LEGISLATIVE NOTES

POLICY DIRECTIONS: MINING AND ENVIRONMENTAL OFFSETS IN NEW SOUTH WALES

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The mining industry in NSW has for some time planned and implemented measures to offset the environmental impacts of development through the approval and environmental assessment process under the Environmental Planning and Assessment Act 1979.

Recently however, the State government is moving away from a traditional "command and control" regulation of industry to more flexible arrangements under various environmental offset schemes, some of which will incorporate market forces to achieve sustainable outcomes.

1. INTRODUCTION

The use of "offsets" to reduce the environmental impact of mining development in New South Wales is evolving from a means of dealing with unique issues associated with specific projects to a broader cross-industry framework.

This is evidenced by an increasing trend across New South Wales' government towards the use of market-based instruments (MBIs)[1] to offset environmental impacts and address the resource allocation requirements associated with development. This trend is supplementing traditional "command and control" (for example, development consent conditions, environment protection licensing) regulation of industry to achieve sustainable development outcomes.

MBIs are regulations that encourage behaviour by market manipulation rather than by explicit legislative directives. A number of MBIs impacting the mining industry have recently been introduced into New South Wales to offset the effects of development, such as:

(a) "Green offsets" under Part 9.3B of the *Protection of the Environment Operations Act 1997* (POEO Act);

(b) biodiversity certification of environmental planning instruments[2] under Part 7 Division 5 of the *Threatened Species Conservation Act 1995* (TSC Act);

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1 Dr Ian Patrick, Determining Landowners Willingness to Participate in Offset Markets, 21 April 2006, http://www.ruralfutures.une.edu.au/projects/3.php?nav=Change%20in%20Rural%20Industries%20and%20Communities&page=86, (23 August 2006)

2 Section 4 of the *Environmental Planning and Assessment Act 1979* (NSW) defines an environmental planning instrument as a "State environmental planning policy, a regional environmental plan, or a local environmental plan, and except where otherwise expressly provided by this Act, includes a deemed environmental planning instrument".

(c) the biobanking scheme under Part 7A of the TSC Act;

(d) the allocation of water within environmental limits via water trading under the *Water Management Act 2000* (Water licensing is beyond the scope of this paper).

As well as the above MBI's, other legislation in force has been drafted to offset the environmental impact of development. This legislation includes:

(a) Property Vegetation Plans (PVPs) under Part 4 of the *Native Vegetation Act 2003* (Native Vegetation Act);

(b) Planning Agreements under Part 4, Division 6 of the *Environmental Planning and Assessment Act 1979* (EP&A Act); and

(c) Conservation agreements under Part 4 of the *National Parks and Wildlife Act 1974* (National Parks and Wildlife Act).

It is important that the mining industry understands this new direction in government policy and actively engages with government in its development, to help ensure its practicality and economic feasibility. An understanding of offset markets and other new legislative schemes will facilitate cost-effective compliance and flexibility in meeting environmental obligations in mine planning and operations. To this end, this paper will outline the practical implications of current environmental offset legislation to the mining industry.

2. GREEN OFFSETS

2.1 Green Offsets Generally

The green offsets scheme was established by the insertion of Part 9.3B into the POEO Act by the *Protection of the Environment Operations Amendment Act 2005* (POEO Amendment Act), commencing on 1 May 2006.

A green offset allows pollution arising from a licensed activity[3] to be offset by environmental works taken at another location outside a development site (but near to it),[4] substituting the negative impacts of development at one site with positive rehabilitation or conservation actions at another. This will allow continued development whilst reducing the total impact of development on the environment over time, so that the net effect of the development on the environment is positive.

A green offset scheme or work condition may be imposed as a condition on an environmental protection licence (EPL) under Part 9.3B of the POEO Act.[5] Although the scheme is designed to target new developments and not act retrospectively, green offset conditions can be imposed on existing EPLs.[6] Where imposed, licensees' can establish green offset works themselves or pay

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3 In this context a licensed activity means one that is controlled by an environmental protection licence under the *Protection of the Environment Operations Act 1997* (NSW).

