

Submission to consultation on

## National Environmental Standards for Matters of National Environmental Significance (MNES)

prepared by Environmental Justice Australia

30 January 2026

On 28 November 2025, the reforms to the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* were passed, which, among other things, provide the Environment Minister with the power to make National Environmental Standards (**Standards**). The Standards are the “centrepiece”<sup>1</sup> of the reforms – legally enforceable regulations intended to set the boundaries for decision-making to deliver the protections needed for matters of national environmental significance.<sup>2</sup> We welcome the creation of Standards as a critical element of the EPBC Act reform required to enact meaningful change.<sup>3</sup> The *National Environmental Standard (Matters of National Environmental Significance) 2025 (MNES Standard)* is crucial to the effective operation of the Act.

**At present the MNES Standard does not meet the requirements of the EPBC Act and will not afford real environmental protection, causing the government to fail to meet its stated objectives for these reforms.**

Unclear drafting and discretionary language will result in greater uncertainty and inefficiency in decision-making. Undefined and unenforceable objectives will result in ineffective processes, rather than defined outcomes.

The MNES standard must be amended in five essential areas:

1. [The MNES Standard must promote the objects of the EPBC Act and not be inconsistent with Australia’s obligations under international treaties](#)
2. [The MNES Standard must be sufficiently defined and outcomes-based](#)
3. [The MNES Standard should apply to all relevant decisions and require proponent compliance](#)
4. [The objectives must be specific and granular](#)
5. [Outcomes and principles must be strengthened and defined](#)

We note and refer also to our Submission to the Senate Standing Committees on Environment and Communications in response to the Inquiry into the *Environment Protection Reform Bill 2025* and six related bills dated 13 November 2025 and Submission to consultation on National Environmental Standards for Environmental Offsets dated 30 January 2026.

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<sup>1</sup> Samuel, G 2020, *Independent Review of the EPBC Act – Final Report*, Department of Agriculture, Water and the Environment, Canberra, October (**Samuel Review**) p 2.

<sup>2</sup> Explanatory Memorandum, Environment Protection Reform Bill 2025 (Cth) (**Explanatory Memorandum**) p 2.

<sup>3</sup> Explanatory Memorandum p 2.

## About Environmental Justice Australia

Environmental Justice Australia is a public interest environmental law practice, based in Melbourne and undertaking work across our areas of expertise throughout Australia. We provide legal advice and support to the community on public interest environmental issues, advocate for better environmental laws, and provide legal education to the community on environment matters. We act primarily for community organisations, Traditional Owners groups and NGOs on matters concerning environment and natural resources law and policy.

We acknowledge the Awabakal, Bunurong, Gadigal, Larrakia, melukerdee, Ngambri, Ngunnawal, punnilerpanner, Wadawurrung and Wurundjeri peoples, the Traditional Owners of the lands on which the Environmental Justice Australia team lives and where our office is located. We pay our respects to Elders past and present, and recognise that sovereignty has never been ceded. This land always was and always will be Aboriginal and Torres Strait Islander land. Environmental justice is inseparable from First Nations justice.

### For further information on this submission, please contact:

Dr Bruce Lindsay  
Senior Specialist Lawyer

Nicola Silbert  
Senior Lawyer

## 1 MNES Standard must promote the objects of the EPBC Act and not be inconsistent with Australia's obligations under international treaties

The Samuel Review found that Australia's natural environment and iconic places are in an overall state of decline and are under increasing threat, and that the EPBC Act is failing to halt this decline.<sup>4</sup> National Environmental Standards, and particularly the MNES Standard, are the central proposed fundamental reform to halt and reverse environmental decline,<sup>5</sup> and are key to implementation of Australia's international obligations.

Section 514YD(2) provides that before making a national environmental standard, the Minister must be satisfied that the standard would promote the objects of the EPBC Act; and the standard would not be inconsistent with Australia's obligations under the international agreements specified in subsection 520(3). The international agreements specified in 520(3) include the Convention on Biological Diversity;<sup>6</sup> the UN Framework Convention on Climate Change;<sup>7</sup> World Heritage Convention;<sup>8</sup> and the Ramsar Convention.<sup>9</sup>

The objects of the EPBC Act include: to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; to promote ecologically sustainable development through the conservation and ecologically

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<sup>4</sup> Samuel Review p viii.

<sup>5</sup> Samuel Review p ix.

<sup>6</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

<sup>7</sup> *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

<sup>8</sup> *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

<sup>9</sup> *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975) ('Ramsar Convention').

sustainable use of natural resources; to promote the conservation of biodiversity; and to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity (section 3).

