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BIODIVERSITY OFFSETS – A SUGGESTED WAY FORWARD

Written by Mark Christensen for the RMLA Conference – September 2008

Introduction

In the fourth edition of the UNEP Global Environmental Outlook, produced in 2007, it was reported that the targets set by the international community for biodiversity protection at the Rio Earth Summit in 1992 had not been met, that the relevant international instruments had been ineffective and it would not be possible to achieve the 2010 biodiversity targets agreed in Johannesburg. In the face of an escalating biodiversity crisis, appropriate economic development policies were called for to sustain the diversity of life on the planet and to maintain the goods and services necessary for humanity's economic activities and well-being.

At the recent Ninth Meeting of the Conference of parties to the Convention on Biological Diversity, held in May 2008 in Bonn Germany, the parties adopted Decision IX/26 concerned with promoting engagement with business. This follows from a decision at the Eighth Conference of the Parties where the Secretariat was requested to compile information on the business case for biodiversity and good biodiversity practice and to make this information available through the secretariats' clearing-house mechanism[1]. Decision IX/26 noted that while there has been notable progress in mobilising the business community on biodiversity, relatively few companies were aware of the business and biodiversity linkages. The Parties adopted a framework of two priority areas for action on business and biodiversity 2008-2010: building and promoting the business case for biodiversity; and dissemination of planning and assessment tools and best practice. As part of the second priority the secretariat is tasked in collaboration with relevant organisations and initiatives, such as the Business and Biodiversity Offsets Programme (BBOP), to compile and make available case studies, methodologies, tools and guidelines on biodiversity offsets, and relevant national and regional policy frameworks.

Biodiversity offsets are conservation actions intended to compensate for the residual, unavoidable harm to biodiversity caused by development projects, so as to ensure no net loss of biodiversity. Before developers contemplate offsets, they should have first sought to avoid and minimise harm to biodiversity[2].

In New Zealand, there has been debate about whether biodiversity offsets or environmental compensation generally can be considered under the Resource Management Act. That issue has now been resolved with offsets or compensation either being seen as within the wider definitions of 'remedy' or 'effects', or generally within the concept of sustainable management in section 5(2).

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[1] See generally UNEP/CBD/COP/9/21/Add.1 27 March 2008

[2] IUCN (The World Conservation Union), *Biodiversity Offsets: Views, experience and the business case*, November 2004 (www.iucn.org/themes/business/Biodiversityoffsets). This definition, while widely accepted, is but one of a range of definitions of biodiversity offsets or green offsets. There remains considerable debate about the appropriate definition and scope of biodiversity offsets.

Moreover, offsets and compensation are matters that can be taken into account under section 104(i)(c)[3].

Despite the acceptance off offsets/compensation as a matter of law, the practice of environmental compensation in New Zealand remains ad hoc and variable and needs to be put on a sounder footing. In 2004 a research monograph on the issue[4] stated:

> Our conclusion is that a far more robust regime needs to be developed in New Zealand if environmental compensation is to be used to protect significant biodiversity and landscape values. At present, we appear to be learning as we go rather than learning from the best and worst of international practice. Central government should provide not only more explicit policy direction but should also promote good practice guidelines. This is imperative in order to improve the quality of policies and rules for environmental compensation in second generation planning instruments (including the New Zealand Coastal Policy Statement).[5]

In this paper I consider selected recent developments in the production of guidelines and methodologies for the use of biodiversity offsets (and environmental compensation generally), both in New Zealand and internationally, and in so doing, suggest a possible way forward for New Zealand.

Benefits, Challenges and Limitations of Biodiversity Offsets[6]

Benefits

Benefits for biodiversity

Biodiversity offsets offer a key tool for stemming the loss of biodiversity at all spatial scales from local to global by ensuring through the idea of 'no-net-loss' that development projects explicitly consider and offset their impacts on biodiversity. But perhaps more significantly in a country like New Zealand where government funding appears insufficient to stem the loss of biodiversity, especially under the pervasive impact of invasive species[7], biodiversity offsets represent a exciting new opportunity to actively engage business in achieving long-term and sustainable biodiversity outcomes.