4 NSW EPA, "Green Offsets for Sustainable Development", 9 December 2004, http://www.environment.nsw.gov.au/greenoffsets/index.htm, (22 August 2006).

5 POEO Act, s 295N(1).

6 POEO Act, s 295N(5).

others to do so on their behalf;[7] or contribute to a green offset fund controlled by the NSW Environment Protection Authority (EPA).[8]

Green offset works are works established "to prevent, control, abate, mitigate or otherwise offset any harm to the environment" or "to make good any environmental damage arising (wholly or partly) from a licensed activity".[9]A green offset scheme incorporates green offset works "to carry out a specified program for the restoration or enhancement of the environment that is related to a licensed activity".[10] A particular green offset scheme may involve the creation of a market with the trading of green offset credits.[11]

Before the POEO Amendment Act, all pollution reduction conditions attaching to EPLs had to take place within the licensed premises. Under the amendments, a green offset condition can be imposed on a licence even though the scheme or work does not relate to the licensed premises,[12] or even the harm arising from the licensed activity, as long as the harm arises from the same kind of licensed activity and the same types of pollution or impacts.[13]

However, under section 295N(2), the EPA must not impose a green offset condition on an EPL until it is satisfied that the effects or benefits of proposed green offset work or scheme:[14]

(1) could not otherwise be done in a cost effective way by other measures under the licence;

(2) is likely to result in at least the same or a more beneficial effect on the environment than the use of other measures;

(3) may be reliably estimated or ascertained by the EPA;

(4) are likely to occur wholly or partly in an area affected by the pollutants or impacts that arise from the activity;

(5) are likely to last at least until the relevant impact of the activity is offset.

2.2 Practical Implications of Green Offsets for the Mining Industry

Offsets will only be used to address pollutants remaining after all cost-effective prevention and mitigation measures have been undertaken on-site.[15] If a developer can prove that proposed on-site mitigation efforts will result in no increased environmental impacts, no offsets will be required.

Green offsets are promoted by the Department of Environment and Conservation (DEC) as more cost effective and flexible for developers as they will target diffuse rather than point source pollution.[16]

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7 POEO Act, s 295P.
8 POEO Act, s 295U.
9 POEO Act, s 295P(1).
10 POEO Act, s 295O(1).
11 POEO Act, s 295O(2).
12 POEO Act, s 295N(1)(a).
13 POEO Act, s 295N(1)(b).
14 POEO Act, s 295N(2).
15 Section 295N(2)(a).

This is explained by the law of diminishing returns; that the cost of reducing environmental impacts increases dramatically as zero additional impact is approached. After all cost effective measures have been taken on-site, the use of offsets will allow industry to meet the goal of net environmental improvement off-site at a lower cost, reducing overall development costs by avoiding the law of diminishing returns.[17]

The mining industry in NSW has had experience with offsets principles as part of the planning and approval regime for major projects. The green offsets scheme merely provides yet another statutory framework for these offsets and, in theory at least, the possibility of meeting environmental goals in a more cost effective manner.

2.3 Green Offsets Pilot: Ulan Coal Mines

The operation of green offset conditions is well explained by the participation of Ulan Coal Mines in DEC's salinity offsets pilot programme.[18]

Mining at Ulan Coal Mines consists of both open cut and underground operations and is located near Mudgee in NSW. Approximately 11 megalitres per day of saline ground water is pumped from surrounding aquifers to prevent flooding of the underground workings. This water was then discharged into Ulan Creek, a tributary of the Goulburn River located in the Hunter River Catchment. Prompted by community concerns and ongoing assessment of environmental impacts, DEC advised Ulan that it had to cease discharge into Ulan Creek except during periods of extreme rainfall.

