

## Submission to DCCEEW - Draft Environmental Offsets Standard

---

This submission has been prepared by academics from Monash Nature Positive Network.

[Monash Nature Positive Network](#) is a multi-disciplinary network of leading researchers across Monash University developing new research and engagement projects designed to address some of the critical policy challenges associated with the global nature positive goal.

- **Associate Professor Anita Foerster** is a legal academic at Monash Business School with over 15 years research experience in environmental and climate change law and regulation. Anita is the Director of Green Lab, where she leads projects exploring legal and regulatory drivers for improved corporate sustainability performance.
- **Dr Ella Vines** is a lawyer and a post-doctoral researcher at Monash Business School's Green Lab, researching regulatory and market mechanisms for net zero, nature-positive companies. Her PhD research considered the capacity of interaction between the Paris Agreement and other laws including corporations law to catalyse the reduction of Australian coal extraction and consumption.
- **Ms Rebekkah Markey-Towler** is a final year PhD candidate at the Melbourne Law School and commencing as a research fellow at Monash University's Impact Labs, Faculty of Business and Economics, researching nature-related risk governance for companies. Her PhD examined the role of regulation in addressing problems relating to mortgage lending in a changing climate.

For further information - [ella.vines@monash.edu](mailto:ella.vines@monash.edu), [anita.foerster@monash.edu](mailto:anita.foerster@monash.edu), [rebekkah.markey-towler@monash.edu](mailto:rebekkah.markey-towler@monash.edu)

### Summary

---

We welcome the Australian Government's efforts to strengthen the regulation of environmental offsets through the proposed National Environmental Standard for Environmental Offsets ('draft standard'). In particular, the draft standard reflects an important shift away from the historical over-reliance on offsets and towards a more structured application of the mitigation hierarchy, consistent with the findings of the Independent Samuel Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('EPBC Act').<sup>1</sup>

In summary, we recommend that the Environmental Offsets Standard be strengthened by:

- **using mandatory language ('must' rather than 'should'), with clear criteria and obligations for proponents, decision-makers and statutory officeholders;**
- **reconsidering, or alternatively significantly limiting, the proposed ability to discharge offset obligations through contribution payments.**

These changes are essential to ensure that offsets contribute to genuine environmental improvement and do not legitimise ongoing biodiversity decline.

---

<sup>1</sup> Graeme Samuel AO, Independent Review of the EPBC Act (October 2020) ('Samuel Review').

## Use of discretionary language and enforceability of the draft standard

---

A significant concern with the draft standards is the prevalence of discretionary language that weakens enforceability and creates uncertainty about how its principles must be applied in practice. Where standards use phrasing such as decision-makers ‘should’ consider a principle, or require decision-makers merely to ‘have regard to’ a standard or be ‘satisfied’ that a decision is ‘not inconsistent with’ it, this imbues the framework with undue flexibility rather than clear obligations. Such weak wording risks inconsistent application and undermines the purpose of the standards, particularly in relation to core principles like measurable improvement and like-for-like compensation.

**We recommend that key provisions and principles of the draft standard be reframed using mandatory language (‘must’ rather than ‘should’), with clear criteria and obligations for proponents, decision-makers and any statutory officeholder responsible for administering offset funds, to ensure that the draft standard delivers robust environmental outcomes rather than overseeing further environmental degradation.**

## Reconsider the option to discharge residual offset compensation obligations through offset contribution payments

---

We note the proposal to amend the *EPBC Act* to introduce a new financial compensation option for proponents with residual offset obligations, supported by a regulatory framework to be established through subordinate legislation.<sup>2</sup> That framework is expected to include the establishment of a special account, a statutory officeholder (the Restoration Contributions Holder), a statutory Restoration Contributions Advisory Committee, and rules governing the expenditure of offset payments.

We recognise the policy intent of providing an alternative pathway for addressing residual impacts in limited circumstances. However, we draw attention to the serious risks associated with this approach. There is now considerable evidence of the significant shortcomings of biodiversity offset schemes, including those operating in Australia.<sup>3</sup> Where offset obligations have been linked to biodiversity markets (e.g., NSW Biodiversity Offsets Scheme), there are serious concerns about insufficient credit supply to match increasing demand associated with large scale developments, and the exploitation of flexibilities in the scheme which allow developers to pay into a restoration fund instead of securing like-for-like offsets, to allow development to proceed.<sup>4</sup>

**The proposed financial compensation option risks repeating known offset-market failures, including supply constraints, delayed delivery of ecological outcomes, and the normalisation of fund-based payments as a substitute for direct avoidance, mitigation or like-for-like offsetting.** If this feature is retained, the design of the functions of the Restorations Contributions Holder and related Advisory Committee, and the rules governing expenditure of payments made to the holder will require very careful attention, ongoing monitoring and review.

---

<sup>2</sup> DCCEEW, Draft Policy Position: National Environmental Standard for Environmental Offsets, Attachment A, 21.

<sup>3</sup> See discussion in Robert Fowler et al, ‘The Australian experience with environmental offsets: an illusory tool for addressing biodiversity loss and climate change?’ (2024) 31(1) University of California Law Environment Journal 29.

<sup>4</sup> Audit Office of NSW, Effectiveness of the Biodiversity Offsets Scheme (Performance Audit, 30 August 2022).

