

## Submission to DCCEEW - Draft National Environmental Standard (Matters of National Environmental Significance)

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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.

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### Summary

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The draft National Environmental Standard (Matters of National Environmental Significance) ('Draft Standard') is a welcome addition to the environmental protection legislative scheme in Australia. This Standard is an example of outcomes-based regulation. Outcomes-based standards, also known as performance-based standards, specify required outcomes but leave it to the regulated entity to determine how to meet these outcomes.<sup>1</sup> This can be contrasted with rules-based standards, also known as prescriptive standards, that specify 'exactly how the regulated entity must act'.<sup>2</sup>

Outcomes-based standards are considered to have considerable benefits over rules-based regulation because they allow 'firms to meet performance standards more quickly, more effectively, and at a lower cost than can regulators using prescriptive regulation, particularly over time'.<sup>3</sup> Despite this, they can also have serious shortcomings. They can allow gaming of the system, increase the complexity of regulation, constrain industry choice and innovation, lead to

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<sup>1</sup> Cary Coglianese, 'The Limits of Performance-Based Regulation' (2017) 50 *Michigan Journal of Law Reform* 525, 532.

<sup>2</sup> *Ibid* 534.

<sup>3</sup> Lauren E Willis, 'Performance-Based Consumer Law' (2015) 82 *The University of Chicago Law Review* 1309, 1335.

undesired outcomes, are highly dependent on effective testing and monitoring and may not ultimately lead to policy success.<sup>4</sup>

Accordingly, we recommend amendments to the Draft Standard **to maximise the benefits and minimise the disadvantages of outcomes-based regulation**. These include:

- (a) reducing discretionary language and improve clarity in the Draft Standard;
- (b) improving alignment with the recommendations of the Samuel Review<sup>5</sup> and other state-based biodiversity legislation such as the *Biodiversity Act 2025 (SA)*; and
- (c) reducing the likelihood of significant impacts to, and increase the likelihood of environmental benefits for, protected matters.

Please refer to Attachment A for a marked-up version of recommended changes to the Draft Standard.

### **1. Objectives: moving from static protection to improvement and recovery**

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A central objective of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* ('EPBC Act') reform agenda is to halt and reverse environmental decline by establishing clear, enforceable national environmental standards that drive better outcomes, not merely better processes.<sup>6</sup> The Samuel Review emphasised that the existing framework has failed because it is overly discretionary, impact-focused, and insufficiently outcome-oriented.<sup>7</sup>

In this context, the objectives of the Draft Standard should be strengthened to require decisions to provide for the protection, conservation, improvement and, where necessary, restoration and recovery of protected matters. This amendment aligns with the Review's call for standards that are outcomes-focused, rather than limited to managing the acceptability of impacts.

Consistently incorporating 'improvement' and 'restoration' across all protected-matter-specific objectives would ensure the Draft Standard reflects the reform objective of changing the trajectory of environmental decline, rather than entrenching a baseline that may already be degraded.

#### **We recommend:**

- 1.1. Using the terminology of 'improve' rather than 'enhance'**, as improve implies greater environmental benefits ought to be achieved. The plain language meaning of 'improve' is 'to bring into a more desirable or excellent condition'<sup>8</sup> while 'enhance' means 'to raise to a higher degree; intensify; magnify'.<sup>9</sup>

### **2. Outcomes: active contribution and non-regression as core reform principles**

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The Samuel Review identified the absence of clear outcomes as a fundamental weakness of the *EPBC Act*. It recommended that national environmental standards articulate measurable environmental outcomes against which decisions can be assessed.<sup>10</sup>

#### **We recommend:**

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<sup>4</sup> Cary Coglianese and Jennifer Nash, 'The Law of the Test: Performance-based Regulation and Diesel Emissions Control' (2017) 34 *Yale Journal on Regulation* 33, 81-88.

<sup>5</sup> Graeme Samuel AO, Independent Review of the EPBC Act (October 2020) ('Samuel Review').

<sup>6</sup> *Ibid*, Recommendation 3.

<sup>7</sup> *Ibid*, ii-iii.

<sup>8</sup> *Macquarie Dictionary* (online at 14 January 2026) 'improve'.

<sup>9</sup> *Ibid*, 'enhance'.

<sup>10</sup> *Ibid*, 2.

- 2.1. Amending the outcomes provision of the Draft Standards** to require decisions to actively contribute to improving the diversity, abundance, resilience and integrity of protected matters would directly respond to this recommendation. This amendment would also ensure the Draft Standard supports the reform objective of restoring trust and transparency by making the purpose of approvals clearer.
- 2.2. Incorporating a reference to the principle of no regression.** The reforms to the EPBC Act include a new ‘no regression principle’ (s 514YG) that stipulates that the Minister must not vary or revoke a national environmental standard unless they are satisfied that it will not, inter-alia, reduce protections to the environment. In accordance with the recommendations of the Samuel Review, we recommend a specific reference to this new principle in the Standard.<sup>11</sup> This will also help make it clear that the Standards aim to improve, not diminish, the protection of the environment.