In response, the mine considered a number of alternatives, including the construction of a desalination plant. Due to cost constraints and land management issues, a large dam was built to store water of low salt content, with highly saline water being used for dust suppression. Water from the dam was then used to irrigate pastures on 250 hectares owned by the project, which are then sold to offset the cost of the project. However, modelling predicted a residual salt load of 280 tonnes a year from this irrigation, with the potential concentration in local shallow aquifers due to leaching from the area irrigated.

DEC advised the mine that an offset ratio of 1:1.5 would apply to the scheme. That is, 1.5 tonnes of salt would have to be offset for every tonne of salt that was predicted to reach shallow aquifers from the area irrigated. To implement this Ulan commenced a number of land use and land management strategies to reduce the export of salt from 4460 hectares of land owned by Ulan outside the area licensed by its EPL. These salt export reduction strategies included tree

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16 NSW Department of Environment and Conservation, "Principles of Green Offsets Schemes", *Green Offsets for Sustainable Development*, April 2002, http://www.environment.nsw.gov.au/resources/greenoffsets.pdf, p 4, (20 August 2006).

17 Ibid, p 4.

18 The project was part of the National Market-based Instruments Pilots Programme, under the National Action Plan for Salinity and Water Quality, between August 2003 and June 2005. The three pilot participants were Ulan Coal Mine, Norske Skog Paper Mill in Albury and Moree Spa Baths. The following summary of the Ulan Coal Mine Pilot is taken from the final report, reference: NSW Department of Environment and Conservation and Action Salinity and Water Australia, *Green Offsets for Sustainable Regional Development: Final Report*, August 2005, http://www.environment.nsw.gov.au/resources/offsets05259.pdf, pp 6-9, (20 August 2006).

revegetation, sowing perennial pastures, changing grazing regimes and destocking remnant vegetation. Although these changes have been implemented, full offset of the salt impacts of irrigation will take a number of years to reach maturity.

The pilot also involves ongoing monitoring and reporting requirements, which have been attached as conditions to Ulan's EPL 394.[19] Including ongoing and set up costs, Ulan Coal Mine estimates that it will save 91 million dollars from salinity offsets over the construction and ongoing costs of a desalination plant over the next 20 years.

3. BIODIVERSITY CERTIFICATION OF ENVIRONMENTAL PLANNING INSTRUMENTS

3.1 Biocertification Generally

Certification of environmental planning instruments (EPIs) was introduced into the TSC Act by the *Threatened Species Legislation Amendment Act 2004* and commenced on 31 October 2005.

The Minister for the Environment may certify an EPI if satisfied that the EPI will lead to the overall "improvement or maintenance"[20] of biodiversity values. Certification is not mandatory, and will most likely be based on local environment plans, as these are the most relevant EPI's with regards to biodiversity.

A discussion paper released by DEC in 2005[21] envisages the development of Regional Conservation Plans (RCP's) mapping biodiversity values. The RCP's will be integrated into the NSW Government's Regional Strategies.[22] Before integration, consideration will need to be given to the social and economic consequences of the RCP's.

RCP's will identify, based on the level of biodiversity values.[23]

(1) Green light areas: Low biodiversity values

Development will no longer have threatened species assessment requirements, no offsets required;

(2) Amber light areas: Some or medium biodiversity values

Development will only be approved if appropriate offsets can be made on or off-site to maintain or improve biodiversity value; and

(3) Red light areas: high biodiversity values

Development will be allowed if it maintains or improves biodiversity values on site. Existing uses will be protected. These areas will be targeted for restoration of habitat for biobank credit generation under the biodiversity banking scheme.

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19 Condition E.1, EPL 394.

20 TSC Act, s 127G(1).

21 Department of Environment and Conservation (NSW), *Biodiversity certification and banking in coastal and growth areas*, July 2005, http://www.environment.nsw.gov.au/resources/biodiversitybankingweb.pdf, p 4, (20 August 2006).

