

Set and forget: How offsets under national environmental law drive **habitat destruction**



**AUSTRALIAN
CONSERVATION
FOUNDATION**

**Nature
needs us,
now**

**We acknowledge the
Traditional Owners of
Country** and their continuing
connection to land, waters and
community. **We pay respect to
their Elders past and present
and to the pivotal role that
First Nations Peoples continue
to play in caring for Country
across Australia.**

ACF wishes to thank Matt Whitting and the ACF Canberra Community Group for research that assisted this investigation.

Contents

Executive summary	4
1. Introduction	6
1.1. What are environmental offsets under the EPBC Act?	6
1.2 Why is the legal protection of an offset site incredibly important?	6
1.3 What does legal protection of an offset site look like?	6
2. This investigation	8
2.1 The ‘why’ behind this investigation	8
2.2 Definition of ‘offset site’	8
2.3 Criteria for adequate legal protection	10
3. Findings	11
3.1 Overview of the protection of offset sites	11
3.2 Required offset sites by area, industry, state or territory, and sector	12
4. Digging deeper — analysis and discussion	15
4.1 How the government sets conditions on approvals, and the implications for legal protection outcomes	15
4.1.1 Approvals fail to require adequate protection	15
4.1.2 Shortcomings with legal protection mechanisms	17
4.1.3 Lack of transparency and no or inadequate reporting requirements	18
4.1.4 Outcomes of weak approval conditions	20
4.2 Post-approvals and monitoring stage — compliance and enforcement issues	21
4.2.1 Variations to approval undermine legal protections promised	21
4.2.2 Delays and deferred commencements dates	24
4.2.3 Inaction on compliance issues	27
4.2.4 Failures of monitoring and enforcement	27
5. Conclusions and recommendations	29

Executive summary

More than 20 years after the introduction of our national nature law, biodiversity continues to be destroyed at alarming rates in Australia.

Under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), the federal environment minister routinely approves projects that will forever destroy threatened species and habitat with the justification that **the developer will compensate for that destruction by conserving a similar place elsewhere – an offset site.**

This practice has allowed big polluters and nature-wrecking industries to continue with business as usual across Australia, while our unique wildlife and landscapes pay the real price.

In theory, an offset site is meant to yield real conservation benefits that will endure for as long as the project's environmental destruction will last.¹ Whether this occurs boils down to if and how the offset site is *legally protected*.

A failure to prioritise legal protection with a 'Set and Forget' regulatory approach leaves an offset site extremely vulnerable – vulnerable to being mined, developed, or otherwise destroyed; and all-together forgotten about by the federal government.

The purpose of this investigation was to find out whether there really is integrity in how offset sites are legally protected.

ACF examined 218 offset sites required under the federal environment approvals that were granted between 2008 and 2012. The investigation did not consider projects that received approval but weren't progressed. This historical timeframe was chosen because in 2024, more than a decade on from the selected time period, failures to create legal protection cannot be excused on the basis the process is underway but not completed.

Vague or weak conditions can lead to uncertain offset protection. This means that it was not enough to only audit compliance with approval requirements; the requirements themselves also had to be scrutinised. Thus, the legal mechanisms available, the approval requirements, and the outcome they produced in each case were assessed against three scientifically backed principles that have been embedded in Australian law and policy for decades. That is, where a project will cause permanent and irreversible destruction to the environment, the offset site must be:

1. Protected *for conservation purposes* through legal mechanisms that are;
2. *Permanent* (lasting forever), and;
3. *Secure* (difficult to revoke).

Together, these principles constitute 'adequate protection'. While the principles themselves are sound, this investigation revealed that the way they are applied in practice is fraught with problems. After checking where the offset sites are supposed to be located and whether they are protected, it was found that:

- More than two thirds of all cases are not tied to any legal obligation for the approval holder to adequately protect the offset site.
- Of the cases where the outcome is known, only 30% are in fact adequately protected. A further 48% are poorly protected because the protection is not permanent, is easily revoked, or is not for a conservation purpose.
- 21% of the offset sites are not protected. The approval has expired in 27% of these cases, so the likelihood of the offset site ever being protected is very low.
- It is unknown whether 42 cases are protected at all. Concerningly, it is state government agencies that are the approval holders in half of these 'unknown' cases.
- 36% of cases did not require the approval holder to report publicly or to the environment department/minister on their progress in protecting their offset site.

- The gas industry had the lowest adequately protected offset sites (21%), while offset sites relating to roads and rail projects had the highest percentage (54.5%).
- Only approval holders with projects in Tasmania adequately protected 50% or more of their offset sites. For projects in Queensland and Western Australia, fewer than 25% of offset sites were adequately protected.

These statistics are representative of an underlying failure to adequately protect offset sites in our national offsetting regime. These systemic failures are damaging to nature and jeopardise the achievement of the federal government's nature positive goals.

There are measures that can and must be put in place to minimise damage to nature. At the very least, strong protection requirements must be required and publishing of offset condition compliance reports made mandatory.

More fundamentally, there needs to be a shift away from the emphasis on offsetting as a response to environmental impacts. New 'nature positive' reforms proposed by the Albanese government must prioritise strong, up front protection of habitat if we are to halt and reverse the decline of nature in Australia. Where offsets are used they should be a genuine last resort, and compliance with conditions should be a key priority for the proposed new national regulator, Environment Protection Australia. The government must also commit to addressing the legacy of the failures exposed by this report - auditing current offsets, taking enforcement action and varying conditions to require adequately protected offsets to be delivered to compensate for harm already done are all essential.

*Below. Googong, NSW
Photo. Peta Bulling*



1. Introduction

1.1. What are environmental offsets under the EPBC Act?

Our national environmental law - the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) - is intended to protect and conserve “matters of national environmental significance” including listed threatened species, wetlands of international importance and World Heritage sites. It reflects Australia’s commitments under international environmental agreements, and the Federal government’s important role in national environmental protection.

One important way in which the EPBC Act seeks to protect and conserve the environment is by prohibiting “actions” that are likely to have a “significant impact” on matters of national environmental significance being taken without approval.

Environmental offsets are conditions on approvals requiring the approval holder to undertake an activity intended to compensate for or “offset” the impacts of their development (the “action”). For example, permitted destruction of listed threatened species habitat will require the approval holder to deliver an offset, typically in the form of habitat protection and enhancement at another location - the offset site.

In theory at least, offsets are a last resort – a last stop policy tool that compensates for acceptable residual impacts that cannot be mitigated and avoided. In practice, they are a controversial and problematic regulatory tool. Offsets frequently lead to the destruction of habitat that should be protected because of unrealistic assumptions about the ability to offset the damage.

Offsets are not specifically provided for in the EPBC Act. Their use is based on an interpretation of the power to attach conditions to the grant of an approval. How these conditions are specified at the time the approval is granted is critical, but not of itself sufficient to ensure that an effective and legally permanent and secure offset site is established. That must be done through a subsequent process of legal protection.²

1.2 Why is the legal protection of an offset site incredibly important?

The legal protection of an offset is critical to the delivery of conservation outcomes.³

To illustrate: even where land containing an offset site is selected and managed effectively, those on-the-ground conservation benefits intended to compensate for the permitted impacts are susceptible to harm from development and other forms of destruction, unless the land’s legal status is altered to bind current and future landholders to protect it forever. And, where damage to the environmental qualities of an offset site occurs, effective legal protection should provide a basis for enforcement action to remedy that loss.

Continuing legal protection is all the more important for safeguarding conservation outcomes because approval holders may not be responsible for the offset site once they have complied with their obligations⁴ or the approval has expired.

1.3 What does legal protection of an offset site look like?

Where an EPBC approval includes an offset condition, the approval holder – if a private entity – generally acquires their offset site by purchasing land themselves, paying a private landholder to conserve their own land, or paying the State to declare or reserve publicly-owned land for conservation. Commonly, however, approval holders are government agencies. In these instances, the State generally selects a section of crown land to become the offset site



Example of an offset condition in an EPBC approval

To offset the loss of up to 29 ha of suitable habitat for the EPBC listed Baudin's Black Cockatoo, Carnaby's Black Cockatoo and Forest Red-tailed Black Cockatoo, the person taking the action must register a legally binding conservation covenant over a conservation offset area within five years of the

date of this approval. The covenant must provide protection for no less than 90 ha of contiguous Jarrah-Marri-Wandoo forest suitable for Black Cockatoo foraging and breeding, and include at least 12 known or potential breeding hollows.⁵

The most common way to legally protect an offset site involves the use of a statutory 'mechanism' to alter the legal status of the land containing the offset site. These mechanisms, such as conservation covenants, are predominantly found in state and territory legislation.⁶ The jurisdictions differ greatly in terms of the types of mechanisms that exist, how they are administered, and what level of protection they provide.

Legal protection is established through some form of 'instrument', a formal document and process that initiates the change in legal status. This could be, for example, a notice in the government gazette that a section of publicly-owned land has been declared a national park, or a written agreement recorded on the certificate of title for privately-owned land that restricts current and future owners in how they can use it. Frequently, these instruments reflect an agreement between the landowner and an administering authority.

Refer to [Appendix A](#) and section 4.1.2. for more details about mechanisms and associated instruments.

Above: Carnaby's Black Cockatoo
Photo. Imagvixen / iStock

2. This investigation

2.1 The ‘why’ behind this investigation

Although environmental offsets are a frequently used regulatory tool in Australia, it is widely acknowledged that they have failed to deliver the environmental outcomes they were intended to deliver.⁷ Scrutinising the role that offsets play in the context of ongoing habitat destruction in Australia is therefore very important.

The context for this investigation is a 2022 ACF investigation into how much threatened species habitat federal environment ministers had approved for destruction in the preceding decade.⁸ The figure was startling – the destruction of over 200,000 hectares of land had been approved under our national environment law; home to more than 400 federally-protected threatened species. This figure was likely to be conservative as it was taken from publicly available data, as not all approvals disclose this information.

It is also important to note that only a fraction of clearing in Australia is referred to the minister for an assessment about its potential impact on federally protected threatened species and places.

In response to that investigation, the office of then-Environment Minister Sussan Ley said ACF’s analysis did not take into account offset requirements to protect threatened species.⁹ This response goes to the heart of the issue with the ongoing use of offsets: **how confident can we be that “offset” requirements actually deliver the environmental outcomes claimed?**

This investigation aims to assess the credibility of this claim by drilling down into an incredibly important, yet often neglected, aspect of the offsetting regime—that of the legal protection of offset sites.

We believe this is an important area of inquiry because:

1. Prior to this investigation, there had been no empirical analysis of the legal protections of EPBC offset sites, to ACF’s knowledge. The Department of Climate Change, Energy, the Environment and Water’s (the Department) June 2023 announcement that it will audit 1,000 offset sites was silent on this issue¹⁰ and the offsets register is not yet operational with this kind of information.¹¹
2. There are considerable inconsistencies in how approval requirements (called conditions) are written when it comes to offset sites. This means that just considering whether an offset condition was imposed and whether it has been complied with is not enough to reach a conclusion as to environmental outcomes on the ground. It is important to also track if and how conditions translate into effective legal protection.
3. One of the problems with evaluating conservation outcomes from offsets is the difficulty in getting access to the necessary ecological data and scientific information. Access for ground truthing, the process of verifying this data in the field, is often difficult as offset sites are commonly situated on privately-owned land. In contrast, the question of whether an offset site is legally protected - an essential precondition to any conservation outcome - is something measurable and specific that can be evaluated.

2.2 Definition of ‘offset site’

For this investigation, ‘offset site’ was defined as any land (specifically identified or not) required to be protected under a condition of an EPBC approval to compensate for a project’s environmental impacts.