### 3. Discretionary language

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The Samuel Review was explicit that discretionary language and inconsistent application of core principles have undermined the effectiveness of the *EPBC Act*. The Review recommended that government should retain the ability to exercise discretion in individual cases, but that this discretion should be a ‘rare exception demonstrably justified in the public interest, with reasons and environmental implications transparently communicated’<sup>12</sup> rather than the norm.

Where standards use phrasing such as decision-makers ‘should’ consider a principle, or where they 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 Draft Standards.

#### We recommend:

- 3.1. That key provisions and principles of the Draft Standard be reframed using mandatory language** (‘must’ rather than ‘should’ – see further Attachment A).

### 4. Cumulative impacts

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The Review identified inadequate consideration of cumulative impacts as one of the most serious failures of the existing framework.<sup>13</sup>

#### We recommend:

- 4.1. Strengthening the Draft Standards** so that proponents of actions must consider and respond to cumulative, indirect and contextual impacts.

### 5. Residual significant impacts

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The proposed definition of ‘residual significant impact of an action’ to be inserted in the *EPBC Act*<sup>14</sup> is framed in largely negative and outcome-based terms—focusing on whether impacts ‘will not be avoided, mitigated or repaired’—without specifying the process, evidentiary burden or decision-making standard by which this conclusion is to be reached. In particular, the definition does not require proponents to demonstrate that avoidance, mitigation or repair options have been systematically identified, assessed and exhausted, nor does it clarify how decision-makers should evaluate claims that such measures are not reasonably feasible. This creates a risk that impacts may

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<sup>11</sup> Samuel Review, p.203.

<sup>12</sup> Ibid, ii.

<sup>13</sup> Ibid, 127, [8.1.1].

<sup>14</sup> DCCEEW, Draft Policy Position: National Environmental Standard for Environmental Offsets, Attachment B.

be characterised as residual by assertion rather than rigorous analysis, potentially weakening the practical operation of the mitigation hierarchy.

**We recommend:**

**5.1. Tightening provisions** so compensation for residual significant impacts is only available once avoidance, mitigation and repair have been demonstrably exhausted.

**5.2. Strengthening the definition** of ‘residual significant impacts of an action’.

## **6. Evidence and First Nations engagement (in the context of climate change)**

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The Samuel Review placed strong emphasis on better evidence, transparency and stronger engagement with Aboriginal and Torres Strait Islander peoples.<sup>15</sup> Making these requirements mandatory aligns with those recommendations. Including a principle requiring decisions to be based on best available evidence, address information gaps, and consider short-, medium- and long-term climate change impacts directly responds to systemic weaknesses identified in the Review.<sup>16</sup>

**We recommend:**

**6.1. Including a principle pertaining to evidence and First Nations engagement** having regard to projected climate change impacts.

## **7. Requiring significant environmental benefit**

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The Samuel Review pointed to the importance of protecting matters of national environmental significance but also pointed to the importance of improving and enhancing protected matters.<sup>17</sup> Leading nature-related laws should therefore not just aim to prevent harm but also aim to ensure improvements to the natural environment.

In South Australia, for example, the *Biodiversity Act 2025* specifically includes a requirement for decision-makers to give effect to the principle that ‘halting reversing biodiversity loss, such that there is an improvement in the state of biodiversity, will require embracing new and transformative ways of thinking and acting to support the environment, culture, economy and wellbeing of the current generation and future generations’.<sup>18</sup>

More specifically, that Act requires that any harm that cannot be avoided or minimised in relation to the clearance of native plants must be offset by the achievement of a significant environmental benefit that outweighs that impact.<sup>19</sup> Significant environmental benefit is defined as ‘measures taken actions undertaken or requirements complied with (restoration actions) if the restoration actions result in an improvement of biodiversity over an ecologically meaningful timeframe...’<sup>20</sup>

As a further example, in the UK, it is now mandatory for developers to deliver a biodiversity net gain of 10% under the *Town and Country Planning Act 1990* (UK). This will be achieved if developers achieve a biodiversity value for the development that exceeds the pre-development biodiversity value of the onsite habitat. The biodiversity value is the total post-development biodiversity value of the onsite habitat, the biodiversity value of any registered offsite biodiversity gain allocated to the development and the biodiversity value of any biodiversity credits purchased for the development.<sup>21</sup>

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<sup>15</sup> Samuel Review, 6-8.

<sup>16</sup> Ibid, 5.

<sup>17</sup> Samuel Review, p.203.

<sup>18</sup> *Biodiversity Act 2025* (SA) s 8(a).

<sup>19</sup> Ibid, s 3(4)(d).

<sup>20</sup> Ibid, s 3(5).

<sup>21</sup> *Town and Country Planning Act 1990* (UK) sch 7A, ss 2(1)-(2).

Amendments would also improve consistency with the ‘net gain’ principle in the proposed offsets Standard. Under this Standard, offsets will be required to deliver a ‘measurable improvement for the affected protected matter relative to an agreed baseline’.<sup>22</sup>

**We recommend:**

- 7.1. Including ‘significant environmental benefits for protected matters’ in the mitigation hierarchy (under the repair and compensation criteria). The mitigation hierarchy amendments would provide consistency with the offsets Standard.
- 7.2. Including ‘significant environmental benefits for protected matters’ as a freestanding principle. The freestanding principle would align with the *Biodiversity Act 2025* (SA).