22 Ibid.

23 Ibid, p 5.

Once an EPI is consistent with the RCP it can be submitted for certification. Certification will last for ten years (with possible extension).[24]

3.2 Practical Implications

Biodiversity Certification will offer an alternative path to the current species assessment under the EP&A Act.[25] Development or activities under the EPI will be deemed not likely to significantly affect threatened species for the purposes of Parts 4 and 5 of the EP&A Act in areas of low biodiversity value.[26] This removes the need to address the test of significance for threatened species normally required of any development, and the need for preparation of a species impact statement.

4. BIODIVERSITY BANKING

4.1 Biobanking Generally

The commencement of the *Threatened Species Conservation Amendment (Biodiversity Banking) Act 2006* on 4 December 2006 inserted Part 7A into the TSC Act, to provide for the establishment of a biodiversity banking and offsets scheme. Biobanking is a voluntary[27] market based scheme to offset the environmental impacts of development on biodiversity. The Scheme will focus on habitat loss and not the offsetting of impacts on individual threatened species.[28]

Although the Act has commenced, there are requirements that must be finalised before the scheme can be implemented. Specifically, these requirements involve the appointment of a Joint Committee of Parliament to prepare a report (to be tabled in Parliament within 6 months of commencement) suggesting guidelines for a trial period of the scheme and options in applying the scheme to the clearing of native vegetation.[29] Additionally, the Minister for the Environment will need to establish biobanking assessment methodology prior to the scheme being implemented.[30]

The biobanking scheme has four main components:[31]

(1) Establishing biobank sites: conservation areas under a conservation agreement between the landholder and the Minister for the Environment that generates credits in accordance with the scheme;

(2) Creating biodiversity credits: credits are generated by the gain in biodiversity on a biobank site through management actions;

(3) Trading of those credits: enabling the credits to be used as an offset against the impact of development on biodiversity values; and

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24 TSC Act, s 126J.
25 See EP&A Act, ss 78A(8), 79B(3), 79C, 111(4) and 112(1B).
26 Ibid.
27 TSC Act, s 127ZL(8), see note at end of section.
28 Department of Environment and Conservation (NSW), Guide to the Threatened Species Conservation Amendment (Biodiversity Banking) Bill 2006, June 2006, < http://www.environment.nsw.gov.au/resources/biobankguide06360.pdf>, p3, (28 August 2006).
29 TSC Act, s 127(3).
30 TSC Act, s 127B.
31 TSC Act, s 127A(2).

(4) Biobanking assessment methodology: used to calculate how many and what class of credits are generated by Biobank site management actions and the number of credits that must be retired to offset development.

4.2 Biobanking Agreements

These are voluntary agreements between the Minister for the Environment and landholders that designate land as a biobank site. Agreements allow landholders to create and sell a specified number and class of credits in accordance with the biobanking assessment methodology[32] and the agreement, in exchange for committing to ongoing conservation management of the land.[33] These "management actions" will improve biodiversity values of the land, by means such as controlling grazing, leaving fallen timber on the ground, controlling pests and weeds and revegetation. Management actions are exempt from the requirements for development consent or environmental assessment under the EP&A Act.[34]

Biobanking agreements have effect in perpetuity[35] and are registered on the title[36] of the land. This means that agreements are binding on, and enforceable by and against successors in title.[37] Agreements may be enforced by any person in the Land and Environment Court.[38]

In limited circumstances, the Minister for the Environment may vary[39] or terminate[40] a biobanking agreement. Generally speaking, obligations can only be varied or terminated if this will not have a negative impact on biodiversity values being protected under the agreement. If there is a negative impact this may require offsets such as the retirement of credits.