Benefits for business

Biodiversity offsets can help companies manage their risks more effectively and strengthen their licence to operate by showing regulators that operations can be based on a 'no net loss' or 'net gain' approach to biodiversity and by securing the support of local communities and civil society. Companies are increasingly seeking to demonstrate good practice on environmental issues to secure their license to operate and access to capital, to obtain consents in a timely way, to operate cost effectively, and to maintain a competitive advantage. Conversely, bad environmental practice can lead to higher operating costs, costly consenting delays, liabilities, and lost revenues.

Benefits for government

Biodiversity offsets offer regulators a mechanism to encourage companies to compensate fully for losses to biodiversity and make important contributions to conservation in many cases with lower costs than alternative (government funded) policies. Offsets can also help to ensure that project developments intended to meet growing demand for energy, minerals, crops and transport are planned in the context of sustainable development, and are accompanied by counterbalancing measures to secure the conservation of ecosystems and species affected by a project.

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[3] *JF Investments Limited v QLDC* C48/2006; see generally Christensen M, (2007) 'Biodiversity offsets – an overview of selected recent developments – where to from here?' Unpublished report, Anderson Lloyd Lawyers.

[4] Borrie, N. Memon, A., Skelton, P. (July 2004) *An International Perspective on Environmental Compensation: Lessons for New Zealand's Resource Management Regime*. Research monograph. Environment, Society and Design Division Lincoln University, Christchurch, New Zealand.

[5] At 8.5, page 38

[6] For a fuller description, see 'Biodiversity Offsets and the Business and Biodiversity Offsets Programme (BBOP)'. Consultation paper for CBD COP IX: UNEP/CBD/COP/9/inf/29].

[7] NZ Biodiversity Strategy

Benefits for conservation organisations

Biodiversity offsets can result in more and better conservation and increase the funding available for conservation. Designing and implementing biodiversity offsets in the context of regional development and at the landscape scale allows offsets to contribute to the strategic aims and objectives of conservation planners. Offsets can also help ensure that national or regional conservation priorities are integrated into business planning.

Challenges and limitations

While biodiversity offsets may, in some circumstances, be able to provide the benefits to business, government, communities, conservation organisations and the financial community, there are risks associated with making biodiversity offsets and limits on what they can and should be expected to achieve. The question of their appropriateness and effectiveness as an environmental mitigation mechanism is debated in the conservation and business communities alike. A strong set of principles can help ensure that biodiversity offsets are only used where appropriate and are designed and implemented so as to avoid or manage the risks.

Inappropriate projects get the go-ahead

Perhaps the strongest concern about biodiversity offsets is that they could make it easier for developments to proceed that have a very significant impact on biodiversity that in many cases would be judged unacceptable, on the back of claims that the damage to biodiversity will be offset. There is also a concern that biodiversity offsets could be used as a form of 'green washing'.

Lack of additionality

Offset activities should be new or additional and not 'business as usual'. That is to say, biodiversity offsets should be activities that would not have been implemented in a 'no offset', or even a 'no development', scenario. Offset planners should address the risk there is no true 'conservation additionality' as a result of the biodiversity offset.

Cost-shifting

The fact that companies take responsibility for their footprint on biodiversity and internalise the costs of conservation is an advantage of biodiversity offsets. However, this investment in conservation by developers is not an alternative to public investment in conservation by government, but should supplement it.

Leakage

In designing offsets, developers should seek to avoid displacing the harmful activities that impact biodiversity to another location, an outcome known as 'leakage'. Landscape level planning can help address this risk.