The MNES Standard as drafted does not adequately promote the objects of the EPBC Act and is inconsistent with the relevant treaties. For example:

- The Samuel Review found that the objects of the EPBC Act, particularly ecologically sustainable development, are not being achieved<sup>10</sup> and the EPBC Act lacks clear outcomes for MNES.<sup>11</sup> If the MNES Standard fails to provide for clear outcomes in accordance with the Samuel Review recommendations, the MNES Standard will not promote the objects of the EPBC Act (see further recommendation 2 below).
- As set out in Recommendation 4 below, the objectives in s 5 are not sufficiently granular and enforceable to provide the environmental protections required to meet Australia's international environmental obligations. For example, when it comes to threatened species and ecological communities, the important international concepts of threatened species populations (set out, for instance, in Article 8(k) Convention on Biological Diversity) is absent from the objective in section 5(3) Item 1. Appendix B1 of the Samuel Review provides examples of appropriately granular objectives (see further recommendation 4 below).
- In addition, the objectives set out in s 5 of the Standard do not correspond with the relevant international treaties. For example, the concept of "wise use" which is central to the Ramsar Convention is not included in Section 5(3) Item 4. The objectives in s 5 should correspond to relevant treaties and include a corresponding level of ambition.

**Recommendation 1:** The MNES Standard must be redrafted to promote the objects of the EPBC Act and afford real environmental protections, including by setting clear enforceable environmental outcomes as set out in Recommendation 2. Section 5(3) should be redrafted at the level of specificity required to implement relevant treaty obligations (see recommendation 4 below).

## 2 The MNES Standard must be sufficiently defined and outcomes-based

As set out in the Draft MNES Policy Position (**Policy Position**)<sup>12</sup> the Samuel Review found that under the current EPBC Act, decision-making requirements are not focused on outcomes for MNES and allow considerable discretion by the Minister.<sup>13</sup> The Samuel Review recommended the development of MNES standards which outline clear outcomes and provide clear and consistent rules for decision-making.<sup>14</sup> The MNES Standard is so core to the Samuel Review recommendations that a draft MNES Standard was included in the report.<sup>15</sup> As such, the MNES Standard is intended to resolve identified issues with the EPBC Act by setting clear expectations to ensure quality and consistency of decision-making.

Yet, as drafted, the MNES Standard is not appropriately clear and outcomes-based to ensure consistency of decision-making. The current drafting risks increasing the uncertainty criticised by the Samuel Review and undermining the policy rationale behind the Standards because it is process-

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<sup>10</sup> Samuel Review p 43.

<sup>11</sup> Samuel Review p 43.

<sup>12</sup> Department of Climate Change, Energy, the Environment and Water, *DRAFT Policy Position: National Environmental Standard for Matters of National Environmental Significance (Policy Position)* p 2. (available at <https://consult.dcceew.gov.au/natl-environmental-standards-mnes>)

<sup>13</sup> Samuel Review p 3.

<sup>14</sup> Samuel Review p 52.

<sup>15</sup> Samuel Review Appendix B1.

driven, unclear and discretionary. The MNES Standard should be amended to resolve this as a matter of priority, including in the following ways:

- **Discretionary and qualifying language should be amended to be clear and defined.** Words and phrases such as “may”, “if possible” and “where necessary” reduce certainty and clarity. This drafting should be amended to achieve the policy purposes of the Standards. Clear, enforceable language (e.g. “must”) should be used instead.
- **The Standards should require specific outcomes rather than process.** As drafted, the MNES Standard is focused on process rather than outcomes. For example, the drafting in Sections 5(1) and s 6(1) is on “decisions” rather than the outcome of those decisions. These sections should be drafted to require specific measurable outcomes.
- **Standards should include parameters within which an outcome or objective is to be achieved, and processes or actions to be followed or taken in achieving an outcome or objective.** Section 514YD(4)(b) provides for Standards to include parameters within, or principles by which, an outcome or objective is to be achieved; and processes or actions to be followed in achieving an outcome or objective. Given the centrality of the MNES Standard to the operation of the EPBC Act, it is appropriate that the Minister include specific parameters, processes and actions in accordance with s 514D(4)(b).
- **The Standards should not introduce undefined terms which weaken concepts in the EPBC Act .** There are several examples of new concepts, undefined in the EPBC Act or regulations which introduce uncertainty in interpretation and application of the Standard. For example, the Water Resources objective (s 5(3) Item 9) introduces new concepts of “site of regional ecological significance”, “site of national ecological significance” and “critical human water needs”. These concepts are undefined by the EPBC Act and increase uncertainty. The Standards must not undermine or water down the EPBC Act by introducing uncertain and weakened terms.
- **The Standards should set measurable and granular outcomes to be achieved.** We welcome the granularity of the objectives for each protected matter (section 5(3)). To further the policy purpose of the Standard, these objectives should include measurable and time-bound outcomes, including science-based thresholds and limits where actions cannot proceed due to the impact they will have on MNES. This is discussed further at Recommendation 4.

**Recommendation 2:** The MNES Standard be amended to substitute discretionary and qualifying language for clear and certain provisions which reduce discretion and uncertainty and set clear and defined outcomes for standards.