The concurrence of the Minister will be required to suspend a biobanking agreement to enable development. Conditions as to this consent may require the retirement of biodiversity credits.[41]

4.3 Biodiversity Credits

(a) Creation of biodiversity credits

Division 3 of Part 7A of the TSC Act sets out the procedure under which a biobank site owner may apply to the Director-General for the Environment for the creation of biodiversity credits. The number and class of credits that may be created are determined in accordance with the biobanking assessment methodology and the relevant terms of the biobanking agreement.[42]

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32 TSC Act, s 27W(5).

33 Department of Environment and Conservation (NSW), *Biobanking: A Biodiversity Offsets and banking Scheme – Working Paper*, December 2005, http://www.environment.nsw.gov.au/resources/biobanking05661.pdf, p 5, (21 August 2006).

34 TSC Act, s 127K.

35 TSC Act, s 127G.

36 TSC Act, s 127I.

37 TSC Act, s 127J.

38 TSC Act, s 127L.

39 TSC Act, s 127H(1)(a).

40 TSC Act, s 127G(2)(a).

41 TSC Act, s 127P.

42 TSC Act, s 27W(6).

Only when registered does a biodiversity credit have force and effect[43] and once registered, remains in force unless it is cancelled or retired under the scheme.[44]

(b) Trading of biodiversity credits

A biodiversity credit may be bought by any person subject to the regulations.[45] Typical buyers would include developers offsetting project impacts, government bodies trying to achieve conservation outcomes or philanthropic organisations.[46]

The market will determine the price paid for credits. In addition to the market price component, the regulations will prescribe an amount to be paid in to the Biobanking Trust Fund before or on the first transfer of a biodiversity credit.[47] Money from the fund will be paid annually to biobank landowner's to assist in resourcing ongoing management actions.[48]

(c) Retirement of credits

Retirement of a biodiversity credit occurs when it is used to offset the impact of a development on biodiversity values.[49] Credits can also be retired voluntarily, for example by philanthropic organisations.[50]

Once credits are retired, obligations under the biobanking agreement to carry out management actions continue, locking in the biodiversity offset for the impact of a development.[51]

4.4 Biobanking Statements

Initially, the biobanking scheme operates on a voluntary basis. Developers can voluntarily use the scheme and apply for a biobanking statement from the Director-General.[52] A biobanking statement confirms the number and class of credits and any on-site measures required for the development to improve or maintain biodiversity values.[53] Credit requirements are then incorporated into the development consent or approval for the activity under the EP&A Act.[54]

Biobank statements can be obtained in respect of "development for which biobanking is available", namely activities and projects to which Parts 4, 5 and 3A of the *Environmental Planning and Assessment Act 1979* apply. Clearing of native vegetation is not "development for which biobanking is available", and continues to be dealt with under the *Native Vegetation Act*

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43 TSC Act, s 127W(8).
44 TSC Act, s 127Y.
45 TSC Act, s 127Z.
46 Department of Environment and Conservation (NSW), Guide to the Threatened Species Conservation Amendment (Biodiversity Banking) Bill 2006, June 2006, < http://www.environment.nsw.gov.au/resources/biobankguide06360.pdf>, p 4, (28 August 2006).
47 TSC Act, s 127ZA.
48 TSC Act, s 127ZW.
49 TSC Act, s 127ZG(2)(a).
50 TSC Act, s 127ZG(2)(d).
51 TSC Act, s 127ZH(2).
52 TSC Act, s 127ZJ.
53 TSC Act, s 127ZL.
54 TSC Act, s 127ZO.

2003.[55] The Director-General may only issue a biobanking statement if the development will improve or maintain biodiversity values, assessed in accordance with the biobanking assessment methodology.[56]

4.5 Practical Implications: Interaction of Biobanking with EP&A Act

(a) Parts 4 and 5

If a biobanking statement is issued, it will not be necessary for the development to be assessed in accordance with the threatened species protection measures provided for by Parts 4 and 5 of the EP&A Act. That is, the development is taken to be development that is not likely to significantly affect any threatened species, populations or ecological communities.