Lack of implementation capacity and lack of clarity on liabilities

Offsets are long-term commitments. There is a risk that an offset may be well-designed, but that the organisations responsible for implementing it are not obliged to carry this responsibility forward into the long-term future. They may also lack the human, institutional, legal and financial capacity to take on such a long-term commitment. In addition, offsets represent enduring liabilities for developers, unless the offset (and associated liability) can be transferred to a secure, independent third party that can mange the offset over an appropriate period. There is a risk that these issues will not be adequately addressed during the design of a biodiversity offset.

Challenges of quantification and offset design

Given our incomplete knowledge of biodiversity and ecosystem functions and services, there are considerable challenges to be met in quantifying projects' impacts on biodiversity and the nature and amount of conservation actions needed to offset them. Demonstrating no net loss of biodiversity is currently difficult or at least equivocal. The quest for quantification is a long-term undertaking and one shared with the biodiversity and business communities for broader environmental management

purposes, not just biodiversity offsets. It is important to note that different groups in society attach different values to biodiversity components. For an offset design process to be credible, it needs to involve the full range of stakeholders, to capture these different values. Consensus building within a broad stakeholder constituency is a sensible approach to minimising risk and facilitating conservation progress while quantification methodologies become more robust.

New Zealand Environment Court Guidelines for the Use of Biodiversity Offsets

The most comprehensive discussion of environmental compensation is *JF Investments Limited v Queenstown Lakes District Council*[8]. There, the Environment Court considered an application for a land use consent for a residential platform situated in an outstanding natural landscape in the Queenstown District. In compensation for the proposed location of a house in that landscape, the applicant offered to remove wilding pines from the uphill half of its site, to carry out work up to the value of $100,000 removing pines from elsewhere in the surrounding landscape, and proposed covenants not to further subdivide the allotment, nor to place additional houses on it in the future.

The Court defined environmental compensation as:

> Any action (work, services or restrictive covenants) to avoid, remedy or mitigate adverse effects of activities on a relevant area, landscape or environment as compensation for the unavoided and unmitigated adverse effects of the activity for which consent is being sought[9].

While the Court accepted that valuing environmental compensation is very complex it stated that this should not of itself prevent the assessment being attempted:

> The difficulties of obtaining such (e)valuations must not prevent the attempt if sustainable management of resources requires it. The practical answer is usually that if the proposed remedial or mitigatory action is the repair of damage of the same kind as the adverse effects of the activity, it is easier to accept as not only relevant, but reasonably necessary as well. Similarly, if the proposed remedy is also in the same area, landscape, or environment then its benefits, compared with the costs of the proposed activity, are more easily seen. Conversely, if the offered environmental compensation is too far in distance, kind or quality from the adverse effects caused by the proposed activity then it may be no longer reasonably necessary, but merely expedient for the developer to offer.[10]

The question of weight to be placed on the compensation needs to be decided on the facts of each case. In providing guidance on when environmental compensation is appropriate, the Court stated:

> We conclude that off-site work or service or a covenant, if offered as environmental compensation or a biodiversity offset, will often be relevant and reasonably necessary under section 104(1)(i) if it meets most of the following desiderata:
>
> (1) it should preferably be of the same kind and scale as work on-site or should remedy effects caused at least in part by activities on-site;
>
> (2) it should be as close as possible to the site (with a principle of benefit diminishing with distance) so that it is in the same area, landscape or environment as the proposed activity;
>
> (3) it must be effective; usually there should be conditions (a condition precedent or a bond) to ensure that it is completed or supplied;
>
> (4) there should have been public consultation or at least the opportunity for public participation in the process by which the environmental compensation is set;
>
> (5) it should be transparent in that it is assessed under a standard methodology, preferably one that is specified under a regional or district plan or other public document.[11]

These guidelines were adopted and applied in the Court's later decision in *Department of Conservation v Wairoa District Council*[12]. There, the Court considered a proposal to clear kanuka