The investigation included approvals with conditions that required offset strategies and plans to be implemented, but excluded approvals with conditions requiring protection where, on balance, the purpose was avoidance or mitigation rather than offsetting (i.e. preventing or reducing a risk of further impact, as opposed to compensating for an impact).¹²

There was some crossover between mitigation and offsetting in some conditions. In those cases, the inclusions and exclusions in the set of offset sites examined were mostly consistent with the Department's offset register.¹³ Approvals that required offset sites at the outset and were later varied to remove this requirement were included (this will be discussed later, see section 4.2.1 and Box 2).

Within these parameters, ACF examined all 218 offset sites required under the federal environment approvals (and any subsequent variations from approval date to present) that were granted between 2008 and 2012. The investigation did not consider projects that received approval but did not progress.

This time period was chosen to ensure that only those projects where there is a clear expectation that legal protection would be in place were considered. It is reasonable to assume approval holders will have protected those offset sites, more than 11 years after the approval was granted.

The data on delay, discussed in section 4.2.2 of this report,¹⁴ will further demonstrate why it was necessary to look at approvals more than 11 years old. The sheer amount of delay means that it is inaccurate to conclude within less than ten years what the final outcomes are for offset legal protection. This is because approval holders are slow at delivering protection outcomes,

and the Department facilitates this process through variations to approvals. A decade is required to let the process play out. Even then, there were numerous examples in our offsets sample still yet to be protected after 11 to 15 years.

To illustrate the point, if we had looked at this same sample seven years after the approvals were granted, a third of approval holders would not yet have protected their offsets in any way. This would not fall evenly across the sample either, for example, about two-thirds of gas approvals would be yet to protect anything seven years after the approval was granted. The average delay data would have been skewed significantly if we selected younger approvals.

In other words, we had to select older approvals because of the Department's failure to enforce the due dates in conditions.

We are confident that the vast majority of the issues investigated with this sample are continuing with current approvals, and so this investigation provides insights relevant to approvals that are still being issued now and current reforms proposals. Where the insights relate only to historic approvals, in limited sections, we have made this clear.

The findings from this investigation are accurate up to late 2023.



2.3 Criteria for adequate legal protection

Approval conditions in and of themselves do not give a true picture of whether an offset actually delivers conservation outcomes. The manner in which these conditions are specified may be part of the problem, as vague or weak conditions can lead to uncertain offset protection. Given this, compliance with offset conditions is not a complete or accurate indication of whether the offset is adequately protected. Instead, our approach was to develop the following three criteria informed by the literature on offsetting and approaches adopted in Australian law and policy:

1. **Security:** Is the protection that the mechanism and instrument provide strong (i.e. difficult to revoke)?¹⁵
2. **Permanence:** Since the project will permanently impact the environment, will the offset site's protection also be permanent (commonly referred to as 'in perpetuity')?
3. **Conservation purpose:** Is the purpose of the protection that of nature conservation?¹⁶

There is strong support for these principles in Australian law and policy, stretching back decades:

- **Between 2007 and 2012**, the Australian Government was working from a draft policy position on offsets that had the kernels of these principles, albeit not as fleshed out or clear as they later became.¹⁷ In 2012, the government set out its position clearly on the use of offsets under the EPBC Act in its *EPBC Act Environmental Offsets Policy*. It states: *'the best legal mechanisms for protecting land are intended to be permanent (lasting forever) and are secure (that is, they are difficult to change or alter). These two elements are important because they mean that land set aside as an offset will continue to provide a secure benefit to the impacted protected matter.'*¹⁸ The 2012 policy also explicitly states that it applies to any variations made to approvals that were granted before the policy was finalised.¹⁹

- **Since 2002**, the environment minister has been responsible for approving the mechanisms that attract tax concessions under the Income Tax Assessment Act 1997 (Cth) ('Tax Act') for private landholders who covenant their land for conservation. Not only is this criteria of security, permanence and conservation purpose enshrined directly in the Tax Act,²⁰ it is also reflected in the Department's own guidelines for which conservation covenanting programs the minister will approve.²¹
- **In 2009**, the federal, state and territory governments published their strategy for conserving a representation of Australian biodiversity in national parks and other protected areas (the National Reserve System).²² For land such as an offset site to be included in the National Reserve System and thereby counted towards Australia's protected area targets, it 'must be designated a 'protected area' to be conserved forever, with effective legal means guaranteeing its perpetual conservation.'²³

These three crucial principles for adequate legal protection are not enshrined in the EPBC Act.

The fact that these principles are not embedded in legislation means that they are not consistently built into offset conditions placed on approvals by the minister. This has ramifications that continue today (discussed below in section 4, 'digging deeper - analysis and discussion').

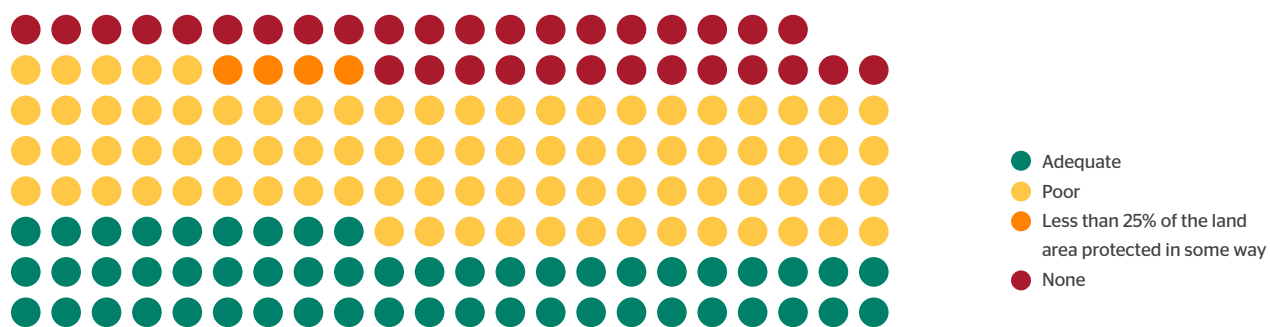
3. Findings

3.1 Overview of the protection of offset sites

Overall, 218 offset sites were required for all the projects approved under the EPBC Act between 2008 and 2012.²⁴ In every case, the offset condition was imposed to compensate for irreversible environmental impacts (as opposed to temporary or transient environmental impacts).

Of these 218 offset sites, we were able to ascertain the legal protection outcome for 174 offset sites.

Figure 1: Protection of required offset sites under the EPBC Act between 2008-2012



Note: Data relates to 174 sites in which legal protections are known.

Of these 174 cases where the outcome was ascertainable, only 53 offset sites are adequately protected (30%). See figure 1.

A further 84 offset sites have a poor level of protection (48%), meaning the protection is not permanent, could be easily revoked, or is not for a conservation purpose.

We found that 37 of the offset sites are not protected and did not even meet the criteria for 'poor protection' (21%).²⁵ For nine of these, the approval has expired so the likelihood of the offset site ever being protected is very low (see the Warro Gas Field case study in Box 1 in section 4.1.1).

Two offsets sites are not yet due to be protected – in one case because the project commenced recently; in the other because the Minister varied the condition to extend the deadline for the approval holder to protect the offset site, meaning the outcome in these two cases is yet to be determined.²⁶

Despite best efforts, we were unable to determine whether 42 offset sites are protected at all.²⁷ These unknown cases are symptomatic of how opaque information about the location and legal protection of offset sites is. Concerningly, it is state government agencies, primarily in Victoria, that are the approval holders in half of these 'unknown' cases. **Additionally, in the course of the investigation, the Department revealed it does not know where many of these offset sites are located or if they are protected.**²⁸

While the lack of information on these 42 cases suggests that many of them are not protected at all, for the sake of clarity and accuracy, we have adopted a conservative approach by excluding these cases from our analysis of legal protection outcomes. If these cases were included, then the overall picture, in terms of legal protection outcomes, would be even worse than that outlined above.

Some of the raw data collected during the investigation is available in [this spreadsheet](#).

3.2 Required offset sites by area, industry, state or territory, and sector

In terms of area, at least 147,779 hectares – almost the size of K’gari (Fraser Island) – was supposed to be legally protected. The words ‘at least’ are used because:

- Only the area required to be protected for 200 of the 218 cases is known; what area was required for the other 18 offset sites is hidden away in unpublished offset plans; and
- Two approval holders were relieved from their obligations to protect over 18,700 hectares of offset sites – see Box 2 in section 4.2.1.

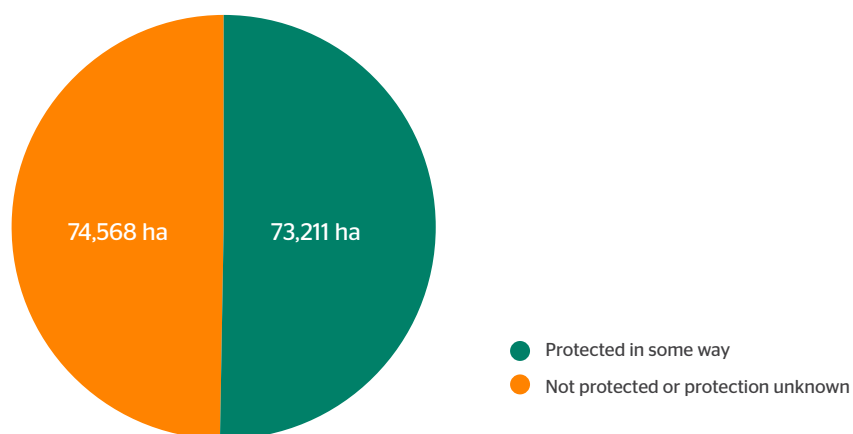
However, only about half of this area (73,211 hectares) is known to be protected in some way. Only 36,254 hectares is known to be adequately protected (see figure 2).

By **industry**, offset sites relating to roads and rail projects had the highest percentage of adequately protected offset sites (54.5%), whereas the gas industry was the lowest with only 21% adequately protected²⁹ (see figure 3).

By **state or territory**, only approval holders with projects in Tasmania adequately protected 50% or more of their offset sites. For projects in the ACT, Queensland and Western Australia, fewer than 25% of offset sites were adequately protected³⁰ (see figure 4).

In terms of the **sector of the approval holder (public/private)**, state government agencies and private entities were almost the same in adequately protecting a mere 31% and 30% of their offset sites, respectively³¹ (see figure 6).