### 3 The MNES Standard must apply to all relevant decisions and require proponent compliance

The MNES Standard, being core to the operation of the EPBC Act, should apply to all relevant decisions. Section 514YK of the EPBC Act provides for regulations to prescribe the application of any National Environmental Standard, and the way it is to be applied. The Samuel Review recommended that the Standard should apply to actions, plans and policies at all scales, not just by approval decision-makers.<sup>16</sup>

The proposed application in the Policy Position (pages 2-3) includes that the Minister only be able to approve an action if satisfied that doing so is not inconsistent with any prescribed National Environmental Standard; and that actions approved by state or territory decision-makers under

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<sup>16</sup> Samuel Review p 203.

approval bilateral agreements may also only be approved if the Minister is satisfied that doing so is not inconsistent with any prescribed Standard. This proposed language should be amended to be “consistent with” to align with new s 136A.

Regulations should require compliance with the MNES standard, not merely that decision-makers “have regard to” it. Proponents should also be required to comply with the Standard, in accordance with the Samuel Review. Weak wording risks inconsistent application and undermines the purpose of the standard.

**Recommendation 3:** Regulations must provide for the MNES Standard to apply to all relevant decisions. Proponents must also have obligations to comply with the MNES Standard.

## 4 Objectives must be specific and granular

The Samuel Review recommended granular and measurable<sup>17</sup> Standards. The Standards must be at the level of specificity to provide for consistent environmental outcomes in order to achieve their policy purpose. Samuel Review Appendix B1 gives an indication of the baseline level of granularity and specificity required for MNES objectives. Section 5(3) must be rewritten to provide a similar, if not greater level of specificity. This is essential to the success of the MNES Standard.

Section 5 should be amended to provide measurable, outcomes-based objectives. For example, the qualifying language in s 5(1) “aims to ensure” should be substituted with “will ensure” to increase certainty and reduce discretion. The words “where necessary” are equivocal and should be removed.

For example, **threatened species and ecological communities** should contain national standard outcomes equivalent to, if not more specific than, Appendix B1 of the Samuel Review. This includes requirements to, for example (at Appendix B1, p 211):

- 7) *Promote the survival and/or enhance the conservation status of **listed threatened species and ecological communities**, taking into account both individual and **cumulative impacts**, by:*
  - a) *Maintaining and improving **habitat** of all **listed threatened species**, including by ensuring that actions and decisions, at a minimum:*
    - i) *avoid adverse impacts to the extent or quality of **habitat critical to the survival** of the species, and*
    - ii) *ensure **no net reduction of habitat** of a **listed threatened species**.*
  - b) *Maintaining and improving **population** numbers for all **listed threatened species**, including by ensuring that actions and decisions, at a minimum:*
    - i) *avoid adverse impacts that are likely to result in the loss of individuals or **populations** of **highly restricted and small and declining species**, and*
    - ii) *ensure **no net reduction** in the **population** of a **listed critically endangered or endangered species** or **important population** of a **vulnerable species**.*
  - c) *Maintaining and improving the extent and condition of **listed endangered and critically endangered ecological communities**, including by ensuring that actions and decisions, at a minimum:*
    - i) *avoid adverse impacts to the extent or quality of areas of **highly restricted and sensitive ecological communities***

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<sup>17</sup> Samuel Review p 53.

- ii) avoid adverse impacts to areas of **listed ecological communities** that meet high **condition thresholds and classes**, and*
- iii) ensure **no net reduction** in the extent or condition of a **listed endangered or critically endangered** ecological community.*
- d) Not exacerbating **key threats** to the **listed threatened species or ecological community**.*

Concepts including cumulative impacts, important habitat, and key threats are defined in the Samuel Review and should be similarly adopted by the Standards.

Another example is the objective for Protection of Water Resources from Unconventional Gas Development and Large Coal Mining Development (Item 9). The draft objective for the protection of water resources introduces two concepts - 'supporting a site of regional or national ecological significance' and 'critical human water needs' - which are neither defined in nor consistent with the EPBC Act. It is not clear why these concepts have been introduced or the purpose they are intended to serve, considering that the definition of 'water resource' used in the EPBC Act means that ss 24D and 24E protect *all* aspects of a water resource. These novel and undefined phrases introduce uncertainty and may incorrectly indicate that it is only these two functions of a water resource that decisions should seek to protect, rather than the intrinsic value of the water resource, resulting in inappropriate decision-making and undermining the policy intent of the Standards.

The objective should be amended to draw on existing concepts and definitions in the EPBC Act and associated guidelines, while introducing the specificity necessary to support enforceable objectives and consistent decision-making. For example:

*'The qualities, functions and integrity of all aspects of water resource are protected and conserved, including:*

- water, organisms and other components and ecosystems that contribute to the physical state and environmental value of the water resource; and*
- the hydrological characteristics and water quality of the water resource, including the conditions within the water resource that support ecosystem services.'*

This suggested objective draws on the definition of 'water resource' in the EPBC Act, the significant impact guidelines currently applicable to this MNES, and the Samuel Review recommendations for water resource protection.