[8] *JF Investments Limited v Queenstown Lakes District Council,* Environment Court C48/2006
[9] Ibid at para 8.
[10] Para 37
[11] Para 42. The Court noted that it was assisted in coming to this view by the IUCN paper.
[12] W081/2007

forest. Approximately one third of the 3570 hectare hill country station was in indigenous vegetation, consisting of kanuka and podocarp-broadleaved forest. Much of the forest was being undergrazed by cattle and sheep, which meant the land was neither being protected from damage nor efficiently used as pasture. The proposal was to clear 354 hectares of kanuka to convert that area to pasture, to be offset by protection of 799 hectares of the most significant areas of indigenous vegetation through a QEII National Trust Open Space Covenant; removal of domestic grazing pressure from all protected areas through the establishment of new fencing and the repair of existing fencing; active control of feral grazing and browsing animals, especially goats and possums; monitoring of biodiversity values; and natural regeneration of pasture areas within the covenanted and fenced area once they were retired from grazing.

DOC had appealed the original Wairoa District Councils resource consent decision on the basis that any indigenous vegetation clearance on the property would be unsustainable because it would lead to the continuing loss of biodiversity, effectively 'death by a thousand cuts'. The Department also argued that the proposed protection of the balance might not be effective.

The proposal was considered against the *JF Investments* guidelines: the proposed offset was on the same site, of the same kind of vegetation, on a grater scale, and there was no reason to think the protection would not be effective. While there was not 'public consultation in a general sense', there had 'been a public resource consent process in which the spectrum of opinion has been expressed and explored by eminently qualified people'. Against the last factor or 'desiderata' that required a standard methodology, the Court recognised the lack of objective measurement against which to assess the offered proposal, but was satisfied its pros and cons had been well worked through.

The Court concluded, '"Here, we see the issue as rather more clear cut than was the case in *JF Investments*, and that the biodiversity offsets approach would ensure the protection of the overall significance of the indigenous vegetation on the property".

Other Frameworks for Biodiversity Offsets

New South Wales

In December 2006, the Threatened Species Conservation Amendment (Biodiversity Banking) Act 2006 commenced. This Act establishes a biodiversity offset and land banking scheme by which the NSW Government intends to introduce a market-based approach to addressing the impacts of development on biodiversity. The scheme recognises that biodiversity offsets were being negotiated on a case by case basis, which was leading to considerable uncertainty.

The biodiversity offset and land banking scheme offers landowners an opportunity to earn credits for creating sites which maintain or improve biodiversity. Developers can then purchase those credits from a central register and use the credits to offset the negative impact of development on biodiversity.

The scheme is subject to a state-wide two-year trial which commenced in July 2008. The framework for the scheme was established under Part 7A of the Threatened Species Conservation Act 1995 and is supported by the Threatened Species Conservation (Biodiversity Banking) Regulations 2008, the BioBanking Assessment Methodology and the Compliance Assurance Strategy.

Biobanking sites may be established on land by means of biobanking agreements entered into between the Minister for the Environment and a landowner. The agreements will require or authorise the landowner to carry out positive environmental management and/or rehabilitation actions in respect of the land. Management actions carried out under a biobanking agreement are exempt from the requirement for development consent or environmental assessment under the Environmental Planning and Assessment Act 1979.

Biodiversity credits may be created in respect of past, current and future management actions carried out on land in accordance with a biobanking agreement. The biobanking assessment methodology, yet to be established, will set out the management actions for which biodiversity credits may be created and will be used as the basis for calculating the number and class (if any) of the biodiversity credits.

Biobanking agreements are to be registered on title to land and generally will have effect as binding agreements on the owner (and subsequent owners) in perpetuity. Biobanking agreements may be enforced by any person, by action taken in the Land and Environment Court.

Biobank sites are exempt from land tax. For the purposes of land tax assessment, the value of a parcel of land is to be reduced by an amount proportionate to the area that is the subject of a biobanking agreement.