## The net gain test under the *EPBC Act* and its interaction with Principles 4 (Measurable Improvements) and 6 (Like-for-like)

---

If the capacity for project proponents to make payments to the Restoration Contributions Holder is maintained, we make the following recommendations for strengthening this process to ensure that direct, like-for-like offsets are prioritised over these payments, and that subsequent funds are expended to ensure like-for-like compensation.

We note the proposal to amend the *EPBC Act* to introduce a requirement that actions or classes of actions with residual significant impacts may only be approved where the Minister is satisfied that the approval will pass a net gain test.<sup>5</sup> Under the proposal, the net gain test may be satisfied if first, a condition: requires the approval holder to compensate for the damage to the protected matter that has been, may be or will be caused by the residual significant impact, requires the approval holder to pay a restoration contribution charge, or a combination of both. While unclear, compensation appears to mean an offset, defined in the draft standard as ‘measures to compensate to a gain for residual significant impacts to protected matters’.<sup>6</sup> Second, compliance with this condition or conditions results in a net gain for the protected matter that is either equal to the prescribed net gain in regulations or, if there is no prescription in the regulations, the Minister is satisfied is appropriate.<sup>7</sup> A similar net gain requirement is proposed in relation to the making of bioregional plans, with regulations to prescribe what net gain means for each protected matter.

This proposed framework engages Principles 4 (Measurable Improvements) and 6 (Like-for-like) of the draft standard. Principle 4 requires that offsets deliver clear, measurable and verifiable improvements to the affected protected matter, relative to a defined baseline and within an appropriate timeframe. Principle 6, in turn, requires that offsetting outcomes maintain ecological equivalence by compensating impacts on a protected matter with improvements to the same, or ecologically equivalent, matter.

While the introduction of a statutory net gain test is a significant and welcome reform, its practical effect will also depend on how Principles 4 and 6 are operationalised—particularly where net gain may be achieved, in whole or in part, through financial contributions rather than direct, like-for-like offsets. International experience suggests that net gain objectives are more credible where they are operationalised through minimum uplift requirements rather than simple equivalence. For example, the United Kingdom’s Biodiversity Net Gain framework (though in its infancy) requires that post-development biodiversity value exceed the pre-development baseline by a prescribed percentage, reflecting an explicit recognition of uncertainty, time lags and failure risk in biodiversity restoration.<sup>8</sup> Absent a comparable safeguard in the draft standard, there is a significant risk that approvals characterised as achieving ‘net gain’ will, in practice, entrench ongoing biodiversity decline.

These risks are amplified when offset payments are pooled or deployed flexibly, heightening the risk that compensatory actions may be spatially, temporally or ecologically disconnected from the original impact. We are concerned about the proposed undermining of Principle 6 when applied to the Restoration Contributions Holder:

---

<sup>5</sup> DCCEE, Draft Policy Position: National Environmental Standard for Environmental Offsets, 22, ‘Attachment A’.

<sup>6</sup> National Environmental Standard (Environmental Offsets) 2025 (Exposure Draft) s 4.

<sup>7</sup> *Environment Protection Reform Bill 2025* (Cth) s 527K.

<sup>8</sup> *Town and Country Planning Act 1990* (UK) Schedule 7A (as inserted by Schedule 14 of the Environment Act 2021). See further, UK Department for Environment, Food & Rural Affairs, ‘Understanding biodiversity net gain’ (Web Page, 26 June 2025) <<https://www.gov.uk/guidance/understanding-biodiversity-net-gain>>.

'The Holder will apply the principle of like-for-like where possible and have regard to [but not be bound by] the Offset Standard in doing so.'<sup>9</sup>

Recent reforms in New South Wales further illustrate the importance of strengthening safeguards around offsetting and financial contribution mechanisms. The NSW Government has committed to increasing transparency and accountability in the application of the mitigation hierarchy, including through the introduction of a public register of avoid and minimise measures for approved developments.<sup>10</sup> In addition, amendments to the *Biodiversity Conservation Act 2016* (NSW) now impose constraints on the use of funds paid in lieu of offsets, including a requirement that deposited monies be acquitted within three years.<sup>11</sup> These reforms reflect a growing recognition that offset frameworks require clear limits, transparency and temporal discipline to reduce the risk that financial contributions substitute for timely, like-for-like ecological outcomes.

**Accordingly, we recommend:**

- **the introduction of clear limits on the circumstances in which financial contributions may substitute for direct, like-for-like offsets including constraints on the timing, use and acquittal of any funds paid in lieu of offsets;**
- **requiring the Restoration Contributions Holder be bound by (rather than required to have regard to) Principle 6 of the draft standard in expending restoration contributions (in line with our overall recommendation that the discretionary language in the draft standards be removed and replaced with prescriptive language outlined above); and**
- **the incorporation of precautionary safeguards, including over-offsetting requirements, to address uncertainty, time lags and the risk of offset failure where residual impacts are approved**

---

<sup>9</sup> DCCEE, Draft Policy Position: National Environmental Standard for Environmental Offsets, 28 'Table 1, policy settings required to provide flexibility to the Holder in the application of the Offsets Standard'.

<sup>10</sup> NSW Government, *NSW Plan for Nature: Government response to the reviews of the Biodiversity Conservation Act 2016 and the native vegetation provisions of the Local Land Services Act 2013* (July 2024) 22–23.

<sup>11</sup> *Biodiversity Conservation Act 2016* (NSW) s 6.31, as amended.