'Ecosystem services' should be defined as in the Samuel Review<sup>18</sup> as follows:

*'The benefits and services obtained from water resources. These include:*

- provisioning services (e.g. use by other industries and use as drinking water)*
- regulating services (such as the climate regulation or the stabilisation of coastal systems)*
- cultural services (including recreation and tourism, science and education); and*
- supporting services (e.g. maintenance of ecosystem function).'*

**Recommendation 4:** The objectives in s 5 must be redrafted to be granular and specific. Samuel Review Appendix B1 should be used as a starting point for these objectives.

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<sup>18</sup> Samuel Review p 224.

## 5 Outcomes and principles

**Outcomes:** Section 6 should be amended to be outcome-based, rather than process-based substituting the focus on “decisions under the EPBC Act” with outcomes under the Act. Equivocal and qualifying language such as “intended to achieve” and “where necessary” should be removed.

**Mitigation hierarchy (Principle 1):** Language should be amended so that compliance with mitigation hierarchy is required, rather than merely “having regard to” or “considering” the hierarchy. In addition, ‘avoidance’ requirements must be clarified by setting out defined thresholds and steps that must be taken to avoid an impact. The Policy Position says that where required, Regulations will outline the information needed to demonstrate that the mitigation hierarchy has been appropriately applied<sup>19</sup> and that further guidance and policy will be developed, including on whether a proposed measure in the mitigation hierarchy is feasible.<sup>20</sup> This approach recognises that, as drafted, Principle 1 is unclear and requires further clarification. To reduce uncertainty and increase efficiency this clarification should be included in the Standard itself rather than by further policy documents.

**Actions appropriately consider impacts to protected matters (Principle 2):** Principle 2 should include a requirement for consideration of cumulative impact, as recommended by the Samuel Review.<sup>21</sup> Qualifying language, particularly the phrase “appropriately consider” should be removed to increase certainty.

**Actions with residual significant impacts to protected matters are compensated (Principle 3):** The language of Principle 3 should be strengthened to remove the qualifying word “generally” and substitute “should” for must. The principle should clarify that there are significant impacts for which ‘compensation’ is not permitted (e.g. where there are unacceptable impacts).

**Appropriate evidence, first nations engagement and consultation (Principle 4):** The Samuel Review recommended prioritising, as a matter of urgency, the National Environmental Standard for Indigenous engagement and participation in decision-making.<sup>22</sup> This Standard should be developed as a matter of urgency. We understand that a Community Consultation Standard and Data and Information Standard will soon be released. Principle 4 should be removed or alternatively amended to incorporate these standards to resolve potential inconsistency.

In the alternative, the requirements in Principle 4 should be strengthened, including to expand the First Nations engagement consultation requirements in Principle 4 to require free prior and informed consent. Section 5 of the draft standard for MNES includes an objective to protect Indigenous Heritage values of a National Heritage place by treating such values “in a manner respectful of Indigenous traditions and beliefs.” Although Principle 4 provides that actions should be supported by “appropriate and suitable” consultation with Aboriginal and Torres Strait Islander people and contribution of their knowledge, it is unclear how this standard will be met by decision makers and proponents. We note that “appropriate and suitable” consultation falls short of the consultation standard for groups with a communal interest in Country (such as that held by First Nations).<sup>23</sup>

**Recommendation 5:** Outcomes and principles should be redrafted to strengthen qualifying language as set out above. Principle 4 should be removed or alternatively amended to resolve

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<sup>19</sup> Policy Position p 13.

<sup>20</sup> Policy Position p 14.

<sup>21</sup> See e.g. Samuel Review p 207.

<sup>22</sup> Samuel Review Appendix B2.

<sup>23</sup> Consultation with First Nations people must be “appropriate and adapted to the nature of the interests” : *Santos NA Barossa Pty Ltd v Tipakalippa* [2022] FCAFC 193 at [104].

inconsistencies with future standards, including to strengthen requirement for free, prior and informed consent.

## Submission to consultation on

# National Environmental Standards for Environmental Offsets

Prepared by Environmental Justice Australia

30 January 2026

On 28 November 2025, the reforms to *the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* were passed, which, among other things, provide the Environment Minister with the power to make National Environmental Standards (**Standards**). The Standards are intended to be the “centrepiece”<sup>1</sup> of the reforms – legally enforceable regulations that set the boundaries for decision-making to deliver the protections needed for matters of national environmental significance.<sup>2</sup> We welcome the creation of Standards, as a critical element of the EPBC Act reform required to enact meaningful change.<sup>3</sup>

Biodiversity offsets are notoriously complex, risky and difficult to implement in practice.<sup>4</sup> It is therefore crucial that the *National Environmental Standard (Environmental Offsets) 2025 (Offsets Standard)* be drafted with sufficient ambition and clarity to prevent the EPBC Act offsets scheme from failing.

