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Australia: Do proposed amendments to the Environmental Offsets Act 2014 deliver on "nil duplication" of environmental offsets?

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In this Alert, Sarah Macoun and Olivia Williamson consider proposed amendments to the *Environmental Offsets Act 2014* intended to clarify and strengthen the restriction on imposing conditions that would have the effect of duplicating environmental offsets across and within jurisdictions. The proposed amendments are contained in the *Environmental Protection and Other Legislation Amendment Bill 2014 (the Bill)* introduced into Parliament on 28 August 2014.

Key Points

- The proposed amendments have been prompted by stakeholder concern about whether the Offsets Act delivers on the stated policy intent of "nil duplication" of environmental offsets and reducing "greentape".
- The proposed amendments to the Offsets Act are intended to clarify and strengthen the original provisions of the Offsets Act directed at removing duplication associated with offset conditions imposed by Commonwealth, State and local government.
- The proposed amendments address one of the deficiencies of the Offsets Act that gives rise to a need to sequence approvals to ensure that approval from a higher level of government is secured first.
- Otherwise, as currently drafted, the amendments are not likely to fully achieve the policy intent. Arguably the amendments make it more difficult to demonstrate a duplication of offsetting requirements. In particular, the amendments do not explicitly preclude offset conditions at a State and local government level where the Commonwealth has determined that an action is not a controlled action.

The operative provisions of the *Environmental Offsets Act 2014 (Offsets Act)* commenced on 1 July 2014. The Bill proposes amendments to clarify the intention of the Offsets Act to remove duplication of offset requirements across and within jurisdictions.

The potential for this intention to be frustrated was identified in a number of the submissions made to the Agriculture, Resources and Environment Committee in respect of the *Environment Offsets Bill 2014*. It was noted that the operation of the restriction relied upon approval conditions being issued in a particular sequence and no provision was made for any offset conditions imposed by a lower level of government first in time to fall away if later "trumped" by an offset condition imposed by a higher level of government where the condition relates to the same matter for substantially the same impact in substantially the same area.

The Offsets Act as passed did not address these concerns. The Bill however proposes the following amendments to the Offsets Act:

1. That it be mandatory (rather than discretionary) for the administering agencies to have regard to existing offset conditions for an area in deciding whether to impose an offset condition.
2. Current section 15 of the Offsets Act will be broken into two separate provisions. New section 15 will relate to a Commonwealth offset condition imposed or a decision made not to impose a Commonwealth offset condition. New section 15A will relate to a State offset condition imposed or a decision made not to impose a State offset condition. The Explanatory Notes to the Bill suggest that this separation will clarify the existing policy intent for the imposition of environmental offsets, namely, that once offset considerations or decisions have been made by a higher level of government, the matter cannot be considered by other levels of government.
3. To insert a new Part 6A into the Offsets Act which provides for particular offset conditions to stop applying if a higher level of government later imposes the same or substantially the same offset condition. In these circumstances, proposed new section 25A requires the administering agency to give written notice to a holder of an authority where it is satisfied that an offset condition imposed by a higher level of government covers the same field as the offset condition imposed by the administering agency. Where this occurs, the offset condition imposed by the administering agency stops having effect from the day the condition imposed by the higher level of government starts or started applying.
4. New Section 25A also requires the administering agency to give an authority holder notice of its decision (including

reasons for the decision) if it does not agree that a later offset condition imposed by a higher level of government covers the same field as the offset condition imposed by the administering agency. This section also allows for a regulation to outline a review process associated with such decisions.

Consistent with the existing situation, the restrictions set out in the Bill in relation to duplication only apply where the later offset condition decision covers the same, or substantially the same, area of land, and the same, or substantially the same, prescribed activity and the same, or substantially the same, prescribed environmental matter as that considered by the lower level of government.

As currently drafted, it is our view that the amendments are not likely to deliver the policy intent of 'nil duplication' of environmental offset conditions. The amendments appear to make it more difficult to demonstrate a duplication of offsetting requirements because, in addition to the condition needing to be for the same, or substantially the same, prescribed activity and prescribed environmental matter, if no offset condition is imposed by a higher level of government, the restriction requires it to be demonstrated that a decision was made by the higher level of government not to impose an offset condition.

The Bill's amendments to section 15 of the Offsets Act indicate that an administering authority may have regard to a document of the Commonwealth or State about a decision not to impose a Commonwealth or State condition, but there is no positive requirement to create such a document nor for those documents to be made available to other levels of government or applicants. In the absence of a document evidencing a decision made by a higher level of government not to impose an offset condition and, absent a positive obligation on the decision maker to record the making of such a decision, it is unlikely that the intended restriction on nil duplication will be achieved.

A preferable approach would be to amend the provisions so that where a higher level of government had the opportunity to impose an offset condition, but did not do so, it is "deemed" that the higher level of government decided not to impose an offset condition, regardless of whether there is documentation recording a decision not to impose a condition.

The amendments to the Bill also do not address whether offset conditions at a State and local government level are precluded where the Commonwealth has determined that an action is not a "controlled action". The making of a decision as to whether an action is a "controlled action" involves the Commonwealth assessing whether or not the proposed action is likely to have a significant impact on a matter of national environmental significance. Such a decision follows an informed assessment process and any decision by the Commonwealth that a proposed action is not a controlled action necessarily means that a decision was made that any impact of the proposed action was not significant in terms of matters of national environmental significance. It is inherent in a 'not controlled action' decision that the Commonwealth has determined that no conditions, relating to offsets or otherwise, ought to be applied.

There is an argument that the suggested deeming arrangement should also be extended to a "not controlled action" decision made by the Commonwealth, with the result that the State government and local government should not be able to seek an offset for the same, or substantially the same, prescribed activity and prescribed environmental matter where the matter and activity has already been referred to the Commonwealth and the Commonwealth decided that the proposed action was not a controlled action.

Finally, we note that none of the amendments contained in the Bill are directed at the manner in which matters of local environmental significance are prescribed. Potential issues in this regard are highlighted in our alert "[Queensland's new Environmental Offsets regime- and what it means for local government offset conditions](#)" that was published on 9 July 2014.

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