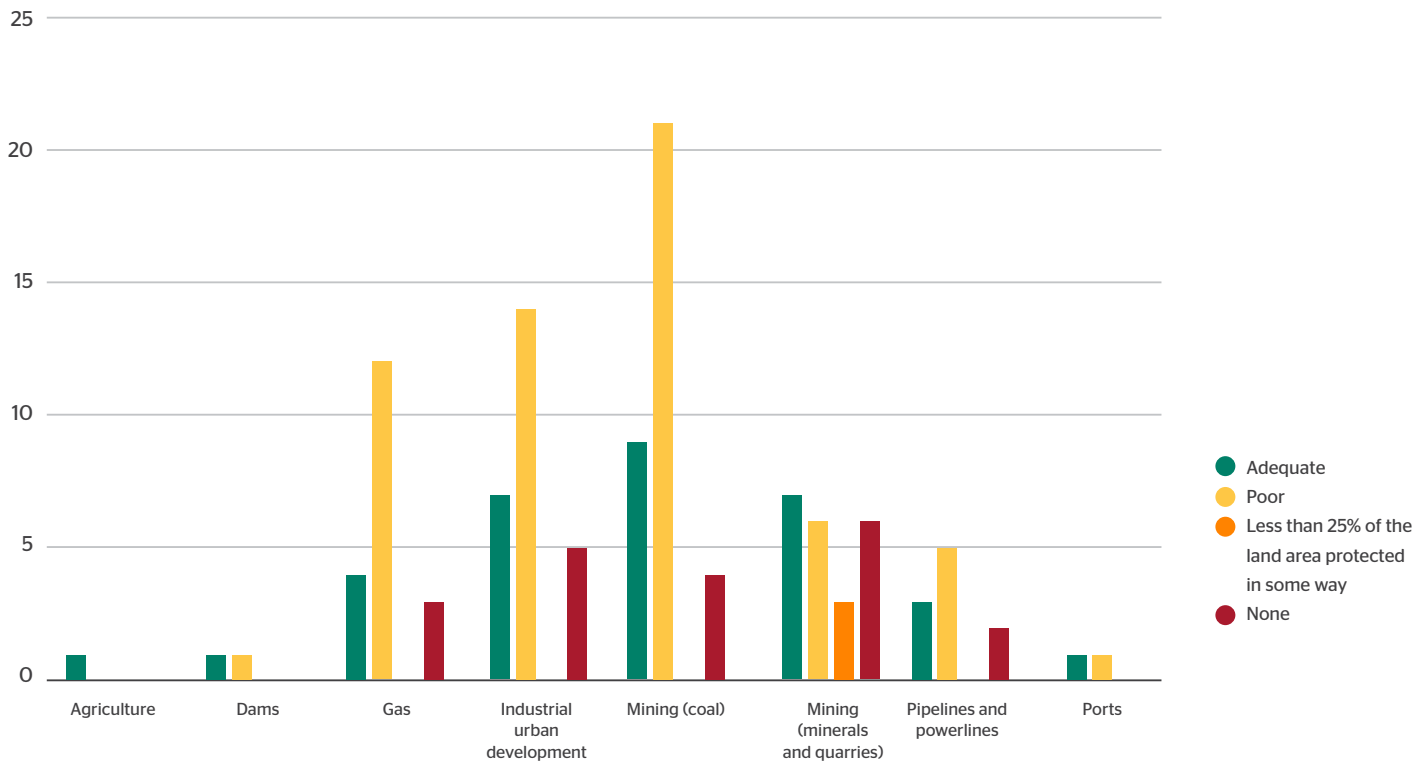
Figure 2: Total Hectares requiring legal protection through offsets in Australia



Source: Australian Conservation Foundation

Right. Offset site in South Morang, Vic.
Photo. Annica Schoo / Kim Garratt

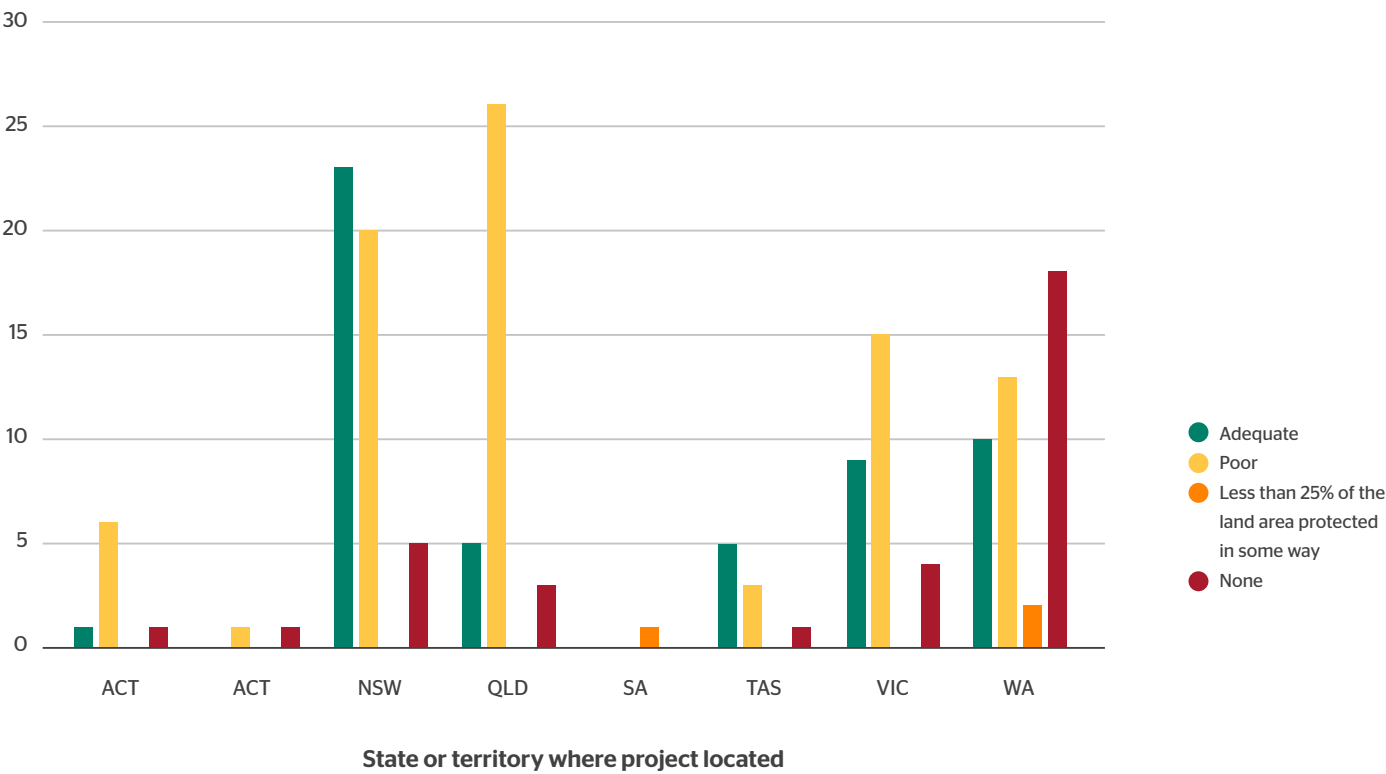
Figure 3: Nature protection through offsets by industry



Source: Australian Conservation Foundation

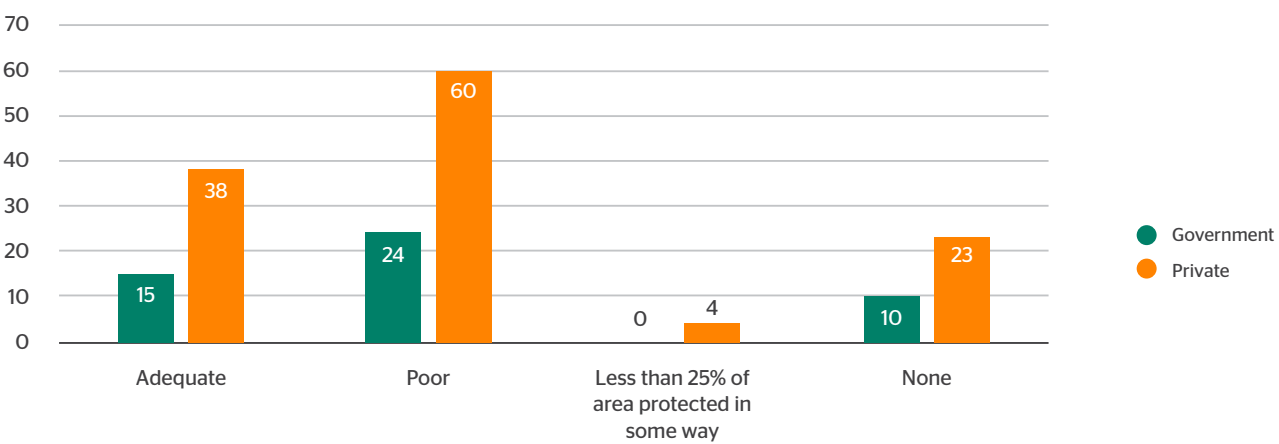


Figure 4: Nature protection through offsets by state or territory



Source: Australian Conservation Foundation

Figure 5: Nature protection through offsets by government and private sector



4. Digging deeper – analysis and discussion

The shortcomings and failures regarding the legal protection of offsets sites exacerbate the habitat destruction involved in granting the environmental approvals in the first place and provide compelling evidence that offsets under the EPBC Act have hastened environmental decline rather than compensating for it as claimed.

This section analyses in detail the reasons for those failures in relation to the critical component of offsets for permanent impacts – that is, their legal protection.

The following issues arise in the context of fundamental problems with using offsets as a response to proposals for habitat destruction. While addressing these issues are critical if offsets are to be used as a “last resort” under our national environmental laws, this is no substitute for much stronger protection of habitat in the first place. The fact that the many issues catalogued below are so deep-seated and prevalent reinforces the need for a much stronger emphasis on legal protection of environmental values.

4.1 How the government sets conditions on approvals, and the implications for legal protection outcomes

4.1.1 Approvals fail to require adequate protection

Frequently, the use of vague and weak language in the approvals analysed meant that approval holders were not in fact legally obliged to deliver the adequate protection of an offset site. For example, the approval conditions:

- Contained vague references to offset sites needing to being protected in the ‘long-term’ or on an ‘enduring basis’, which is not the same as ‘permanently’ or ‘in perpetuity’;
- Treated the acquisition of a property as synonymous with legal protection by merely directing approval holders to ‘set aside’ or ‘retain’ land, or to pay a state government agency to purchase private land on their behalf, rather than imposing any formal requirement to legally protect the offset site;
- Directed the approval holder to develop a post-approval offset plan without requiring that it be *implemented*, effectively omitting any obligation to carry out any kind of protection;
- Directed the approval holder to develop an offset plan without specifying what the plan needed to contain before it could be approved and before the project could commence;
- Provided multiple options for the approval holder to choose from, one or more of which facilitated weak protection (if any protection at all); and
- Specified or permitted the use of a mechanism that was not fit-for-purpose in protecting an offset for conservation; that was susceptible to revocation; or which otherwise offered only precarious protection (discussed in section 4.1.2 below).

Cumulatively, vague and weak offset conditions meant that in a third of all cases the approval required adequate legal protection (67 of 218, or 31%). In other words, **over two thirds of all cases were not tied to any legal obligation for the approval holder to conserve the offset site in perpetuity with a difficult-to-revoke legal mechanism.**

The Warro Gas Field in southwest Western Australia is an example of weak conditions leading to poor nature protection (refer to Box 1). Successive failures by the Department and then minister meant that the approval holder, Latent Petroleum, was not required to finalise the legal protection of the offset site. That offset site was to be situated within the very area where the seismic survey for gas exploration was to permanently damage Carnaby’s Black Cockatoo foraging and breeding habitat. Ultimately, Latent Petroleum neglected to protect the offset site and undertook the seismic survey project without consequence.

In 89% of gas industry projects, the offset condition in the approval was weak. The Department wrote the strongest conditions for road and rail projects, as approximately half (47%) of those conditions were adequate.

In 86% of WA approvals, the offset condition was weak; compared with 52% in NSW approvals.

While this may appear to be a problem of condition drafting from a previous government and officials, the Department and minister of today have variations

powers which could be used to rectify these issues immediately in approvals that remain active. As the variations discussion at section 4.2.1 below will show, the Department is actively using its variation power for older approvals; however, never in favour of the environment or stronger protection.

Box 1: Case study of Warro Gas Field in southwest Western Australia

In December 2010, a seismic survey for gas exploration was approved next to and *within* the Watheroo National Park in southwest Western Australia (EPBC 2010/5454).

A poorly-written condition

The wording of the draft recommendation report, if adopted, would have required Latent Petroleum to secure the offset site's protection in perpetuity with a covenant.³²

A change to condition 8 in the final approval, however, meant Latent Petroleum was only required to 'submit an application' for a conservation covenant within a year to an unspecified state agency. It is unclear whether the application was in fact submitted and, if so, what came of it, as no such covenant is registered on the Certificate of Title.

An offset site within the project area

The approval specified that the 187-hectare proposed offset site was to be situated within a parcel known as Lot 10323. Unusually and concerning, the offset site fell *within the project area itself* where irreversible impacts to the Carnaby's Black Cockatoo foraging and breeding habitat were to occur. In other words, the prospects of actually protecting the offset site were low.