**At present the Offsets Standard does not meet the requirements of the EPBC Act and is insufficient to address the risks associated with biodiversity offsetting. It will not afford real environmental protection and would cause the government to fail to meet its stated objectives for these reforms.**

The Offsets Standard must be amended in six essential areas:

1. [The Offsets Standard must be amended to promote the objects of the EPBC Act and be not inconsistent with Australia’s obligations under international treaties](#)
2. [The Offsets Standard must be outcomes-based, clear and enforceable](#)
3. [The Offsets Standard must set out appropriate safeguards on restoration contributions and the Restoration Contribution Holder must be bound by principles](#)
4. [The Offsets Standard must be introduced alongside regulations recognising matters that cannot be offset](#)
5. [The Offsets Standard should apply to all relevant decisions, and require proponent compliance](#)
6. [The Offsets Standard objectives, outcomes and principles should be strengthened and improved](#)

We note and refer also to our Submission to the Senate Standing Committees on Environment and Communications in response to the Inquiry into the *Environment Protection Reform Bill 2025* and six related bills dated 13 November 2025 and Submission to consultation on National

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<sup>1</sup> Samuel, G 2020, *Independent Review of the EPBC Act – Final Report*, Department of Agriculture, Water and the Environment, Canberra, October (**Samuel Review**) p 2.

<sup>2</sup> Explanatory Memorandum, Environment Protection Reform Bill 2025 (Cth) (**Explanatory Memorandum**) p 2.

<sup>3</sup> Explanatory Memorandum p 2.

<sup>4</sup> Gibbons, P., Macintosh, A., Constable, A. L., Hayashi, K., *Outcomes from 10 years of biodiversity offsetting, Global Change Biology*, (2017). <https://doi.org/10.1111/gcb.13977>

Environmental Standards for Matters of National Environmental Significance dated 30 January 2026.

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### **For further information on this submission, please contact:**

Dr Bruce Lindsay  
Senior Specialist Lawyer

Nicola Silbert  
Senior Lawyer

## **1 Standards must promote the objects of the EPBC Act and not be inconsistent with Australia's obligations under international treaties**

While theoretically a tool to limit environmental decline, in practice, biodiversity offset frameworks are notoriously risky and difficult to implement.<sup>5</sup> The Samuel Review found that the current Environmental Offsets Policy 'contributes to environmental decline rather than active restoration'<sup>6</sup> including because, as noted by the Draft Offsets Policy Position,<sup>7</sup> offsets are often the default rather than the last resort; are poorly designed or implemented; and are subject to weak monitoring, compliance, and enforcement of offset conditions.<sup>8</sup> The Samuel Review recommended that the offsets framework be reformed to ensure that offsets are ecologically feasible and deliver genuine protection and restoration in areas of highest priority.<sup>9</sup>

Section 514YD(2) provides that before making a national environmental standard, the Minister must be satisfied that the standard would promote the objects of the EPBC Act, and would not be inconsistent with Australia's obligations under the international agreements specified in subsection 520(3). The international agreements specified in 520(3) include the Convention on Biological

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<sup>5</sup> Gibbons, P., Macintosh, A., Constable, A. L., Hayashi, K. *Outcomes from 10 years of biodiversity offsetting, Global Change Biology*, (2017). <https://doi.org/10.1111/gcb.13977>

<sup>6</sup> Samuel Review p 138.

<sup>7</sup> Department of Climate Change, Energy, the Environment and Water, *Draft Policy Position: National Environmental Standard for Environmental Offsets (Draft Offsets Policy Position)* (Available from <https://consult.dcceew.gov.au/natl-environmental-standards-mnes>)

<sup>8</sup> Draft Offsets Policy Position p 2.

<sup>9</sup> Samuel Review p 140.

Diversity;<sup>10</sup> the UN Framework Convention on Climate Change;<sup>11</sup> World Heritage Convention;<sup>12</sup> and the Ramsar Convention.<sup>13</sup>

The objects of the EPBC Act include to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; to promote the conservation of biodiversity; and to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity (section 3). The Samuel Review found that the objects of the EPBC Act, particularly ecologically sustainable development are not being achieved.<sup>14</sup>

Given the findings of the Samuel Review, and risks associated with biodiversity offsets as a practice, the Offsets Standard is not sufficiently outcomes-based, clear and enforceable and does not place appropriate safeguards on the use of restoration contributions for the Minister to be satisfied that it will not facilitate managed biodiversity decline, by way of offsets, contrary to the objects of the EPBC Act.

The Standard as drafted does not identify or recognise matters that cannot be offset. To fulfill obligations under the Convention on Biological Diversity (Article 8) the Standard must be introduced alongside regulations or declarations of matters that cannot be offset, including endangered and critically endangered species and ecological communities, as detailed at recommendation 4 below. It should also implement international good practice for biodiversity offsetting, principles of which are detailed below at recommendation 6.

**Recommendation 1:** The Offsets Standard must meet internationally recognised scientific standards and contain appropriate safeguards including by adoption of Recommendations 2-6 below for the Minister to be satisfied that it promotes the objects of the EPBC Act and is not inconsistent with Australia's obligations under international treaties.

