EPBC Act Review Secretariat on 18th August 2020.

A nationally consistent offset standard requires independent oversight by a technically competent advisory group (e.g. the Mitigation and Restoration Scientific Committee) mandated to ensure compliance with the Standard. This includes specialist advice on the likelihood of an offset condition meeting the requirements of the National Mitigation and Offset Standard and advice on corrective interventions.

Element	Description
Environmental Outcome	Offsets support a maintain or enhance outcome for MNES ⁵ by delivering an absolute net gain ⁶ in the viability of impacted threatened species and ecological communities that are MNES.
National Standard	<ol style="list-style-type: none">1) Biodiversity offsets can only be considered as appropriate responses to impacts on threatened species and ecological communities after measures to avoid and mitigate impacts have demonstrably been taken (in accordance with a Threatened Species and Ecological Communities Standard).2) Offset proposals must be supported by strong scientific evidence that required outcomes can be achieved, and be reviewed by experts with relevant scientific knowledge of the appropriateness, feasibility and risks associated with an intended offset to compensate for a development impact on a particular MNES.3) Offset gains must be calculated based on absolute increases over time in populations, in habitat area and quality, or in area and condition of ecological communities attributable to the offset action (as appropriate). Protection of existing habitat may be a precondition for achieving such increases, but does not itself achieve a gain.4) Offset gains must be larger than the loss from the associated impact, must be for the same MNES as impacted, and must be proximal to the impact area.5) Offsets must be identified, secured and starting to realise required environmental outcomes for the MNES

⁴ Contributions from Martine Maron, Kingsley Dixon, David Keith, Megan Evans, Brendan Wintle and other academics with expertise in offsets and ecological restoration.

⁵ See Overarching MNES Standard

⁶ Net gain relative to prior to the impact occurring

	<p>prior to commencement of the approved impact. Delays between impact and full achievement of required environmental outcome must be minimised and appropriate discount factors applied.</p> <p>6) For species and ecosystem recovery/restoration offsets, proponents must demonstrate success in achieving ecologically competent species recovery and ecosystem restoration based on approved completion criteria (see footnote).</p> <p>7) Milestones and Key Performance Indicators (KPIs) must be established to ensure the offset is achieving the required gains for the MNES.</p> <p>a. Where Milestones and KPIs are not met, courses of action to mitigate underperformance of the offset must be planned, funded and implemented.</p> <p>b. Offsets that involve rehabilitation and restoration must demonstrably be on a sustained and positive recovery trajectory according to the International Principles and Standards for the Practice of Ecological Restoration⁷ and the Restoration and Recovery Standard.</p> <p>c. An Offset and Mitigation Bond Fund must be established to provide the financial guarantees that ensure attainment of required offset gains in the event the offset provider is unable, insolvent or technically incapable of delivery of agreed Milestones and KPIs for the offset.</p> <p>8) A single offset area may not provide offsets for multiple impact areas (but may provide offsets for impacts on multiple MNES from a single project area). Offsets must be additional to existing actions and regulatory obligations.</p> <p>a. Offset activities must continue to be managed for the duration of the impact to ensure maintenance of agreed levels of function and diversity commensurate with a net-gain in environmental values.</p>
Monitoring and Reporting	<p>1) Offsets involving restoration must be monitored in accordance with the principles in the Restoration and Recovery Standard and in a way that allows clear</p>

⁷ <https://www.ser.org/page/SERStandards/International-Standards-for-the-Practice-of-Ecological-Restoration.htm>

	<p>attribution of environmental outcomes to offset actions versus other actions and background trends.</p> <p>2) Specifically, monitoring must be at an appropriate scale, frequency and complexity to inform interventions that are required to attain the approved level of species and ecosystem recovery.</p> <p>3) Where a threshold is not achieved (such as an inability to move to a higher restoration standard), that appropriate, proven and approved corrective interventions are implemented.</p> <p>4) All offset, restoration and recovery plans, records and monitoring including intervention actions are published promptly and kept publicly available online.</p>
Review	