Once a biobanking statement is obtained, the consent authority or determining authority must incorporate the credit requirements and any other conditions of the statement into the conditions of consent or approval.[57] This may require the proponent to retire biodiversity credits and take other onsite measures to offset any negative impact on biodiversity values.

As the biobanking scheme is voluntary, not obtaining a biobanking statement in respect of development (including a refusal by the Director-General to issue a biobanking statement) does not prevent the development being assessed in accordance with the relevant threatened species assessment provisions of the EP&A Act.[58]

(b) Part 3A

Biobanking statements may also be issued in respect of projects proposing to apply for project approval under Part 3A of the EP&A Act,[59] and the Minister for Planning may approve a Part 3A project subject to a condition that requires the proponent to acquire and retire biodiversity credits.[60]

If a biobanking statement was obtained in respect of a project, the Minister may also approve a project subject to a condition that requires the proponent to comply with any condition of the biobanking statement.[61]

4.6 Prospecting and Mining on Biobank Sites

Mining interests are protected under the biobanking scheme. As stated in section 127U of the TSC Act, "nothing in [the biobanking scheme] prevents the grant of a mining authority…in respect of a biobank site in accordance with Mining Act 1992" or the "carrying out, on or in respect of a biobank site, of any activity authorised by a mining authority". Exploration licences can also be granted over land that includes a biobank site.[62]

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55 TSC Act, s 127ZJ. Clearing of native vegetation must not be carried out except in accordance with a development consent or property vegetation plan in accordance with the *Native Vegetation Act 2003*.

56 TSC Act, s 127ZL(1).

57 TSC Act, ss 127ZO and 127ZP.

58 TSC Act, s 127ZL(8), see note to section.

59 TSC Act, s 127ZJ.

60 EP&A Act, s 75JA(1) This subsection applies whether or not a biobanking statement under Part 7A of that Act was obtained in respect of the project.

61 EP&A Act, s 75JA(4).

62 TSC Act, s 127ZS.

To ensure that any issues impacting mineral extraction or exploration are considered before land is established as a biobank site, the Minister must consult with the Minister for Primary Industries before entering into any biobanking agreement.[63] Additionally, the Minister must not enter into a biobanking agreement where the land is the subject of a mining lease (including a subsurface lease) unless the holder of the lease has consented in writing to the agreement.[64] Holders of other authorities under the Mining Act also must be consulted about the terms of the agreement by the Minister.[65]

In short, biobank landowner's will be afforded the same protection as other private landowners under the Mining Act whose land is affected by mining.[66] This may involve compensation for management actions undertaken by the landowner,[67] and the retirement of biodiversity credits by the holder of the authority to fully offset biodiversity losses.[68]

5. PROPERTY VEGETATION PLANS

5.1 Property Vegetation Plans Generally

Property vegetation plans (PVPs) are part of the native vegetation management strategies under the Native Vegetation Act.

One of the key objectives of the Native Vegetation Act is to end broad scale land clearing of "native vegetation"[69] in NSW, unless the clearing "improves or maintains"[70] environmental outcomes. To this end, the clearing of native vegetation is an offence in non-urban areas[71] except in the following circumstances:

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63 TSC Act, s 127D(7).

64 TSC Act, s 127F(1)(e), see also s 127D(7).

65 TSC Act, s 127F(1)(f).

66 Department of Environment and Conservation (NSW), "Integrating Biobanking with Mining Legislation", *Refinements to the development and implementation of the Biodiversity Banking Bill after stakeholder consultation*, 13 February 2007, http://www.environment.nsw.gov.au/threatspec/billrefine.htm#mine, (2 March 2007).