## 2 Offsets Standard must be outcomes-based, clear and enforceable

The Samuel Review found that a fundamental shortcoming of the EPBC Act is that it does not provide sufficient constraints on discretion, and this considerable and unfettered discretion in decision making has resulted in poor environmental outcomes.<sup>15</sup> The Samuel Review recommended the development of granular and measurable<sup>16</sup> standards which outline clear outcomes and provide clear and consistent rules for decision-making.<sup>17</sup>

The Offsets Standard, as currently drafted **is not appropriately clear, outcomes-based and granular to ensure consistency of decision-making**. The current drafting risks increasing the uncertainty criticised by the Samuel Review and undermining the policy rationale

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<sup>10</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

<sup>11</sup> *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994).

<sup>12</sup> *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

<sup>13</sup> *Convention on Wetlands of International Importance especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975) ('Ramsar Convention').

<sup>14</sup> Samuel Review p 43.

<sup>15</sup> Samuel Review pp 43, 48.

<sup>16</sup> Samuel Review p 53.

<sup>17</sup> Samuel Review p 52.

behind the Standards because it is process-driven, unclear and discretionary. The Offsets Standard should be amended to resolve this as a matter of priority, including in the following ways:

- **Discretionary and qualifying language should be amended to be clear and defined.** Words and phrases such as “may”, “if possible” and “where necessary” reduce certainty and clarity. This drafting should be amended to achieve the policy purposes of the Standards. Clear, enforceable language (e.g. “must”) should be used.
- **The Standards should specify outcomes rather than process.** As drafted, the Offsets Standard is focused on process rather than outcomes. For example, Section 5 states that the object of the Offsets standard is to provide a ‘framework’, rather than stating what the outcome of that framework is intended to be. The Standard should be drafted to require specific measurable outcomes.
- **Standards should include parameters within which an outcome or objective is to be achieved, and processes or actions to be followed or taken in achieving an outcome or objective.** Section 514YD(4)(b) creates a power for the Minister to include within the Standard parameters within, or principles by which, an outcome or objective is to be achieved processes or actions to be followed or taken in achieving an outcome or objective. Given the risks associated with the Offsets Standard to the operation of the EPBC Act, it is appropriate that the Minister include specific parameters, processes and actions in accordance with s 514YD(4)(b).
- **Monitoring, reporting and enforcement measures** should be included. As recommended in the Samuel Review this should include provisions for time-bound milestones that clearly identify the required absolute increases of approved indicators; outline corrective courses of action that will be taken where increases in the indicators or milestones have not been achieved; and set out who will fund, manage, monitor and report on the ongoing outcomes of the offset area, including indicators and milestones.<sup>18</sup>

## Recommendation 2:

The Offsets Standard must be amended to:

- substitute discretionary and qualifying language with clear and enforceable drafting.
- include defined outcomes and parameters within which an outcome or objective is to be achieved, and processes or actions to be followed or taken in achieving an outcome or objective; and
- provide for key reporting, monitoring and enforcement measures, including a formalised register which includes full details of all offset approval conditions.

## 3 Offsets Standard must set out appropriate safeguards on restoration contributions and the Restoration Contribution Holder must be bound by principles

The importance of safeguards is particularly significant given the option for proponents to pay a ‘restoration contribution charge’ instead of securing actual direct offsets. The current drafting risks allowing offsets to be approved without guarantee that genuine offsets will be delivered or real environmental outcomes will be achieved because proponents instead pay ‘restoration contributions’ into an offset fund.

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<sup>18</sup> Samuel Review p 140.

In New South Wales, a similar scheme has been criticised for collecting money that could not be spent because no suitable offset exists. Without strong safeguards, this model risks becoming a pay-to-destroy system that normalises nature loss instead of preventing it. Having previously had a similar scheme, NSW is now overhauling their offsets laws following findings that this scheme was easily gamed and largely ineffective. The ability for developers to pay into the offsets fund compromised the scheme because money was continuously paid into the fund without sufficient offsets being able to be sourced.<sup>19</sup>

As drafted, the Offsets Standard does not contain the appropriate safeguards to avert biodiversity decline under the new offsets framework. It is particularly concerning that the Restoration Contributions Holder does not need to fully comply with all principles contained in the Offsets Standard.<sup>20</sup> Since most proponents are likely to opt for restoration contributions, the Standard will be largely ineffective, as the Restoration Contribution Holder is not bound by its principles. This raises the risk that contributions could be collected but not invested in accordance with the Standard, with no clear mechanism for enforcement. For example, the fund-holder would not need to secure like-for-like outcomes. This would allow damage to one type of habitat to be offset by investment in a totally different ecosystem, weakening the purpose of the offsets scheme. It is essential that the Restoration Contributions Holder is bound by the principles in the Standard.

**Recommendation 3:** The Restoration Contribution Holder must be bound by the principles in the Standard, without exception. The Standard should contain stronger upfront restrictions on the use of restoration contribution charges, including a requirement to confirm, before approval, whether a suitable like-for-like offset is genuinely available.