The Biobanking Act establishes a system for trading in biodiversity credits, so that once created and registered (in a register of biodiversity credits to be established by the Director-General of the Department of Environment and Conservation, the credit may be transferred to any person, subject to the regulations.

Transfers of biodiversity credits have effect when registered under the scheme. Part of the funds generated from the sale of the credits are to be held on trust (in a Biobanking Trust Fund and bank account to be established by the Minister) for the landowner, who receives this as funding for management actions carried out under their biobanking agreement.

Once created, a biodiversity credit remains in force unless it is cancelled or retired under the scheme. A credit cannot be cancelled if it has been transferred to a bona fide purchaser without notice of the circumstances that are grounds for the cancellation of the credit, eg, if the application for the creation of the credit contained materially false or misleading information. A credit may be retired when it is used as an offset in connection with a development proposal, retired voluntarily or retired for the purpose of complying with a direction given under the Biobanking Act. For example, a biobank site owner (or former owner) may be directed to retire credits if the Minister considers that biodiversity credits were created for a management action that was not carried out, or not completed, in accordance with the relevant biobanking agreement.

Under the Biobanking Act, biobanking statements may be issued for development and activities to which the Environment and Planning Assessment Act applies. An application for a biobanking statement for a development must include an assessment of the impact, or likely impact, of the development on biodiversity values. The Biobanking Act does not specify details as to what form this assessment will be required to take. If the development is likely to impact on biodiversity values, developers can:

- propose offset works to minimise biodiversity loss or establish their own biobank site to generate credits;
- purchase or retire biodiversity credits to offset the impact or likely impact; and/or
- change the project so that no biodiversity loss occurs.

The Biobanking Act recognises that biodiversity loss should be avoided and/or minimised before considering the use of offsets, as the Director-General may refuse to issue a biobanking statement if the developer has not demonstrated that all cost-effective onsite measures to minimise the impact of the development on biodiversity values are being, or will be, carried out.

Ultimately, a biobanking statement may be issued only if the development will improve or maintain biodiversity values. The statement may be issued subject to conditions, including as to the onsite measures to be carried out to minimise biodiversity loss or the retirement of biodiversity credits.

Victoria

The Victorian Department of Sustainability and Environment has developed the 'habitat hectare' approach[13]. This approach uses observable physical habitat components in an assessment which is standardised for each ecotype, using its 'benchmark'. The benchmark represents the average characteristics of mature stands of native vegetation of the same community type in a natural or undisturbed condition. Applying the benchmark to the impact and potential offset sites enables the

[13] Parkes, D. et al (2003) Assessing the quality of native vegetation: the habitat hectares approach. *Ecological Management and Restoration* 4 (Supplement), s29-s38; Gibbons, P. et al (2007) Offsets for Land Clearing: No Net Loss or the tail wagging the dog? *Ecological Management and Restoration 8(1)* 26-31.

amount of change in the condition of biodiversity to be compared. The assessment is made in terms of a site's condition and landscape context. Site condition measures how much the site has changed from a benchmark, by looking at:

- the presence of large old trees (for woodlands and forests)
- the amount of tree canopy cover (for woodlands and forests)
- the amount of logs (for woodland forests)
- the cover and diversity of the understorey
- the presence of appropriate regeneration
- how weedy the site is
- how much leaf litter there is

Landscape context considers how well the patch of vegetation can cope with natural fluctuations and disturbances, such as old trees dying, bushfires and floods. It is measured by the size of the area of vegetation that the site is within, as well as links to, and the amount of, neighbouring patches of vegetation. Assessments are carried out in accordance with a detailed Vegetation Quality Assessment Manual and an Index of Wetland Condition. BBOP has adopted the Victorian system for use in its Offset Design Handbook.

The Business and Biodiversity Offset program (BBOP)

BBOP is a partnership between companies, governments and conservation experts to explore biodiversity offsets. BBOP's goals are:

- Demonstrating conservation and livelihood outcomes in a portfolio of biodiversity offset pilot projects;

- Developing, testing, and disseminating best practice on biodiversity offsets; and

- Contributing to policy and corporate developments on biodiversity offsets so they meet conservation and business objectives.