Right. Carnaby's Black Cockatoo foraging and breeding habitat next to and within the Watheroo National Park is vulnerable to destruction due to weak offset protection.

Photo. chameleonseye

No offset protection, and no repercussions

More than 13 years on, the Certificate of Title for Lot 10323 still does not refer to a conservation covenant for the offset site,³³ meaning successors in title are not bound to conserve it, if the land is sold. There is no other public record of the proposed offset site being protected in the way the approval required. And, to make matters worse, the approval expired in April 2012 - a bizarrely short 18 months after it was granted.

Recently, the company has drilled five gas wells on Lot 10323, including one approximately 650 metres from where the offset site should be. Latent Petroleum is investigating the commercial viability of developing these gas wells in Lot 10323 for full scale production immediately next to and under the Watheroo National Park.³⁴



4.1.2 Shortcomings with legal protection mechanisms

The *type of mechanism* that approval conditions specified or permitted contributed significantly to weak requirements that put protection outcomes at risk. This was despite the fact that in almost every jurisdiction³⁵ there was at least one mechanism capable of offering adequate protection (see [Appendix A](#) for details). This section elaborates on the problems associated with various types of mechanisms.

Firstly, conditions often explicitly or implicitly allowed the use of mechanisms where conservation was not a primary purpose of the statute where the mechanism was found. For example:

- Mining, planning and conveyancing laws are overseen or administered by ministers and agencies whose functions potentially conflict with conservation, meaning the offset sites that are reliant on the mechanisms in those laws may be vulnerable to future land-use changes in favour of development, mining, or other forms of destruction.
- For offsets on publicly-owned land, approvals often required no more than the vague (and in some cases temporary) ‘vesting’ of land in public authorities or the making of a non-binding ‘reservation’ under crown land administration laws.³⁶ This leaves considerable discretion as to the strength and duration of the protection afforded to such offset sites.

Secondly, in many cases, the devil was in the detail with the security and permanence of mechanisms, even if the relevant legislation had an overall conservation purpose. For example:

- **Voluntary declarations in Queensland:** 21 cases in Queensland utilised a mechanism under the *Vegetation Management Act 1999* (Qld) known as a ‘voluntary declaration’, or ‘VDec’, as the method for protecting the offset site. The statute has a conservation purpose, and VDecs appear to protect the relevant land well for the period they are in effect. However, the statute allows for clearing in these areas without approval, such as for designated transport infrastructure. Also, the statute generally facilitates an early end to VDecs, making them ill-suited to situations where an offset

requirement has been imposed to compensate for permanent and irreversible environmental damage (see [Appendix A](#) for details). Once the VDec is discharged, the land with the offset site is generally assigned to a different vegetation category, at which point it is susceptible to exemptions for clearing done in connection with development for fossil fuel industries, infrastructure, and other purposes.³⁷

- **Biodiversity credits in New South Wales:** Four cases in New South Wales involved the use of mechanisms called ‘BioBanking Agreements’ (now defunct) and ‘Biodiversity Stewardship Agreements’ under statutes that had or have a conservation purpose but did not explicitly require the retirement of credits. Under this legislation, agreements are registered on title and the environmental qualities of the land can generate credits that can later be sold. However, it is the ‘retirement’ of these credits *prior to a project commencing* that is the crucial step when offsets are concerned. The credits must be removed from the market before the project’s environmental impacts occur to reflect that the environmental qualities that initially generated the credits will be lost to development. An approval for BHP, though, did not contain conditions requiring the retirement of credits.³⁸ While credits remain in the market, it is possible that an approval holder can on-sell them for profit or use them as a basis for satisfying a separate offset obligation without having ever truly offset the original impact for which the agreement was intended.

Thirdly, there were many mechanisms where adequate protection was contingent upon certain measures being included in the particular instrument that established the legal protection. For example, a mechanism could be in perpetuity or temporary depending on the terms of the agreement. Such mechanisms are detailed in [Appendix A](#). While it was imperative that approvals required those measures be taken (for the intention behind the condition to be realised), offset conditions rarely specified that.

Fourthly, while most instruments that establish the legal protection of an offset site can be changed, some statutes provide that high level executive or parliamentary approval is needed for such change (meaning those mechanisms offer higher security). By contrast, other statutes allow changes to occur at the bureaucratic level or by a statutory authority without a conservation focus (meaning those mechanisms offer low security).

Unfortunately, approvals being issued today have similar problems to those outlined above. Even where an approval creates a clear and specific legal obligation to protect an offset site, the mechanism that is allowed can render that obligation largely meaningless. For example, EPBC 2022/09383 is an industrial precinct development project that was approved with conditions in December 2023. The approval offers a robust definition of legal security until it suggests VDecs as a possible mechanism for the offset site's protection.

This contemplation of a VDec is concerning given the Department stated recently it has a position on which mechanisms are generally unacceptable, yet it refuses to disclose that position and decides on a case-by-case basis which mechanism is appropriate.³⁹ Additionally, the approval of the industrial precinct development only requires the offset site to be protected until the expiry of the approval in the year 2050, even though the project's environmental impacts will be permanent. This is a recurring theme in contemporary approvals.

It is also important to note that the Department's current audit of 1,000 offset sites⁴⁰ will be assessing approval holders' compliance with offset conditions as they were written. It will not consider the problems baked into the approvals themselves.

4.1.3 Lack of transparency and no or inadequate reporting requirements

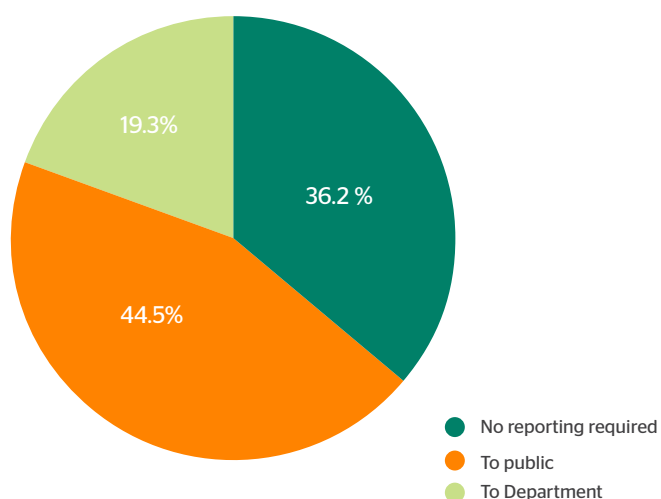
Approval conditions can require approval holders to report on how they are tracking in protecting their offset site. This is an important transparency and accountability measure.

However, less than half of all cases had conditions that required approval holders to report publicly on the status of the protection of the offset site (97 of 218 or 44.5%). In another 42 cases (19.3%), approval holders were required to report only to the Department. In 79 cases (36.2%), the approval imposed no reporting requirement whatsoever.

Astoundingly, there was no reporting requirement in more than half of the cases where the approval holder was a government entity (37 of 70).

By industry, gas project conditions were the most transparent in requiring public reporting in 89.5% of cases. Road and rail projects, on the other hand, were required to report publicly in only 18.4% of cases.

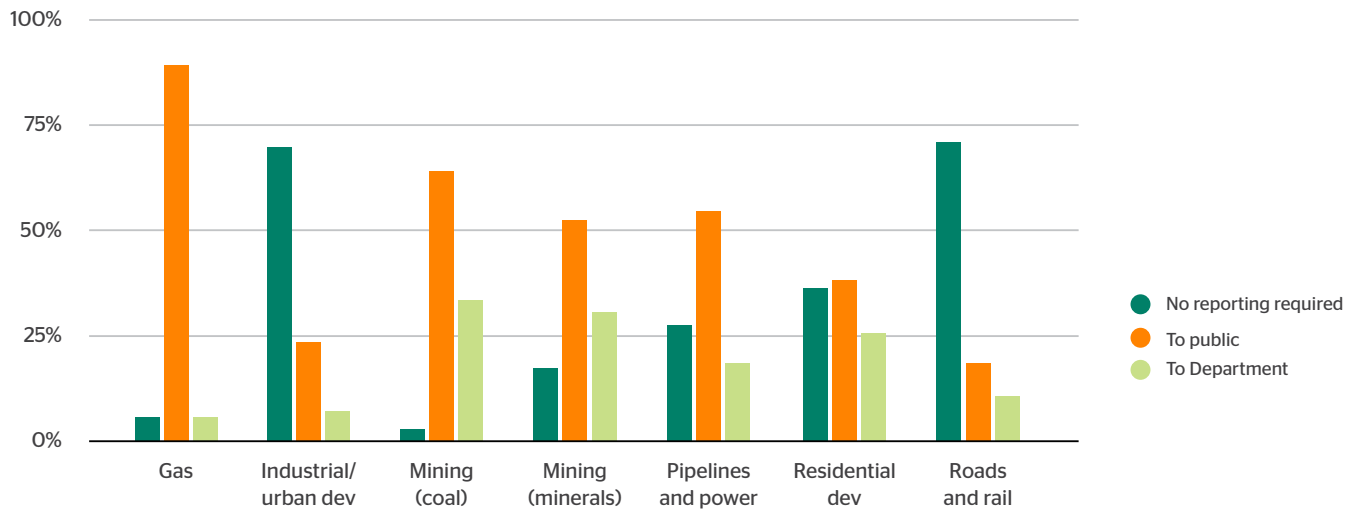
Figure 6: Reporting on protection of offset sites



Source: Australian Conservation Foundation

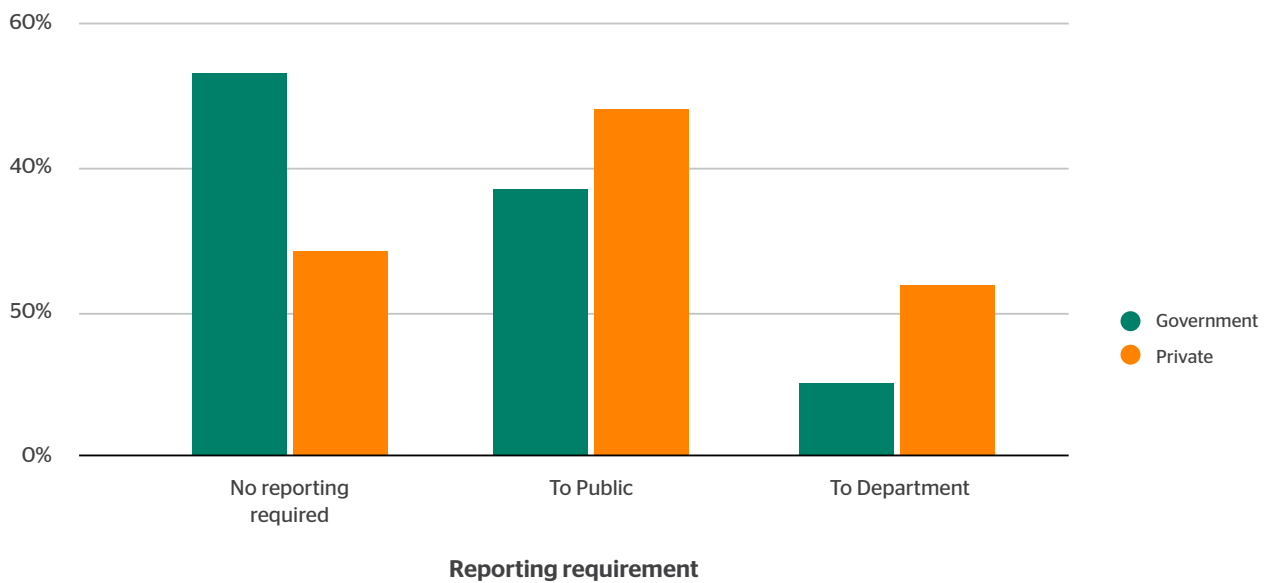
This practice has substantially improved in contemporary condition writing. Recent approvals consistently contain clear obligations to publish plans and compliance reports on websites within a defined timeframe.