67 TSC Act, s 127ZE(4).

68 TSC Act, s 127S(2).

69 Native Vegetation Act, s 6.

70 Native Vegetation Act, s 3(b).

71 Native Vegetation Act, s 5; see Schedule 1 for land excluded from the operation of the Act.

(1) in accordance with a development consent granted in accordance the Native Vegetation Act;[72]

(2) in accordance with a PVP;

(3) clearing of non-protected regrowth;[73]

(4) clearing of certain native groundcover;[74]

(5) for routine agriculture management activities;[75]

(6) the continuation of existing cultivation, grazing or rotational farming practices;[76]

(7) sustainable grazing;[77] or

(8) certain types of clearing authorised under other legislation.[78]

PVPs are voluntary but legally binding agreements negotiated between a landholder and the relevant Catchment Management Authority, identifying actions for the protection and enhancement of native vegetation and offsets for any proposed clearing. A PVP may also be linked to government funding incentives for conservation programs on private land, such as revegetation funding. A PVP can be made for up to 15[79] years and registered plans run with the land.[80]

If proposed clearing does not "improve or maintain" environmental outcomes, the proposal may be offset under a PVP with positive management actions to help meet the "improve or maintain" test. Offsets may include, for example, agreeing not to clear regrowth, reducing stocking rates from areas of remnant vegetation, planting, reseeding or improving habitat by weed control.[81]

5.2 Practical Implications of PVPs

The Native Vegetation Act does not apply to the clearing of native vegetation "authorised under the *Mining Act 1992*".[82] This means that clearing on a surface mining lease in accordance with the conditions of an approval under the EP&A Act, does not require a development consent or PVP in accordance with Native Vegetation Act.

If clearing of native vegetation is required and is not approved under development consent or project approval, development consent under the Native Vegetation Act or the preparation of a PVP will be required.

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72 Granted by the Minister for Planning applying Part 4 of the EP&A Act and section 14 Native Vegetation Act.

73 Native Vegetation Act, s 19.

74 Native Vegetation Act, s 20.

75 Native Vegetation Act, s 22.

76 Native Vegetation Act, s 23.

77 Native Vegetation Act, s 24.

78 Native Vegetation Act, s 25.

79 Native Vegetation Act, s 30.

80 Native Vegetation Act, s 31.

81 NSW Government, *Native Vegetation Management in NSW*, November 2005, http://www.nativevegetation.nsw.gov.au/p/factsheet_05.pdf, p 1, (23 August 2006).

82 Native Vegetation Act, s 25(l).

6. PLANNING AGREEMENTS

6.1 Planning Agreements Generally

The *Environmental Planning and Assessment Amendment (Development Contributions) Act* commenced on 8 July 2005. The amendments introduced a statutory framework into the EP&A Act for planning agreements between planning authorities and developers.

A planning agreement is a voluntary contractual arrangement where a planning authority can obtain contributions from a developer for a "public purpose". A public purpose includes:[83]

(1) the provision of public amenities or public services,

(2) affordable housing,

(3) transport or other infrastructure relating to land,

(4) or the conservation or enhancement of the natural environment.

Planning agreements allow more flexibility for planning authorities in determining both the type and amount of contribution a developer will have to make. Additionally, planning agreements may wholly or partially exclude further development contributions under sections 94, 94A or 94EF of the EP&A Act.[84]

6.2 Practical Implications of Planning Agreements

By widening the purposes for which developer contributions can be made, planning agreements allow the social impacts of mining development to more flexibly offset by the provision of public services and infrastructure. Additionally, public concerns regarding the environmental impacts of mining may also be allayed by planning agreements which enhance or conserve the natural environment.

6.3 Planning Agreement Case Study: Moolarben Project

On 20 December 2005, Moolarben Coal Mines Pty Ltd lodged an application for project approval under Part 3A of the EP&A Act for the construction and operation of the Moolarben Coal Project near Mudgee, New South Wales.[85] The project includes the development of three open cut mines (production up to 8Mtpa) and an underground mine (production up to 4Mtpa) to recover approximately 127 Mt of coal, together with a coal handling and processing facility and rail infrastructure.[86]

The proponents of the project have been responsive and alert to the opportunities of the new offset regimes mentioned above, with the use of planning agreements incorporating property vegetation plans and in its overall offset strategy.