At present, BBOP has released 8 documents on topics such as loss/gain quantification methodologies, site selection/landscape planning, biodiversity offset multipliers and ratios and a cost-benefit handbook. Once the consultation period has closed in mid-October 2008, work will begin on finalising a practical toolkit which will be made available to industry, policy makers, development agencies, conservation organisations, financial institutions and others. Since biodiversity offsets offer business benefits as a voluntary management tool, companies are keen to ensure that their voluntary efforts are regarded as socially acceptable and scientifically credible. For this reason, private sector representatives have asked for BBOP multi-stakeholder partnership of experts to help design and implement biodiversity offsets to provide credibility, practicality and political support for the approach.

The following draft principles on biodiversity offsets have been developed to guide biodiversity offset projects:

- No net loss: A biodiversity offset should achieve measurable conservation outcomes that can reasonably be expected to result in no net loss of biodiversity.

- Adherence to the mitigation hierarchy: Biodiversity offsets are a commitment to compensate for significant residual adverse impacts on biodiversity identified after appropriate avoidance; minimisation and rehabilitation measures have been taken according to the mitigation hierarchy. Offsets cannot provide a justification for proceeding with projects for which the residual impacts on biodiversity are unacceptable.

- Landscape context: Biodiversity offsets should be designed and implemented in a landscape context to achieve the best measurable conservation outcomes, taking into account available information on the full range of biological, social and cultural values of biodiversity and supporting an ecosystem approach.

- Stakeholder participation: In areas affected by the project and by the offset, the full and effective participation of stakeholders should be ensured in all phases of decision-making

about biodiversity offsets, including their evaluation, selection, design and implementation. Special consideration should be given to the existing, recognised rights of indigenous and local communities.

- Equity: Biodiversity offsets should be designed and implemented in an equitable manner, which means the sharing of the rights and responsibilities, risk and rewards associated with a project in a fair and balanced way among the stakeholders.

- Long-term success: The design and implementation of biodiversity offsets should have as their objective sustained outcomes in terms of:

    - The viability of key biodiversity components;
    - The reliability and accountability of governance and financing; and
    - Social equity.

- Transparency: The design and implementation of biodiversity offsets, and communication of their results to the public, should be undertaken in a transparent manner.

A New Zealand Suggestion

Recently, an assessment framework for biodiversity offsets has been proposed based on experience with two New Zealand biodiversity offsets.[14] The paper proposes and discusses six principles as follows:

a. Biodiversity offsets should only be used as part of an hierarchy of actions in which a development project must first seek to avoid impacts and then minimize the impacts that do occur. Biodiversity offsets should not be used to justify adverse impacts; rather they are the final step in a process that focuses first on avoidance and minimisation.

b. Some form of guarantee must be provided that the offset proposed will occur. One of the major criticisms of offsets, especially in North America, is that most approved offsets fail to meet their objectives or never actually occur.

c. Biodiversity offsets are inappropriate for certain ecosystem (or habitat) types because their rarity or the presence of particular species within them makes the clearance of these ecosystems inappropriate under any circumstances. Notwithstanding the hierarchy in principle one, it seems clear that there are some ecosystems or habitat types for which offsets are never going to be possible. These may be ecosystems that have already been diminished to such an extent that any further loss is unacceptable, or habitats of species whose loss would most likely lead to the extinction of the species as well.

d. Biodiversity offsets can involve protection of existing habitat but most often involve the creation of new habitat, especially when existing habitat already enjoys a degree of protection.

e. A clear currency is required that allows transparent quantification of values to be lost and values to be gained in order to ensure ecological equivalency between cleared and offset areas. Any biodiversity offset proposal must be founded on very good knowledge of the biodiversity values of both the site that is to be impacted and the offset site, including composition, structure and pattern, function, and dynamics and resilience of the system. The development of a clear currency to quantify the values at different sites being considered as part of biodiversity offsets is essential to ensure that clearance of high quality habitat or a rare ecosystem is not offset using an area of low quality habitat or common ecosystem and thus that biodiversity offsets have credibility.