Figure 7: Required reporting on offset sites by industry



Source: Australian Conservation Foundation

Figure 8: Reporting requirement of offset sites by government and private sector



Source: Australian Conservation Foundation

4.1.4 Outcomes of weak approval conditions

There was a clear correlation between the strength of offset conditions (including the type of mechanism that the approval specified or permitted) and the outcome that those conditions produced in each case.

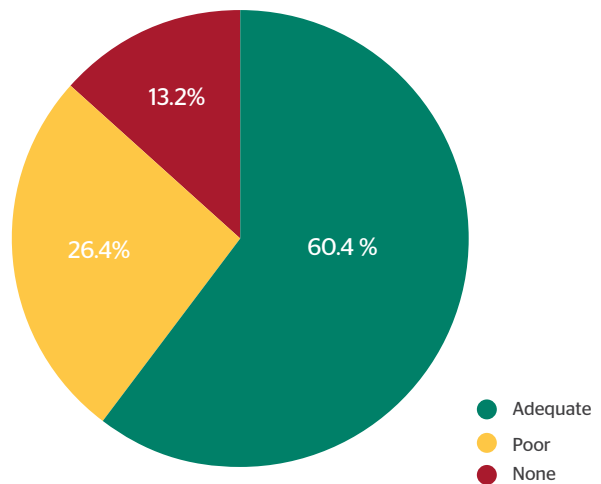
The form of the requirement did play some role: cases where the approval directed the approval holder to develop a post-approval offset plan resulted in worse rates of adequately protected offset sites (21%),⁴¹ compared to where the approval conditions alone contained all of the offset protection requirements (34%).⁴²

However, what mattered more than the form of the requirement was whether it was strong in *substance*: did the approval require the approval holder to establish legal protection with a mechanism that is difficult to revoke and which ensures the offset site will be conserved on a permanent basis? This was the most significant determinant of whether an offset site would be properly protected. To illustrate:

- 60% of the time, where an offset was set up for success at the outset with a strong protection requirement, the offset was subsequently adequately protected (32 of 53 cases).⁴³
- By comparison, where the initial protection requirement was weak, only 17.5% of cases resulted in an adequate protection outcome (21 of 121 cases).⁴⁴

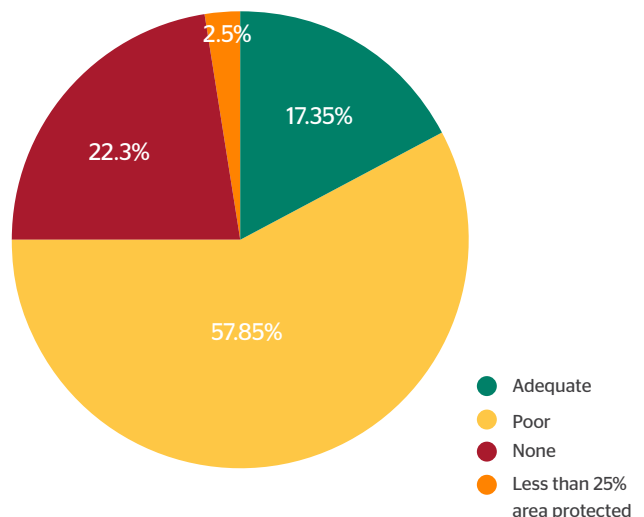
This finding indicates that setting a robust condition involves no additional resources for the minister and the Department, but significantly improves the chance of an adequate protection outcome.

Figure 9:
Protection outcomes for strong requirements



Source: Australian Conservation Foundation

Figure 10:
Protection outcomes for weak requirements



Source: Australian Conservation Foundation

Gas projects also had one of the lowest proportions of offsets with no protection at all at 15.8%, beaten only by coal at 11.8%. While at first glance it might appear that these industries are relatively good performers, a more comprehensive analysis tells another story, with deviations suggestive of different relationships between these industries and regulators. For example, the gas industry had the highest proportion of weak conditions (89%) as well as the lowest number of adequately protected offsets (21%) and highest number of poorly protected offsets (63%).

Road and rail projects, which had the highest proportion of strong conditions (47.4%), had the highest proportion of adequately protected offsets (54.6%).

Notably, cases with reporting requirements consistently resulted in far fewer ‘unknowns’ in terms of the protection that was delivered:

- Where approval holders were made to publish their reports publicly, only 8% of cases resulted in an ‘unknown’ protection outcome.
- By contrast, where there was no reporting requirement, 35% of those cases became ‘unknowns’ in terms of what, if any, protection was delivered.⁴⁵

4.2 Post-approvals and monitoring stage – compliance and enforcement issues

4.2.1 Variations to approval undermine legal protections promised

In 33% of cases, the Department approved variations to offset conditions to allow for delays in legal protection. There were also many instances where post-approval variations saw offset protection requirements weakened to make compliance less onerous for approval holders beyond delays. For example:

- In southeastern Tasmania, a requirement to place a covenant on a conservation reserve for the endangered Basalt Peppercreese was changed to a requirement to monitor the population at the site. This variation came after the existing population of 74 plants crashed to less than 10.⁴⁶ The approval originally required the Tasmanian Government to bolster the population with 1,000 seedlings to compensate for the loss of 48 plants through the demolition of a bridge.⁴⁷ The outcome of the approval has been no legal protection and the loss of two populations of the endangered plant.
- And, in what may have been the result of successful lobbying efforts, Fortescue Metals Group and Roy Hill had conditions requiring them to protect offset sites revoked and replaced with threat abatement conditions. See Box 2 for more details.



Box 2: Case study of iron ore approvals in the Pilbara, WA

Fortescue Metals Group Pty Ltd (FMG) received three approvals to mine iron ore and develop associated infrastructure in the Pilbara between April and August 2011. Roy Hill received approval to develop a railway to support iron ore mining in the Pilbara in January 2010.

The approvals contained conditions requiring the companies to protect a total of over 18,700 hectares of land. Variations to their approvals, however, saw those conditions weakened to instead become threat abatement requirements and the option to pay into an approved fund.⁴⁸ ACF obtained documents under freedom of information law in relation to one of the FMG approvals (EPBC 2010/5567) to gain an insight into what happened.

Lobbying the department

The mining project commenced in June 2011 and impacted the Northern Quoll, Pilbara Leaf-nosed Bat and Mulgara. Throughout 2012, FMG wrote to the federal environment department and met with department officials in a bid to have the approval varied. FMG proposed offsetting into Karijini National Park, which the department found was inappropriate and unlikely to deliver an outcome.

FMG advised the officials that; 'It is not possible to guarantee that land will not be subject to mining activities in the future.'⁴⁹ FMG then sought to remove the condition requiring the protection of land altogether and continue only with a requirement for landscape scale management. An official advised that the landscape scale management was insufficient to warrant the revocation of the conditions in the approval.⁵⁰

Shortly after that, the matter was transferred to a 'Pilbara Task Force'. Within two months, FMG was granted the variations it was seeking in the approval in question and in a number of other approvals throughout the Pilbara. The decision brief cited that the variations were recommended because it would be 'difficult' to secure land due to mining tenements in the Pilbara.⁵¹

The Pilbara bioregion is 91.8% covered by mining tenements—this decision set a precedent that any development in the Pilbara could be relieved of an obligation to secure an offset, meaning any conservation gains from management activities would be extremely vulnerable to the rising tide of iron ore mining in the region.⁵²

The Pilbara Environmental Offset Fund

After this, a number of Pilbara projects, including Roy Hill's, were relieved of their obligations to legally protect land to offset their impacts. The Pilbara Environmental Offsets Fund (PEOF) was created by the WA Government which allowed a cash payment into a fund for strategic conservation projects.

The federal environment department endorsed this approach as a valid offsetting tool under national environmental law in 2020 and it has become the standard offset requirement in the Pilbara, including through variations to approvals such as FMG and Roy Hill's.

The WA Government was due to supply a plan for legally protecting land through the PEOF in 2021. However, it has still not finalised the plan; a delay which the federal department said was a 'matter for the Western Australian Government' in senate scrutiny processes recently.⁵³

Without a plan to legally secure land in the PEOF, the WA Government has achieved what FMG sought to achieve in 2012, only at a bioregional scale: **conservation efforts with the constant threat of mining defeating the entire endeavour.**

12 years on, and no outcome

While FMG has contributed funding to research and undertaken some management activity, more than 12 years since it was granted its environmental approvals it is yet to protect anything or pay a cent into the PEOF (according to the most recent compliance report for the projects). It 'maintains an intention' to do so.⁵⁴

When the Department was asked in November 2022 whether any contribution had been made to the PEOF in relation to any of the known approvals with such a requirement, it stated that there was no evidence of such payments, despite many of the projects having commenced more than a decade ago.⁵⁵

Below. Iron Ore mining in the Pilbara by Fortescue Metals was found to impact the Northern Quoll. Despite this, the company fought to change their legal responsibilities under the EPBC Act.

Photo. John Carnemolla / Shutterstock



4.2.2 Delays and deferred commencements dates

This investigation deliberately selected projects approved more than a decade ago in order to avoid projects in which an offset was not yet protected. Nevertheless, there were cases in the sample in which close to 15 years have elapsed and no protection has been delivered.

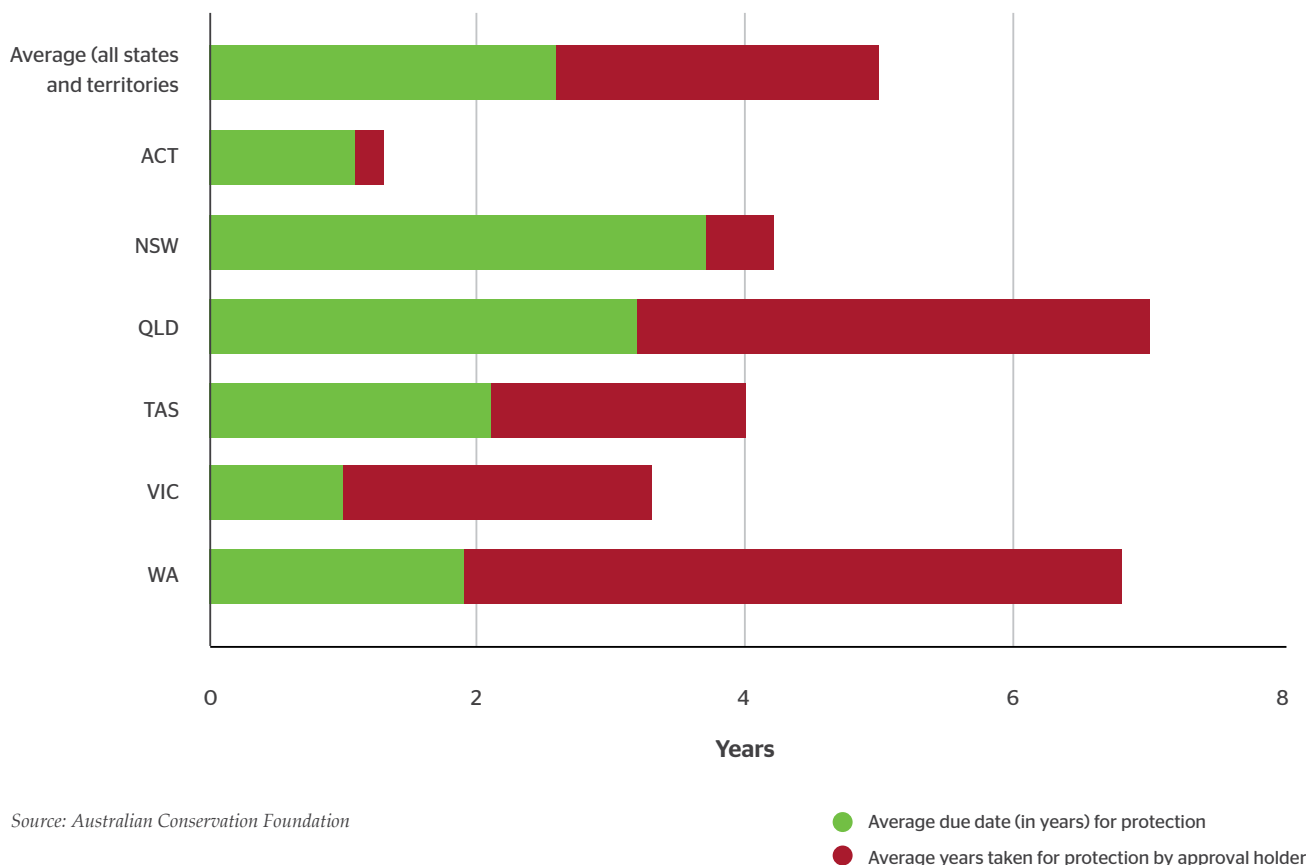
The Department and approval holders have both played a role in the extreme delays observed. While approvals (including subsequent variations) allowed on average about two and a half years for an offset site to be protected, approval holders took on average about five years to deliver some form of legal protection.

