

29 September 2014

2014 CORPORATE
PARTNERS



The Acting Research Director
Agriculture, Resources and Environment Committee
Parliament House
George Street
Brisbane Qld, 4000

Dear Ms Crighton

Environmental Protection and Other Legislation Amendment Bill 2014

Thank you for the opportunity to provide feedback on the *Environmental Protection and Other Legislation Amendment Bill 2014* (EPOLA Bill).

While the EPOLA Bill covers a number of important pieces of legislation, the Property Council's primary concern is with the amendments proposed to the *Environmental Offsets Act 2014* (Act).

The Property Council has been involved in consultation on the Queensland Government Environmental Offsets Framework (Framework) for two years.

During this time, we have attended many working groups and meetings, provided numerous submissions, and dedicated countless resources to working with the Department of Environment and Heritage Protection (DEHP) to ensure the Framework provides a workable solution for all stakeholders.

We were therefore disappointed by a number of the provisions within the Act which did not facilitate the policy intention of simplifying the Framework and removing duplication across the levels of government.

The EPOLA Bill provides an opportunity for the Government to rectify these errors, and ensure the Framework fulfils its stated intention.

The Property Council has worked closely with DEHP and the Department of State Development, Infrastructure and Planning (DSDIP) since the EPOLA Bill was introduced into Parliament, to provide feedback on further amendments required to the Act.

The following sections are of particular concern to the Property Council:

Amendment of section 14 (Imposing offset condition)

The Property Council supports the change proposed to section 14, however additional changes will be necessary to reduce duplication across administering agencies at the same level of government e.g. between State Government departments.

Amendment of section 15 (Restriction of imposition of offset condition – Commonwealth condition imposed or decision made not to impose Commonwealth condition) and New section 15A (Restriction on imposition of offset condition – State condition imposed or decision made not to impose State condition)

The revised wording of section 15 and the new section 15A have provided an overly complicated response to the issues identified in the operation of the current legislation.

The intention of the amendment of section 15 and the insertion of new section 15A is to clarify that where a higher level of government has considered an activity and matter, a lower level of government cannot impose a condition for the same, or substantially the same, activity and matter.

The Property Council has a number of concerns with the proposed amendments. They can be summarised as follows:

- the Commonwealth and the State do not decide "not to impose conditions";
- the change from 'impact' and 'area' to 'activity' and 'matter' has the ability to substantially change how the legislation is implemented;
- the Commonwealth's decision that an action is:
 - not controlled action, or
 - not a controlled action — 'particular manner',

is a decision that the Commonwealth has decided not to impose a Commonwealth condition; this is not clearly recognised.

The first of these concerns arises from the use of the term 'decision'. Governments do not make 'decisions' not to act. An applicant would very rarely receive a notice from a government stating they will not be imposing a condition.

This terminology must be changed to reflect the fact that a government may have considered an impact on a matter, or had the opportunity to consider it, and has chosen not to impose a condition.

Additionally, there is no need to list the types of documents that constitute a consideration, as each level of government will have different policies and procedures that outline matters they must take into consideration when undertaking an assessment. Introducing specific examples of documents only serves to create further confusion.

The second issue arises with a change that occurred between the *Environmental Offsets Bill 2014*, and its finalisation as the Act.

During this time, section 15 changed from removing duplication where there was a consideration of:

- (a) the same, or substantially the same, impact; and
- (b) the same, or substantially the same, area.

To

- (i) the same, or substantially the same, prescribed activity; and
- (ii) the same, or substantially the same, prescribed environmental matter.

This has changed the scope of the legislation, and brings into question what will be considered as 'substantially the same'... environmental matter.

For example, under the original wording, when clearing one hectare of koala trees, it is clear to another level of government assessing that same clearing of one hectare, that they are assessing substantially the same impact in substantially the same area.

With the revised wording of the legislation, it is unclear if the clearing of one hectare of koala habitat (the **koala species** is a matter of national environmental significance) for residential development under Commonwealth legislation, would be considered as substantially the same prescribed activity and prescribed environmental matter when clearing one hectare of koala habitat for residential development under State legislation (**koala habitat** is a matter of state environmental significance).

The Property Council recommends the Committee reconsider this change, and reinstate the original provisions relating to the same, or substantially the same impact and area, to ensure the legislation is able to achieve its intended purpose of removing duplication.

The third issue also relates to duplication. The policy statement for Section 15 of the Act states that it '...was inserted to avoid duplication of offsets between Commonwealth and State conditions, and also between State and local government conditions.'

While the current wording requires further amendment, its intent is clear- when a higher level of government has determined that an impact does *or does not* require an offset, then a lower level of government cannot impose an offset.

The current drafting of the legislation does not take into account the varying ways in which the levels of government undertake their environmental assessments.