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83 EP&A Act, s 93F(2).

84 EP&A Act, s 93F(3)(d). Section 94 makes provision for contributions in relation to the provision or improvement of services or amenities, whilst section 94A relates fixed development consent levies.

85 Wells Environmental Services, Moolarben Coal Project: Response to Submissions, December 2006, p 4.

86 Ibid, p 3.

As outlined in its Response to Submissions,[87] Moolarben will enter into a voluntary planning agreement that will require Moolarben:[88]

(1) to transfer of approximately 237 ha of land to the Minister for the Environment for incorporation into the Goulburn River National Park;

(2) manage approximately 1726 hectares for the life of the Moolarben Coal Project in accordance with the offset strategy described in the Environmental Assessment Report in Appendix K and Section 5.1.7 of the Response to Submissions Report; and

(3) to progressively establish PVPs between relevant landholders and the Hunter-Central Rivers Catchment Management Authority committing the landholder to best practice agriculture, the retention of remnant native vegetation at the Date of Project Approval and enhancement of native vegetation.

7. VOLUNTARY CONSERVATION AGREEMENTS

7.1 Voluntary Conservation Agreements Generally

The National Parks and Wildlife Act provides for the creation of voluntary conservation agreements.[89] Voluntary conservation agreements restrict the use of privately owned land to protect its natural and cultural values.[90]

Conservation agreements are made with the Minister for the Environment and coordinated by the National Parks and Wildlife Service. Once registered, a conservation agreement is binding on and enforceable against successors in title to the land.[91]

7.2 Practical Implications of Conservation Agreements

Conservation agreements can potentially impede a mining project. In order for mining to take place over an area the subject of conservation agreement, either:

(1) the consent of all parties to the agreement is required to vary or terminate the agreement;[92] or

(2) the Minister for the Environment may terminate or vary the conservation agreement without the consent of the land owner.[93] An agreement may be terminated if the Minister is of the opinion that the agreement is no longer needed for, or is no longer capable of being used to achieve, any purpose for which the agreement was entered into.

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87 The Response to Submissions incorporating a Preferred Project was provided pursuant to section 75H(6) of the EP&A Act as requested by the Director-General of Planning on 2 November 2006.

88 Ibid, p 27.

89 National Parks and Wildlife Act, s 69B.

90 National Parks and Wildlife Act, s 69C.

91 National Parks and Wildlife Act, s 69E.

92 National Parks and Wildlife Act, s 69D(2)&(3).

93 National Parks and Wildlife Act, s 69D(4).

Section 28 of the EP&A Act allows an environmental planning instrument to suspend the operation of a regulatory instrument for the purpose of enabling development. A conservation agreement is taken to be a regulatory instrument for the purposes of section 28.[94] A suspension of a conservation agreement under section 28 cannot be given effect without the concurrence in writing of the Minister for the Environment.

8. CONCLUSION

As the broad range of offset mechanisms illustrate, there is significant overlap in their purpose and execution. One of the challenges to the mining industry in developing new projects, and one that it is already experiencing, is managing the expectations of various agencies each of which is driving its own offset agenda. While ever those administering it retain strong leadership, one of the strengths of the Part 3A process under the EP&A Act is that it can be effective to resolve the sometimes misaligned priorities of different regulatory agencies.

Another question to be faced by industry and regulators is whether the ongoing, and in some cases perpetual, involvement of private, profit making entities in conserving areas and resources set aside in offset schemes is sustainable over the long term. It may be, particularly in the case of biodiversity offsets, government outsourcing of its stewardship of protected environments is more costly and less secure in the long term.

In the short term, in seeking the most acceptable method of securing environmental offsets, the mining industry needs to carefully balance the requirements for certainty in the offset options selected against the practical longevity and lifecycle cost of those commitments.

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94 National Parks and Wildlife Act, s 69KA.