There were five examples in which the Department varied approvals to allow more than a decade of delays—all five were fossil fuel projects, including the case study provided below in Box 3.

By state or territory, the worst overall delays were in Queensland and Western Australia, both with more than six years on average until some level of protection was achieved (if at all). See figure 11.

New South Wales and Queensland enjoyed the most approved delays by the Department, both on average obtaining due dates of more than three years.

Figure 11: Delays by state and territory where projects located: including offset sites still not protected



Interestingly, coal mining and gas were the industries that enjoyed the most approved delays from the Department, at over five years and over four and a half years, respectively. For the mining of minerals and for quarries, approved delays were substantially less at two and a half years, despite having similar impacts on nature as coal mining. See figure 12.

There were examples in every jurisdiction of adequate protections being delivered within two years, including for larger offsets and coal and gas projects.⁵⁶ Approval holders are capable of achieving adequate protections on time.

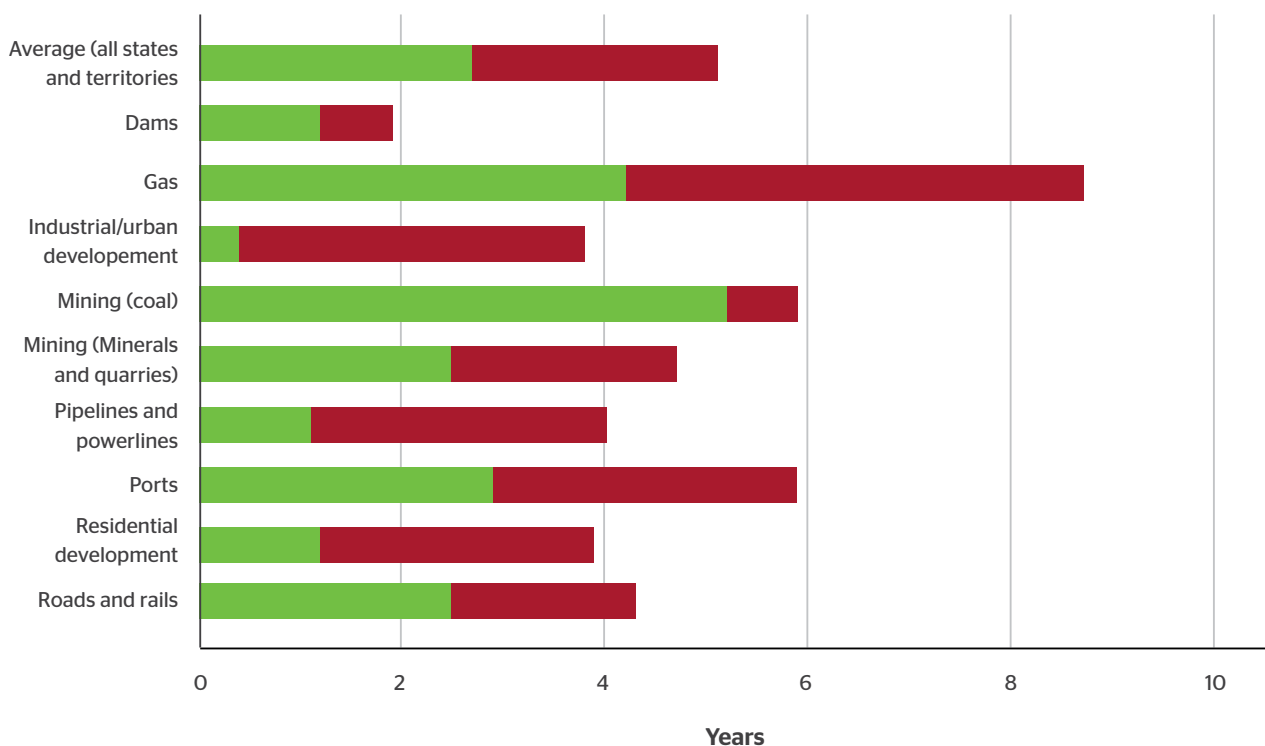
Coal mining (along with dams) had the least delays beyond those approved by the Department, which suggests the industry has a strategy of engaging with the regulator to shore up delays rather than falling into non-compliance. Two thirds of coal mining projects in the investigation had received variations to their approval from the Department to allow for delays.

Based on the public record, no enforcement action has been taken in relation to any of the projects in the investigation on the basis of delays for legal protection.⁵⁷

The Department has only ever issued one infringement notice on the basis of delayed offset protection, to ACF's knowledge.⁵⁸ In late 2020, the Department issued an infringement notice to Crudine Wind Farm for failing to secure its offset on time.⁵⁹ The company was a little over a year overdue in legally protecting the offset. The Department then varied the approval to allow the company another two years to achieve legal protection. Protection was ultimately achieved four years after commencement (which is a better-than-average result in NSW according to the data in this investigation).

There has never been a prosecution for a breach of approval conditions under the EPBC Act.

Figure 12: Delays by industry: including sites still not protected



Note: This excludes all offset sites where the time until protection was due and/or achieved is unknown

Source: Australian Conservation Foundation

● Average due date (in years) for protection
● Average years taken for protection by approval holder

Box 3: Case study of Ulan coal mine in NSW's central west region

In November 2010, the federal government approved a proposal by Ulan Coal Mines Limited (Glencore) to expand its thermal coal mining operations at Ulan, NSW. The project formally commenced on 14 February, 2011,⁶⁰ and involved the clearing of 69 hectares of White-box Yellow-box Blakely's red gum woodland (Box gum woodland) as well as Swift parrot, Regent Honeyeater and Large-eared pied bat habitat.

The approval required a number of offsets that were originally due to be protected in November 2012. In the 13 years since the original decision, the approval has been varied nine times to allow for delays in legally protecting the offset sites.

Lobbying for weaker protections at the state level

For seven years, between 2011 and 2018, Glencore sought variations from the federal environment department to delay legal protection of the offsets. The reason cited was that it was negotiating with the NSW Government on the appropriate mechanism. Glencore was seeking a conservation agreement (a weaker mechanism) and the NSW Government preferred a BioBanking agreement (a strong mechanism).⁶¹ Glencore was accompanied by legal counsel and by the NSW Minerals Council in some of the negotiations.⁶²

By the time Glencore's preference for weaker protections was acquiesced to, the NSW Government had revised its offsets and environmental policies multiple times and BioBanking Agreements were no longer an available mechanism (replaced by Biodiversity Stewardship Agreements and credits).

Once the preferred mechanism was decided between the NSW Government and Glencore, a number of tenure issues arose that caused additional delays which could have been foreseen.

The role of the federal environment department

In response to variation requests in both 2015 and 2016, the federal environment department appeared to be growing tired of the delays, stating that "another timeframe extension request is not likely to be viewed favourably by the Department".⁶³ However, in more than 13 years, Glencore has not protected all of the relevant offset sites.⁶⁴

One offset is protected by a NSW conservation agreement (corresponding with the one condition which was written clearly with a strong requirement), three through a reservation of Crown Land (a poor mechanism) and one is still not protected.

Glencore, by pushing the NSW Government for many years, ultimately achieved even weaker protections than those it sought. The federal environment department facilitated this protracted negotiation through nine approved delays to offset deadlines, and through poorly written conditions that did not specify that a strong mechanism was required. Had stronger conditions existed in the first place and the department held its ground on the deadlines, perhaps the NSW Government would have succeeded in negotiating for strong protections.



Above. Approval for Glencore's Ulan coal mining operations have been varied nine times in 13 years to allow for delays in legally protecting the offset sites, which are critical habitat for the Regent Honeyeater

Photo. 4FR/ iStock

4.2.3 Inaction on compliance issues

Despite the fact that only 30% of cases demonstrated adequate protection, the role of the Department in writing weak conditions and freely varying approvals resulted in a finding of fewer potential non-compliances than might otherwise have been the case. The majority of bad outcomes were a result of the Department setting itself up to fail, either through weak conditions or varying conditions to allow for outcomes that were not intended when the approval was originally made.

This investigation identified 19 instances where it appears the approval holder has not complied with the offset conditions in their approval in relation to legal protection (including any subsequent variations) – meaning potential non-compliance was found in over 10% of cases. In a few cases, the approval expired or the Department appeared to be inquiring into the potential non-compliance.

ACF has referred the relevant suspected matters of non-compliance to the Department for further investigation. At a high level, these matters were cases where no legal protection was found, the due date had passed, and the condition was clear in creating an obligation to legally protect a specified offset site by a particular date.

As discussed above, there was no infringement notice or other enforcement action on the Department's register relating to any project in the investigation for a failure to protect an offset.

4.2.4 Failures of monitoring and enforcement

This investigation has demonstrated how difficult it is to both locate offset sites, verify whether and how they have been legally protected, and assess that against what the approval required (not to mention what the approval should have required).

Approval holders' compliance should be readily ascertainable, especially for the Department who is tasked with monitoring and enforcing the approval conditions that the minister imposes.

However, the Westmeadows Truganina case, discussed in Box 4 below, indicates that the Department is not across these matters.

Right. Location where the Department incorrectly advised an offset site exists, Truganina, Vic

Photo. Tom Kinsman



Box 4: Case study of Westmeadows development in Truganina, Victoria

In July 2012, Intrapac (through a subsidiary company West M Developments Pty Ltd) was granted approval to construct a residential development at Westmeadows Lane in Truganina, Victoria.

The approval required at least 12.15 hectares of land providing habitat to the Golden Sun Moth to be protected and managed in perpetuity. The company was required to obtain the federal environment department's approval of the proposed offset and evidence of financial transactions used to secure the site were to be provided. The state environment department was named as responsible for management of the offset.

In May 2022, ACF wrote to the Victorian Department of Environment, Land, Water and Planning (DELWP) asking whether it manages the offset for this approval and, if so, whether further details could be provided. DELWP responded that it was not responsible for the management of the offset.

In November 2022, Senator Sarah Hanson-Young asked the Department of Climate Change, Energy, Environment and Water (the Department) about a number of EPBC approvals in a question on notice. In its answer, the Department stated that the relevant offset for this approval was a lot that was later established to no longer exist.⁶⁵ ACF pursued this line of inquiry with the local council and discovered that the lot had been subdivided and was now an aged care facility.