[14] 'Biodiversity offsets: Two New Zealand Case Studies and An Assessment Framework', D.A. Norton (2008) Environmental Management].

f. Determination of what is an appropriate offset must take into account both the uncertainty involved in obtaining the desired outcome for the offset area and the time-lag that is often involved in reaching this point. Uncertainty relates primarily to the inability of ecologists to accurately predict what a system will be like at some point in the future as a result of management actions implemented as part of the offset (eg restoration).

Biodiversity offsets in New Zealand - a possible way forward

There is some real confusion surrounding the use of the concept of a biodiversity offset in New Zealand. This confusion was noted by the Court in *JF Investments*[15]. Whereas the Environment Court has generally considered the issue as one of 'environmental compensation' (with some exceptions such as the *Wairoa* case), much of the international literature (including the IUCN paper which assisted the Court in developing its desiderata), is concerned with 'biodiversity offsets'. Perhaps this inconsistency has arisen because the Court in many of the cases (eg *Memon, Stapylton-Smith, JF Investments*) has been dealing with issues of landscape impacts and amenity effects, which are not specifically biodiversity related.

Much of the discussion in other jurisdictions is about how biodiversity values can be assessed and measured. The objective is then to offset the effects of a development on biodiversity by securing an equivalent (or better) biodiversity or conservation gain. Such a gain is most readily achieved where 'on-site in kind' values are identified – that is, like for like, on or close to the site in question. Conceivably, it can also be achieved in other ways as well. For example, by 'off-site out of kind' offsets (eg, the protection of a 'higher value' lowland podocarp forest in a separate ecological district to 'compensate' for the removal of an area of 'lower value' beech forest). Another approach in New Zealand (and the one adopted in the *Department of Conservation v Wairoa District Council* case), involves the enhancement of values within a degraded area (usually as a result of domestic grazing animals and/or invasive species) on site or off-site to offset the clearance of indigenous vegetation. The challenge with biodiversity offsets (of whatever nature) is to establish a transparent and coherent means of identifying the overall objectives of adopting such an approach, as well as how the relevant values are measured and protected.

Biodiversity offsets versus environmental compensation for generally

The wider concept of 'environmental compensation' on the other hand has to take account of the fact that a whole range of conservation and amenity values are not susceptible to 'valuation' in a manner similar to biodiversity values. Adverse effects on landscape and amenity values for example, cannot be 'offset' by an equivalent positive effect. It is not possible to recreate an outstanding landscape for one which has been adversely affected by development. In this context, it is, however, possible to consider whether positive effects from the development in question can be offered which result in an overall 'gain' such that a proposal overall is acceptable.

The Court in *JF Investments* has articulated what is in effect a hybrid set of considerations taken primarily from papers dealing with biodiversity offsets and has adapted them in the context of landscape and amenity considerations. The question is whether this is the preferable approach, or whether there should be policy or regulatory direction that deals with biodiversity offsets as a specific subset of environmental compensation.

In terms of environmental compensation generally, one of the fundamental questions is whether it is appropriate to consider that effects on landscape and amenity values can ever be 'compensated for' in real terms. While one may accept that one or more positive effects outweigh one or more adverse effects of a particular proposal, the danger is to try to see one as a substitute for another in the sense of an 'offset', when the positive and adverse effects cannot be assessed or valued with the same currency. For example, the provision of walking tracks and waterways restoration cannot 'compensate for' a perceived failure to meet the objectives and policies of a district plan about limiting urban growth. That is because there is no currency against which to assess the adequacy of such 'compensation'. It is, however, appropriate to consider, in the round or as a balancing exercise, whether the proposal is worthy of consent as promoting sustainable management. The 'desiderata' are helpful in this context as well – the more closely related the 'compensation' is to the 'effect', both is

[15] *JF Investments Ltd*, op.cit., at para 13

spatial and subject terms, the easier it might be to make that overall assessment. But it would be a mistake (with respect) to try to require some sort of standard methodology for comparing apples and oranges. Was $100,000 of wilding pine control the appropriate compensation, or should it have been another figure – say $60,000 or $200,000? That exercise is incapable of actual measurement.