## 4 Offsets Standard must be introduced alongside regulations recognising matters that cannot be offset

The standard fails to acknowledge that some protected matters, such as endangered and critically endangered species and ecological communities, may be at such risk that impacts cannot be offset. There is a power for the Minister to make a declaration for matters which cannot be offset – this declaration should be made concurrently with the Offsets Standard.

The Standard should also clarify circumstances where offsets are not permitted. The Draft Offsets Policy Position provides that the Regulations will prescribe which impacts to protected matters cannot be compensated, an example being where an offset would be inconsistent with Australia's international obligations or where offsetting is known not to be possible.<sup>21</sup> New section 134AA will allow the Minister to make declarations to protected matters that are not able to be offset via a restoration contribution payment. It is appropriate that the Offsets Standard be introduced alongside such regulations identifying matters that cannot be offset.

**Recommendation 4:** The Offsets Standard must recognise matters that cannot be offset, including by being introduced concurrently with regulations or a declaration under s 134AA specifying matters, including endangered or critically endangered species and ecological communities cannot be offset via a restoration contribution payment.

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<sup>19</sup> Department of Planning and Environment (NSW), *Final Report: Independent Review of the Biodiversity Conservation Act 2016*, August 2023, p 3; Legislative Council Portfolio Committee No. 7 – Planning and Environment, Parliament of NSW, *Integrity of the NSW Biodiversity Offsets Scheme* (Report 16, November 2022).

<sup>20</sup> Draft Offsets Policy Position pp 26-28.

<sup>21</sup> Draft Offsets Policy Position p 3.

## 5 Offsets Standard should apply to all relevant decisions, and require proponent compliance

**The Offset Standard should apply to all relevant decisions.** Section 514YK of the EPBC Act provides for regulations to prescribe the application of any National Environmental Standard, and the way it is to be applied. The standard should apply to actions, plans and policies, as recommended by the Samuel Review.

The proposed application in the Draft Offsets Policy Position (pages 2-3) includes that the Minister only be able to approve an action if satisfied that doing so is not inconsistent with any prescribed National Environmental Standard; that actions approved by state or territory decision-makers under approval bilateral agreements may also only be approved if the Minister is satisfied that doing so is not inconsistent with any prescribed Standard. This proposed language should be amended to be “consistent with” to align with new s 136A.

The Standard should bind proponents to ensure that approval holders comply with the Standard. As drafted it is “anticipated that proponents will be guided by the Offsets Standard in practice when designing projects as it will support actions with residual significant impacts to meet EPBC Act requirements”.<sup>22</sup> Regulations should require that proponents are actually bound by, and are required to comply with, the Offset Standard, as these are often the entities that actually in control of the implementation of offset conditions in practice.

**Recommendation 5:** The Offsets Standard should apply to all relevant decisions, including requiring that proponents comply with the Standard.

## 6 Offsets Standard objectives, outcomes and principles

We welcome the inclusion of the eight principles proposed in the draft Offsets Standard. These are an important starting point in setting out the foundations for the new Offsets scheme.

The principles do not, however, include internationally accepted foundational principles of biodiversity offset schemes. The principles should be amended to include principles directed at the following:

- Stakeholder participation: In areas affected by the project and by the biodiversity offset, the effective participation of stakeholders should be ensured in decision-making about biodiversity offsets, including their evaluation, selection, design, implementation and monitoring.<sup>23</sup>
- Equity: A biodiversity offset should be designed and implemented in an equitable manner, which means the sharing among stakeholders of the rights and responsibilities, risks and rewards associated with a project and offset in a fair and balanced way.<sup>24</sup> We note that the Samuel Review recommended prioritising, as a matter of urgency, the National Environmental Standard for Indigenous engagement and participation in decision-making.<sup>25</sup>

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<sup>22</sup> Draft Offsets Policy Position p 5.

<sup>23</sup> Business and Biodiversity Offsets Programme (BBOP), *When is an Offset Not an Offset? A Framework of Necessary Conditions for Biodiversity Offsets* (2009) 16 (Table 1, Principle 6) <<https://link.springer.com/article/10.1007/s00267-020-01415-0/tables/1>>

<sup>24</sup> Business and Biodiversity Offsets Programme (BBOP), *When is an Offset Not an Offset? A Framework of Necessary Conditions for Biodiversity Offsets* (2009) 16 (Table 1, Principle 7) <<https://link.springer.com/article/10.1007/s00267-020-01415-0/tables/1>> See also Tupala, A.-K., Huttunen, S., & Halme, P. (2022). Social impacts of biodiversity offsetting: A review. *Biological Conservation*, 267, 109431. <https://doi.org/10.1016/j.biocon.2021.109431>

<sup>25</sup> Samuel Review Appendix B2.

Participatory principles should be drafted to cross reference to the upcoming First Nations Standard, including obligations of free prior and informed consent.