In November 2023, Senator Sarah Hanson-Young asked the Department about the approval again. This time it responded that the lot number provided in November 2022 was not protected as part of the approval. The company was allowed to offset into the Western Grasslands Reserve,⁶⁶ which is an offset required to be delivered by the Victorian Government for the Melbourne Strategic Assessment. The Melbourne Strategic Assessment is a large environmental approval covering the urban expansion of Melbourne, but explicitly did not cover this development in its boundaries.

The company was allowed to make a cash payment to the Victorian Government which was substantially cheaper than securing an offset itself. Documents obtained under freedom of information law show that this occurred after significant lobbying from the company and its legal counsel.⁶⁷ The approval holder, West M Developments Pty Ltd, was deregistered as a company in July 2017.

The Victorian Government has only acquired 20% of the Western Grassland Reserve, despite its 2020 deadline for establishing the reserve.⁶⁸ This was the subject of a damning audit by the Victorian Auditor General in 2020.⁶⁹ The Victorian Government has not acquitted its own environmental obligations, let alone Intrapac's obligations. Not only is it a bad environmental outcome in this case study, but it took ACF and others (including Commonwealth Senators) approximately two years to extract an accurate answer from the Victorian and Commonwealth governments.

5. Conclusions and recommendations

Adequate legal protection is a critical safeguard – it is fundamental to whether an offset site will deliver conservation benefits that are real, additional, and which endure for as long as the environmental impacts from a project will last.

The detailed analysis above contains many important findings relevant to better administration of the current system. We assume that many similar conclusions will be derived from the federal government's promised offsets audit and hopefully more, given the government's investigatory powers and access to information.

These concluding recommendations address the Albanese government's commitment to a new approach to environmental protection, including an overhaul of national nature protection laws and the development of a new package of 'nature positive' legislation.

Nature positive means nature loss is halted and reversed by 2030 when assessed against a 2020 baseline.⁷⁰ As the analysis above demonstrates, the current system is anything but nature positive, with offsets hastening nature destruction by facilitating the grant of approvals for environmental harm and then exacerbating the loss by allowing offsetting of impacts with no or, at best, inadequate legal protection.

The 'Set and Forget' approach to offsets we have exposed in this report is symptomatic of a broader approach to nature protection regulation which involves little more than managing the ongoing decline of biodiversity. As Environment Minister Tanya Plibersek has recognised, we need a "conceptual shift" in our approach to nature protection laws. Here are seven key things that this report demonstrates is required:

1. Offsets are not a substitute for clear, up front protections for threatened species habitat and other environmental values. Offsets hold out the promise that we can allow habitat destruction to proceed and compensate for the damage with an offset. The failures exposed by this report when it comes to something as fundamental as adequate

legal protection of offsets sites reinforce the need to move the emphasis from offsetting to clear, up front protection of nature.

2. We need a strong, independent, capable and well resourced Environment Protection Authority. The 'Set and Forget' title for this report sums up a regulatory approach that must be addressed as part of the promised reforms. As is clear from this report, this regulatory approach reflects a lack of legislative authority, a lack of capacity and a lack of resources. The federal government has committed to creating a new, independent regulator - Environment Protection Australia - and it will be critically important that this new EPA has the legal tools, independence and funding to perform its task. Monitoring, auditing and taking compliance and enforcement action in relation to offset obligations should be a high priority for the new EPA.
3. Any use of offsets must be strictly confined. Offsets must genuinely be a last resort, and there needs to be a high degree of assurance that legally protected offsets will be delivered prior to approval and before any impact is permitted to proceed.
4. Proponents must be accountable for delivering the offsets they have committed to by accepting approval conditions:
 - Proponents should be subject to a clear legal obligation to deliver adequate legal protection for offset sites. Wherever a project is approved with offset conditions, that approval must explicitly require the approval holder to establish the legal protection of an offset site with a mechanism that is difficult to revoke and that ensures the offset site will be conserved on a permanent basis, beyond the expiration of the approval. Only then can the legal protection go some way to compensating for the biodiversity permanently lost from the project.
 - The regulator (the minister and the department under the EPBC Act, or the EPA under proposed new national nature protection laws) should rule out varying conditions in a way that weakens the protection required or removes the requirement for an offset site.

- The current offsets register must be expanded to include full details of all offset approval conditions, and include information on offset sites and the legal mechanism used to protect the site.

5. Offsets for destruction of habitat compensate for significant, irreversible impacts on Matters of National Environmental Significance, so it is critical that the combination of approval conditions and state and territory mechanisms used adequately protect the offset site. The proposed definition of “securely protected” included in draft National Environmental Standards for Restoration Actions must be limited to mechanisms that cannot be varied, revoked or withdrawn. These mechanisms should be identified and designated ahead of time; for example, in regulations or legally enforceable standards. This is especially important where the approval granted under national environmental laws expires - without a guarantee of protection in perpetuity there is inadequate assurance that the offset will be permanent.
6. So long as state and territory mechanisms are the preferred option for legal protection, the federal government must limit approval holders to using only those mechanisms that offer adequate protection.⁷¹ To do this in a way that allows flexibility for changes to state and territory laws, but that also removes discretion and ensures consistency and clarity, a list of such mechanisms that provide adequate protection should be set out in delegated legislation. Where adequate protection is contingent upon certain measures being included in the particular instrument that establishes the legal protection, the regulations should specify that those measures must be taken where such a mechanism is used.⁷²

Primary legislation should:

- Set parameters that prevent the inclusion of weak mechanisms in the regulations; and
 - Prevent the use of any mechanisms that are not set out in the regulations.
7. The legacy of past failures exposed by this report should not be ignored or dismissed - if the federal government is serious about their commitments to ‘nature positive’ then it needs to respond to the instances of non-compliance identified, complete its audit of offsets and take enforcement action. The government should also commit to using the powers it has available to it under the EPBC Act to vary conditions on approvals if this is required to ensure that the original commitment to delivery of an offset is met.

Footnotes

- ¹ See, for example, Department of Sustainability, Environment, Water, Population and Communities, (2012) *EPBC Act environmental offsets policy* (p 6), at: https://www.dcccew.gov.au/sites/default/files/documents/offsets-policy_2.pdf
- ² See [Appendix B](#) for a discussion of the relevance of management.
- ³ Underpinning Australia's current national offsets policy is the principle that offsets should deliver conservation benefits that are real, additional, and which endure for as long as the environmental impacts will last. See Department of Sustainability, Environment, Water, Population and Communities (2012) *EPBC Act environmental offsets policy* (p. 6), at: https://www.dcccew.gov.au/sites/default/files/documents/offsets-policy_2.pdf
- ⁴ J May, et al (2016) *Are offsets effective? An evaluation of recent environmental offsets in Western Australia*, Biological Conservation (p. 8), at <http://dx.doi.org/10.1016/j.biocon.2016.11.038>
- ⁵ Condition 4 in EPBC 2011/6192, at <http://epbcnotices.environment.gov.au/publicnoticesreferrals/>
- ⁶ See [Appendix A](#), which includes details on two Commonwealth mechanisms that were relevant to the investigation.
- ⁷ For an overview of the concerns about the use of biodiversity offsetting, see M Maron, et al (2016) *Taming a Wicked Problem: Resolving Controversies in Biodiversity Offsetting*, at <https://academic.oup.com/bioscience/article/66/6/489/2754298>
- ⁸ Australian Conservation Foundation (22 March, 2022) *Aggravating Extinction Investigation: How the Australian government approves the destruction of threatened species habitat*, at <https://www.acf.org.au/investigation-reveals-extent-of-habitat-destruction>
- ⁹ A Morton for The Guardian (22 March, 2022) *Australian government 'aggravating extinction' through land-clearing approvals, analysis finds*, at <https://www.theguardian.com/environment/2022/mar/22/australian-government-aggravating-extinction-through-land-clearing-approvals-analysis-finds>
- ¹⁰ The Hon. T Plibersek, Minister for the Environment and Water (29 June, 2023) *Government launches environmental offsets crackdown*, at <https://minister.dcccew.gov.au/plibersek/media-releases/government-launches-environmental-offsets-crackdown>
- ¹¹ Department of Climate Change, Energy, the Environment and Water, EPBC Offsets Register, at <https://epbcpublicportal.awe.gov.au/offsets-register/>
- ¹² For example, condition 2 in EPBC 2008/4676 required the approval holder to 'ensure that 2ha of Carnaby's Black Cockatoo foraging habitat is retained...' across the development site and condition 3 required that the retained areas are 'ceded to the Crown to be vested as part of reserves with a formal purpose for conservation in perpetuity'. These conditions were excluded from the investigation.
- ¹³ Department of Climate Change, Energy, the Environment and Water, EPBC Offsets Register, at <https://epbcpublicportal.awe.gov.au/offsets-register/>
- ¹⁴ The raw data is also available in [this spreadsheet](#).
- ¹⁵ This term is relative. Some mechanisms that are difficult to revoke (for example, because they require high level executive or parliamentary approval in order to be changed) still allow mining. For this reason, 'security' is based on the mechanism being difficult as opposed to impossible to revoke. See details in [Appendix A](#).
- ¹⁶ Either because the statute where the mechanism is found has a conservation purpose, the wording used in the instrument specifies a conservation purpose, or the agency overseeing and administering the mechanism/instrument's implementation has a conservation focus and purpose.
- ¹⁷ Department of the Environment and Water Resources (August, 2007) *Draft Policy Statement: Use of environmental offsets under the Environment Protection and Biodiversity Conservation Act 1999* (p. 6), at <https://webarchive.nla.gov.au/awa/20140311193843/http://www.environment.gov.au/archive/epbc/publications/draft-environmental-offsets-2007.html>
- ¹⁸ Department of Sustainability, Environment, Water, Population and Communities (2012) *EPBC Act environmental offsets policy* (p. 18, see also Box 3 on p. 19), at: https://www.dcccew.gov.au/sites/default/files/documents/offsets-policy_2.pdf
- ¹⁹ As of 2 October 2012. Department of Sustainability, Environment, Water, Population and Communities (2012) *EPBC Act environmental offsets policy* (p. 4), at https://www.dcccew.gov.au/sites/default/files/documents/offsets-policy_2.pdf
- ²⁰ The Tax Act defines conservation covenant as something that 'restricts or prohibits certain activities on the land that could degrade the environmental value of the land'; that is 'permanent and registered on the title to the land (if registration is possible)'; and that 'must be perpetual'. See Volume 1, Part 2-5, Division 31-5, subsections (2)(b) and (5) of the *Income Tax Assessment Act 1997* (Cth) for the full text of the provisions.
- ²¹ Department of Climate Change, Energy, the Environment and Water (2024) *Guidelines for approval of a conservation covenanting program*, at <https://www.dcccew.gov.au/environment/biodiversity/conservation/covenants/how-to-apply#guidelines>
- ²² National Reserve System Task Group convened under the Natural Resource Policies and Program Committee (2009) *Strategy for Australia's National Reserve System 2009-2030*, at <https://www.dcccew.gov.au/environment/land/nrs/publications/strategy-national-reserve-system>
- ²³ National Reserve System Task Group convened under the Natural Resource Policies and Program Committee (2009) *Strategy for Australia's National Reserve System 2009-2030* (pp. 42-43), at <https://www.dcccew.gov.au/environment/land/nrs/publications/strategy-national-reserve-system>
- ²⁴ To elaborate:
 - A total of 355 projects were approved under the EPBC Act between 2008 and 2012.
 - Of those 355 approvals, 193 (54%) included a condition that required one or more offset sites.
 - In all 193 approvals, the offset condition was imposed to compensate for permanent impacts.
 - 41 projects requiring offset sites did not proceed, meaning 152 approved projects went ahead that required one or more offset sites. As some of the projects required multiple offset sites, this meant 218 offset sites were required.
- ²⁵ These 37 cases include 33 cases where no area is protected at all, and four cases where less than 25% of the area has been protected in some way.
- ²⁶ These two cases have been excluded when calculating the statistics for protection outcomes for better accuracy.
- ²⁷ Unless reference is made explicitly to these unknown cases elsewhere in the report, these 42 cases have been excluded when calculating the statistics for protection outcomes for better accuracy.
- ²⁸ Environment and Communications Committee (Supplementary Budget Estimates 2023-2024) *Portfolio Question Number SQ23-001629 / Question on Notice number 80*, at <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId8-EstimatesRoundId22-PortfolioId46-QuestionNumber80>; Environment and Communications Committee (Supplementary Budget Estimates 2023-2024) *Portfolio Question Number SQ23-001630 / Question on Notice number 81*, at <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId8-EstimatesRoundId22-PortfolioId46-QuestionNumber81>. The Department's answers refer to the EPBC Act Public Portal and compliance reports, neither of which contain the information that was sought in the questions.
- ²⁹ Of the known cases, the agriculture and dams industries had only one and two offset sites (respectively), meaning the sample size is not large enough for accurate statistics about those industries' protection outcomes.
- ³⁰ Of the known cases, South Australia and the Northern Territory had one and two offset sites respectively, meaning the sample size is not large enough for accurate statistics about the protection outcomes of projects in those jurisdictions.
- ³¹ Of the known cases, state government agencies adequately protected 15 of 49 offset sites, and private entities adequately protected 38 of 125 offset sites.
- ³² The then Condition 8 of the [draft recommendation report](#) read: 'The person taking the action must ensure that within one (1) year of approval, 187.2 ha containing Carnaby's Black Cockatoo foraging habitat, as designated by the red line at Attachments C1 and C2, is established within a conservation covenant'. The approval defined the conservation covenant as 'an arrangement that provides for the protection in perpetuity' of 187 hectares of Carnaby's Black Cockatoo foraging habitat.
- ³³ The certificate of title refers to a covenant registered in September 2000. This far predates the EPBC approval and is referred to in the EPBC approval documents as a covenant that already existed at the time the approval was granted.
- ³⁴ The land where the gas wells are situated is the subject of a retention lease granted in 2014 and valid until the end of 2024. See Western Australian Department of Mines, Industry Regulation and Safety, *WA Petroleum Titles (DMIRS-011)* at <https://catalogue.data.wa.gov.au/dataset/wa-petroleum-titles-dmirs-011> and *Latent Petroleum Limited* (3 January, 2022) *Warro Gas Field - Shut-in & Suspended Wells Warro Project: Environment Plan* (p. 14 and executive summary), at <https://ace.dmp.wa.gov.au/ACE/Public/PetroleumProposals/ViewPlanSummary?registrationId=102932>. ACF understands that a production licence would need to be issued by the Western Australian government to permit full scale development of the gas field.
- ³⁵ While the ACT does not itself have a mechanism capable of offering adequate protection in our assessment, conservation agreements under the EPBC Act (Commonwealth legislation) can be used across all jurisdictions.
- ³⁶ With the exception of the Crown Lands Act 1992 (NT). See [Appendix A](#) for details.
- ³⁷ See [Appendix A](#) for details. Note that Queensland law appears to restrict some of these exemptions from applying where an offset is imposed under its state offsets legislation, but it does not appear that offsets imposed under the EPBC Act are protected from the application of such exemptions.
- ³⁸ See EPBC 2010/5350, at <http://epbcnotices.environment.gov.au/publicnoticesreferrals/>
- ³⁹ Environment and Communications Committee (Budget Estimates 2023-2024) *Portfolio Question Number SQ23-001107 / Question on Notice number 263*, at <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId8-EstimatesRoundId21-PortfolioId46-QuestionNumber263>; Environment and Communications Committee (Supplementary Budget Estimates 2023-2024) *Portfolio Question Number SQ23-001632 / Question on Notice number 172*, at <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId8-EstimatesRoundId22-PortfolioId46-QuestionNumber172>