The assertion that Commonwealth 'not a controlled action' decisions under the *Environmental Protection and Biodiversity Conservation Act 1999 (EPBC Act)* are not considered as a government choosing not to seek offsets under this framework, does not support the Government's policy position.

When the Commonwealth makes a decision about whether an action is a controlled action or not, it is making an informed assessment regarding the potential for an activity to have a significant impact on a prescribed matter of national environmental significance (MNES).

For the Act to operate as intended, notices of not controlled action under the EPBC Act must be considered as a decision in relation to significant impacts on prescribed matters. Where an action has been identified as not a controlled action, the Commonwealth has determined that the action will not have a significant impact on MNES, and as such, decided that no offset conditions apply for those MNES.

In informing the Government's policy position, the various decisions that may be made by the Commonwealth also need to be taken into account. Rather than deciding that the action is a not controlled action, the Commonwealth may decide that it is a Not controlled action — 'particular manner' i.e. that the proposed action is not likely to be significant if undertaken in a particular manner. This type of decision also needs to be recognised for the purpose of the Act.

Where an action has been identified as controlled, further assessment is undertaken by the Commonwealth to determine whether impacts on MNES can be avoided or mitigated, and to determine the level of offsets (if any) required. This further assessment may be undertaken using:

- an accredited assessment (e.g. bilateral agreements);
- assessment on referral information;
- assessment on preliminary documentation;
- assessment by Environmental Impact Statement or Public Environment Report; or
- assessment by public inquiry.

Example:

A proposed action will have an impact on the koala and koala habitat, so it is required to be referred to the Commonwealth and assessed by the local government (under State legislation).

An application is lodged with the local government. The local government determines that under its planning scheme and in accordance with State policies, offsets will be required as there are impacts on koala habitat.

As required, the proponent also refers its proposal to the Commonwealth for assessment under the EPBC Act. The Commonwealth assesses the proposal and determines the action will not have a significant impact on the koala. The action is declared as not a controlled action, and as such, no offset conditions are imposed.

The intention of the Act is to ensure that because the Commonwealth- as a higher level of government- has chosen not to seek offsets for a matter, the local government in this situation is then not permitted to seek offsets for substantially the same matter.

For Section 15 to operate as intended, there must be recognition by the Government that notices of not controlled action are decisions made by the Commonwealth under the EPBC Act in relation to significant impacts on prescribed environmental matters.

The Property Council has provided these suggestions to DEHP and DSDIP, and has worked closely with them to ensure the final legislation reflects these changes.

New Part 6A (When offset conditions stop applying)

The intention of the new section 25A is to ensure that where a lower level of government has imposed an offset condition and a higher level of government subsequently chooses to impose or not impose an offset condition, the original condition imposed by the lower level of government must fall away.

This change was intended to facilitate the policy intent of removing duplication in offset conditions. As currently drafted however, section 25A does not meet its stated intention as it only applies to situations where a higher level of government *has* imposed an offset condition.

Section 25A relies on a lower level of government notifying an applicant where there is a duplication of offset conditions. In reality, the lower level of government will likely be unaware of a condition imposed by the Commonwealth, so the onus must be on the applicant to inform the administering agency of the duplication.

Once the applicant has notified the administering agency, there must be a process and timeframe by which the agency is required to remove the duplicative condition. A dispute resolution process is also necessary to address those situations whereby an applicant and administering agency disagree about whether or not a condition is duplicative.

The Property Council has worked with the DEHP and DSDIP to provide input on how this section can be amended to include the above processes, and better reflect its desired outcome.

Additional amendment- Section 24(3)

There is no discretion in section 24(3) of the legislation for administering agencies to charge less than the maximum amount set out in the environmental offsets policy for financial settlement offsets.

Anecdotal evidence suggests that many local governments want to charge less than the amount required in the policy, however the legislation prevents them from doing so.

Section 24(3) should be amended to provide that administering agencies are permitted to charge *no more than* the amount set out in the environmental offsets policy.

This would provide local governments with the same discretion they have when levying infrastructure charges, where they are able to set the charge at any amount up to the maximum amount specified by the State Government.

With respect to the State, if it thought that oversight is needed in the exercise of this discretion, this could be provided by requiring that a decision to charge less than the amount set out in the environmental offsets policy be approved by the chief executive of the relevant department.

As this proposed change does not alter the obligations of any party under the legislation, the Property Council would like to see it considered through the EPOLA Bill.

Thank you once again for the opportunity to provide feedback on the EPOLA Bill.

The Property Council would be pleased to appear before the Committee and further explain our above concerns with the legislation, and provide an overview of the consultation being undertaken by DEHP and DSDIP.

If you have any questions about the Property Council or this submission, please do not hesitate to contact Jen Williams on 07 3225 3000/ jwilliams@propertyoz.com.au.

Yours sincerely



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