It may be that in this wider context, the UK concept of 'planning obligations' may be of some assistance[16].

Planning obligations (or 'Section 106 agreements' under the Town and Country Planning Act 1990) are private agreements negotiated, usually in the context of planning applications1, between local planning authorities and developers, and intended to make acceptable development which would otherwise be unacceptable in planning terms. Planning obligations might be used to prescribe the nature of a development (eg by requiring that a given proportion of housing is affordable); or to secure a contribution from a developer to compensate for loss or damage created by a development (eg loss of open space); or to mitigate a development's impact (eg through increased public transport provision). The outcome of all three of these uses of planning obligations should be that the proposed development concerned is made to accord with published local, regional or national planning policies.

The Secretary of State's policy requires, amongst other factors, that planning obligations are only sought where they meet all of the following tests.
A planning obligation must be:

a. relevant to planning;
b. necessary to make the proposed development acceptable in planning terms;
c. directly related to the proposed development;
d. fairly and reasonably related in scale and kind to the proposed development; and
e. reasonable in all other respects.

The use of planning obligations must be governed by the fundamental principle that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms.

It may well be that this concept has some application in a more formal sense in New Zealand.

A proposal for a National Environmental Standard

Currently, the debate over biodiversity offsets is being fought out before Council hearing panels and the Environment Court. This is an expensive, time consuming and ultimately uncertain process with regard to the outcome obtained. I suggest that a practical way forward is to remove the heat of this debate from the adversarial process. This will require the introduction of a standard methodology and a means by which the design of an offset can be certified as achieving no net loss. This will enable developers to have certainty about what is acceptable or not and how much a necessary offset will cost. That will mean that there can be appropriate planning by developers. There need be no debate at a hearing then about whether an offset is or is not adequate. If a consent has been granted conditional on certification of an offset, if that certification is not obtained, then the consent cannot be implemented. It may be that in certain circumstances, the debate in a hearing is only about whether from a sustainable management perspective the consent should be declined notwithstanding that it might be possible to design an offset (the 'go, no-go decision'). The system could operate as follows:

a. A National Policy Statement (NPS) is established which provides that for those projects identified in a national environmental standard, the objective to be achieved in a consenting process is no net loss of biodiversity (or possibly, even a net gain of biodiversity). The NPS would set the general principles similar to the BBOP principles and provide that consents can be granted conditionally subject to later certification that a proposed offset will achieve no net loss;

b. A National Environmental Standard which sets out:

[16] See Circular 05/05 Office of the Deputy Prime Minister 18 July 2005; 'Planning Obligations: Policy Guidance' Department for Communities and local Government July 2006.

i. The types of activities which are required to implement offsets to achieve no net loss of biodiversity (perhaps those affecting threatened biodiversity);

ii. An appropriate methodology that must be applied in assessing the effect and the proposed offset. This methodology needs to be transparent and able to be used without unreasonable cost (perhaps based on Victoria's Habitat/Hectares approach);

iii. How certification that a particular offset proposed will achieve no net loss can be done, and who can provide that certification

iv. The basis upon which bonds are to be calculated and held to guarantee the certified outcome.

The challenge is to develop a system for New Zealand without 'one side' dominating the discussion and obtaining a legislated framework that favours one interest group over others. The framework developed needs to be based on sound ecological principals, but be developed within a pragmatic legal, economic and social framework.