- **Transparency:** The design and implementation of a biodiversity offset, and communication of its results to the public, should be undertaken in a transparent and timely manner.<sup>26</sup> This principle should be consistent with any upcoming Community Consultation Standard and Data and Information Standard.
- **Science and traditional knowledge:** The design and implementation of a biodiversity offset should be a documented process informed by sound science, including an appropriate consideration of traditional knowledge.<sup>27</sup> The Samuel Review noted that offsets must be supported by relevant robust scientific evidence that considers the appropriateness and feasibility of the offset.<sup>28</sup>

In addition to adding internationally accepted principles, the current drafting must be strengthened. The language of all principles needs to be tightened to ensure that they are clear, outcomes-based and enforceable. For example, the word “should” should be replaced with “must” in all the principles as drafted.

- **Objectives:** Section 5 should be amended to provide a measurable, outcomes based objective. As drafted, the object is to “provide a framework” rather than any measurable outcome in the environment.
- **Outcomes:** Section 6 should be amended to be outcome, rather than process based substituting the focus on “decisions under the Act” with outcomes under the EPBC Act. Equivocal and qualifying language such as “intended to achieve” and “where necessary” should be removed. As discussed below regarding Principle 4, measurable improvement should be from an absolute baseline.
- **Principle 1—Feasibility:** The language of principle 1 should be strengthened including to remove qualifying language “will likely contribute” (s 8(2)(b)) and including a definition of “feasible”. We note the Samuel Review provided a definition of “ecologically feasible” and “achievable” which could be adopted.
- **Principle 2—Security:** Long-term biodiversity outcomes require legally secure and well-funded offset arrangements. The principle as drafted provides insufficient minimum standards for legal protection, and should be amended to provide legally enforceable protection. In addition, internationally accepted good practice requires a principle of permanence (i.e. that the offset be maintained in perpetuity).<sup>29</sup>
- **Principle 3—Direct and tangible:** Section 10(3) provides for indirect offsets where identified as a higher priority in a conservation planning document. Indirect Offsets should be limited, as they are under the current EPBC Act environmental offsets policy which requires 90% of offsets to be direct offsets,<sup>30</sup> because there are risks and they do not deliver direct and tangible benefits.
- **Principle 4—Measurable improvements** should be from a baseline from an appropriate point in time with available data rather than at the point of time of the relevant decision, to

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<sup>26</sup> Business and Biodiversity Offsets Programme (BBOP), *When is an Offset Not an Offset? A Framework of Necessary Conditions for Biodiversity Offsets* (2009) 16 (Table 1, Principle 9)

<<https://link.springer.com/article/10.1007/s00267-020-01415-0/tables/1>>

<sup>27</sup> Business and Biodiversity Offsets Programme (BBOP), *When is an Offset Not an Offset? A Framework of Necessary Conditions for Biodiversity Offsets* (2009) 16 (Table 1, Principle 10)

<<https://link.springer.com/article/10.1007/s00267-020-01415-0/tables/1>>

<sup>28</sup> Samuel review P 140.

<sup>29</sup> Business and Biodiversity Offsets Programme (BBOP), *When is an Offset Not an Offset? A Framework of Necessary Conditions for Biodiversity Offsets* (2009) 16 (Table 1)

<<https://link.springer.com/article/10.1007/s00267-020-01415-0/tables/1>>

<sup>30</sup> Department of Sustainability, Environment, Water, Population and Communities, *EPBC Act Environmental Offsets Policy* (2012) <[https://www.dcceew.gov.au/sites/default/files/documents/offsets-policy\\_2.pdf](https://www.dcceew.gov.au/sites/default/files/documents/offsets-policy_2.pdf)>

avoid the problem of declining baselines as is the trend in the Australian environment. Baselines reveal implicit assumptions about the future of biodiversity - if the rate of decline of the crediting baseline is steep, biodiversity offsets can exacerbate biodiversity decline.<sup>31</sup> For this reason, we recommend using a baseline for example using data from Australia's State of the Environment Report.

- **Principle 5—Additionality:** The principle of additionality is essential to effective biodiversity offsetting. This principle should, however, be elaborated with further guidance and more specificity for what is required. For example, some of the granular information in the Draft Offsets Policy Position could be incorporated directly into Principle 5.
- **Principle 6—Like-for-like:** As detailed above, we are concerned that this provision builds in exceptions to this important principle. It is essential that there be no exceptions to the like-for-like principle, including by the Restorations Contribution Holder and s 13(2) should be removed accordingly.
- **Principle 8—Offset commenced prior to impact:** This principle should be tightened to ensure the offset has been properly secured, for example by including a condition of approval that works not be commenced until an offset has been properly secured.

**Recommendation 6:** the objectives, outcomes and principles should be strengthened in accordance with the above.

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<sup>31</sup> Martine Maron, Joseph W. Bull, Megan C. Evans and Ascelin Gordon, 'Locking in Loss: Baselines of Decline in Australian Biodiversity Offset Policies' (2015) 192 *Biological Conservation* 504-512 <<https://www.sciencedirect.com/science/article/abs/pii/S0006320715002128#:~:text=Abstract,maintenance%20of%20that%20declining%20trajectory>>.