**8. Monitoring and evaluation**

A recurring theme of the Samuel Review is the need for accountability mechanisms that allow government and the public to assess whether reforms are delivering improved environmental outcomes.<sup>23</sup>

**We recommend:**

- 8.1. The inclusion of a principle mandating periodic reporting on compliance with the Draft Standards, to provide an evidence base for evaluating the effectiveness of the reformed *EPBC Act* framework.

**Attachment A: Recommended changes to the draft National Environmental Standard (Matters of National Environmental Significance)**

Recommended changes made in red below to the draft National Environmental Standard:

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| <p>Section 5 Objectives</p> <p>(1) This Standard aims to ensure decisions provide for the protection, conservation, <b>improvement</b> and, where necessary, recovery of...</p> <p>(2) This Standard aims to promote and <del>enhance</del> <b>improve</b>...</p> <p><i>Change language under the objectives for each protected matters to: ‘protected, conserved, <b>improved</b> and restored’</i></p> |
| <p>Section 6 Outcomes</p> <p>(1) The outcomes which this Standard is intended to achieve are that decisions under the Act:</p> <p>(a) provide for the protection, conservation, <b>improvement</b> and, where necessary, restoration of protected matters;</p>   |

<sup>22</sup> Department of Climate Change, Energy, the Environment and Water, *Draft Policy Position: National Environmental Standard for Environmental Offsets* (2025) 7.

<sup>23</sup> *Ibid*, 175-187.

(b) **actively** contribute to the promotion and ~~enhancement~~ **improvement** of the diversity, abundance, resilience, and integrity of protected matters; and

(c) facilitate **the principles of** ecologically sustainable development **(including the precautionary principle) and reflect a principle of no regression.**

#### Principle 1 Actions appropriately consider the application of the mitigation hierarchy

(1) Actions ~~should~~ **must** be planned and taken having regard to the mitigation hierarchy provided for in this section.

(2) ~~If possible,~~ impacts to protected matters ~~should~~ **must** be avoided by taking measures to anticipate and prevent significant impacts to protected matters before those impacts occur.

(3) Where significant impacts to protected matters cannot be avoided, ~~the impact should~~ **measures must be identified and implemented to reduce significant impacts on protected matters to the fullest possible extent (whether the impacts are direct, indirect or cumulative)** ~~be mitigated through a demonstrated process of identifying and implementing measures to reduce significant impacts on protected matters.~~

(4) Following the application of any appropriate avoidance and mitigation measures, **measures must be taken to repair impacts on protected matters as soon as possible and as close to its original condition as possible** ~~any repairable impacts on protected matters should be repaired as soon as possible and as close to its original condition as possible.~~

(5) Repair will **generally** be a viable option only where: (a) repair can be done in a timely manner; and (b) repair activities are feasible and sustainable in the long term for the protected matter.

(6) Repair activities ~~should~~ **must include a focus on the significantly impacted protected matter, and involve on-site works with specific goals for re-establishment of values to reduce residual significant impacts and achieve a measurable improvement to the condition of an affected protected matter relative to the baseline for the affected protected matter.**

(7) Following the application of any appropriate avoidance, mitigation and repair measures, appropriate measures ~~should~~ **must** be taken to compensate for any residual significant impacts associated with the action **and those measures must be a measurable improvement to the condition of an affected protected matter relative to the baseline for the affected protected matter.**

#### Principle 2 Actions appropriately consider impacts to protected matters

In considering the nature, extent or severity of an impact on a protected matter, ~~regard should be had to the context in which the impact might occur~~ **proponents of actions must consider and respond to all the relevant circumstances.**

Note 3: This includes using all reasonable efforts to prevent actions contributing to potential cumulative impacts, both direct and indirect, or exacerbation of key threatening processes that are reasonably likely to result from the action.

Principle 3 Actions with residual significant impacts to protected matters are compensated

Compensation for a residual significant impact ~~should generally~~ **must** only be considered after the prior steps in the mitigation hierarchy (avoidance, mitigation and repair) have been exhausted.

Principle 4 Appropriate evidence, first nations engagement and consultation

Actions ~~should~~ **must** be supported by appropriate and suitable: (a) data and information; (b) consultation with Aboriginal and Torres Strait Islander people and contribution of their knowledge; and (c) consultation with other interested parties.

Principle 5 Best available evidence and information

(1) Decisions must be based on the best available evidence, including scientific evidence, Aboriginal knowledges and local knowledge, and be made having regard to the potential long-term, medium-term and short-term impacts of climate change.

(2) Steps must be taken to fill information gaps that impede appropriate management and recovery.

(3) Evidence must be stored and shared consistent with best practice data and information management.

Principle 6 Significant environmental benefits

Decision-makers must aim to achieve significant environmental benefits for protected matters that result in improvements to those protected matters over an ecologically meaningful timeframe.

Principle 6 Monitoring and evaluation

Reports must be prepared every 3 years that demonstrate compliance with the National Environmental Standards.