- ⁴⁰ The Hon. T Plibersek, Minister for the Environment and Water (29 June, 2023) *Government launches environmental offsets crackdown*, at <https://minister.dcceew.gov.au/plibersek/media-releases/government-launches-environmental-offsets-crackdown>
- ⁴¹ 52 is the total number of cases that involved an offset plan where the outcome is known. Of those 52 cases, 11 were adequately protected.
- ⁴² 122 is the total number of cases that involved an offset condition where the outcome is known. Of those, 42 were adequately protected.
- ⁴³ 53 is the total number of cases where the outcome is known and where the protection required was adequate.
- ⁴⁴ 121 is the total number of cases where the outcome is known and where the protection required was inadequate.
- ⁴⁵ The statistics in this paragraph exclude the two cases where protection is not yet due.
- ⁴⁶ ECOTas for Department of State Growth (April, 2017) *Review of records and collections of Lepidium Hyssopifolium (Soft Peppergrass) in Tasmania: Background information to inform long-term management options of sites under the jurisdiction of the Tasmanian Department of State Growth* (p. 1), at https://www.transport.tas.gov.au/_data/assets/pdf_file/0008/219941/Lepidium_Hyssopifolium_State-wide_Review_Report_April_2017_FINAL.PDF
- ⁴⁷ EPBC 2007/3807, at <http://epbcnotices.environment.gov.au/publicnoticesreferrals/>
- ⁴⁸ Due to these variations, these four cases have been classified as having required inadequate protection.
- ⁴⁹ FOI Reference 74610 (p. 15), at <https://www.dcceew.gov.au/sites/default/files/documents/74610.pdf>
- ⁵⁰ FOI Reference 74610 (p. 195), at <https://www.dcceew.gov.au/sites/default/files/documents/74610.pdf>
- ⁵¹ FOI Reference 74610 (p. 3), at <https://www.dcceew.gov.au/sites/default/files/documents/74610.pdf>
- ⁵² See Western Australia Environmental Protection Authority (2014) *Cumulative environmental impacts of development in the Pilbara region: Advice of the Environmental Protection Authority to the Minister for Environment under Section 16(e) of the Environmental Protection Act 1986*, at <https://www.epa.wa.gov.au/sites/default/files/Publications/Pilbara%20s16e%20advice%20%20270814.pdf>
- ⁵³ Environment and Communications Committee (Budget Estimates 2023-2024) *Portfolio Question Number SQ23-001127 / Question on Notice number 239*, at <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId8-EstimatesRoundId21-PortfolioId46-QuestionNumber239>
- ⁵⁴ Fortescue Metals Group Limited (August, 2022) *Annual EPBC Compliance Report – 2021-2022*, at https://cdn.fortescue.com/docs/default-source/environmental-publications/annual-epbc-compliance-report-2021-2022.pdf?sfvrsn=d0eda1e2_1
- ⁵⁵ Environment and Communications Committee (Budget Estimates 2022-2023, October and November) *Portfolio Question Number SQ22-00725 / Question on Notice number 188*, at <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId8-EstimatesRoundId19-PortfolioId46-QuestionNumber188>
- ⁵⁶ In those jurisdictions with a sufficient sample size, i.e. excluding the Northern Territory and South Australia.
- ⁵⁷ Department of Climate Change, Energy, the Environment and Water (2024) *Infringement notice register under the EPBC Act and EPBC Regulations*, at <https://www.dcceew.gov.au/environment/epbc/compliance/infringements#:~:text=If%20you%20breach%20a%20condition,and%20who%20has%20paid%20them>
- ⁵⁸ It is difficult to determine with complete confidence because breaches are sometimes of conditions which require offset plans to be implemented, which means the activity in question could take many forms.
- ⁵⁹ Department of Climate Change, Energy, the Environment and Water (18 September, 2020) *NSW windfarm fined for breaching environmental conditions*, at <https://www.dcceew.gov.au/about/news/media-releases/nsw-windfarm-fined-breaching-environmental-conditions>
- ⁶⁰ Ulan Coal Mines Pty Ltd (2019) *Ulan Coal Mines Pty Limited EPBC Approval 2009/5252 Annual Compliance Report 2019* (p. 8), at <https://www.glencore.com.au/.rest/api/v1/documents/9f03ff1d7ef9f4cc09e7723d4ef16657/EPBC+2009-5252+2019-20+compliance+report.pdf>
- ⁶¹ FOI Reference 190709, at <https://www.agriculture.gov.au/sites/default/files/documents/190709.pdf>
- ⁶² FOI Reference 190709, at <https://www.agriculture.gov.au/sites/default/files/documents/190709.pdf>
- ⁶³ FOI Reference 190709, at <https://www.agriculture.gov.au/sites/default/files/documents/190709.pdf>
- ⁶⁴ See Ulan Coal Mines Pty Ltd (2022-2023) *Ulan Coal Mines Pty Limited EPBC Approval 2009/5252 Annual Compliance Report 2022-2023*, at https://www.glencore.com.au/.rest/api/v1/documents/10a91a168e5737316749c4db201b1f41/EPBC+2009-5252+2022-23_V1.pdf
- ⁶⁵ Environment and Communications Committee (Budget Estimates 2022-2023) *Portfolio Question Number SQ22-000725 / Question on Notice number 188*, at <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId8-EstimatesRoundId19-PortfolioId46-QuestionNumber188>
- ⁶⁶ Environment and Communications Committee (Supplementary Budget Estimates 2023-2024) *Portfolio Question Number SQ23-001632 / Question on Notice number 172*, at <https://www.aph.gov.au/api/qon/downloadestimatesquestions/EstimatesQuestion-CommitteeId8-EstimatesRoundId22-PortfolioId46-QuestionNumber172>
- ⁶⁷ FOI Reference 180610, at <https://www.agriculture.gov.au/sites/default/files/documents/180610.pdf>
- ⁶⁸ See Victorian Department of Energy, Environment and Climate Action (2024) *Western Grassland Reserve*, at <https://www.msa.vic.gov.au/conservation-in-action/western-grassland-reserve#:~:text=To%20protect%20one%20of%20the,establish%20the%20Western%20Grassland%20Reserve>; A Carey and C Lucas for The Age (12 May, 2019) *From grassland to wasteland: Victoria breaks promise to create environmental reserve*, at <https://www.theage.com.au/politics/victoria/from-grassland-to-wasteland-victoria-breaks-promise-to-create-environmental-reserve-20190512-p51mjd.html>
- ⁶⁹ Victorian Auditor-General's Office (17 June, 2020) *Protecting Critically Endangered Grasslands*, at https://www.audit.vic.gov.au/report/protecting-critically-endangered-grasslands?section%3D&sa=D&source=docs&ust=1707446800355799&usg=AOvVaw3qfzoTqbntdG_2W4qxV32
- ⁷⁰ See <https://www.naturepositive.org/>
- ⁷¹ It is acknowledged that the list of adequate mechanisms in [Appendix A](#) are those that were relevant to the cases within this investigation. There may be other recent mechanisms that offer adequate legal protection. As was discussed at section 4.1.2, the Department has also stated that it has a position on the mechanisms it considers unacceptable but refuses to disclose which mechanisms those are.
- ⁷² For example, credit retirement for Biodiversity Stewardship Agreements in NSW – see section 4.1.2.
- ⁷³ See Department of Climate Change, Energy, the Environment and Water (2023) *National Reserve System*, at <https://www.dcceew.gov.au/environment/land/nrs>

Right. Masked lapwing chick in Googong, NSW
Photo. Peta Bulling



We love **our beautiful planet**

Australian Conservation Foundation

Wurundjeri Country, Level 1, 60 Leicester Street, Carlton VIC 3053 ABN 22 007 498 482

Phone 1800 223 669 **Email** acf@acf.org.au **Web** www.acf.org.au

f Australian Conservation Foundation **t** @AusConservation

ACF publications can be found at: www.acf.org.au/reports

Printed on 100% post-consumer recycled paper



**AUSTRALIAN
CONSERVATION
FOUNDATION**

**Nature
needs us,
now**