

Submission to DCCEEW

National Environmental Standard for Matters of National Environmental Significance

This submission has been prepared by members of the [Monash Nature Positive Network](#), a multi-disciplinary network of leading researchers across Monash University developing new research and engagement projects designed to address the critical policy challenges associated with the global nature positive goal.

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- Ms Rebekkah Markey-Towler is a lawyer and research fellow at Monash Business School's Green Lab, researching net zero, nature positive companies. Her PhD research examined the role of regulation in addressing problems relating to mortgage lending in a changing climate.

Summary

Our key recommendations are summarised as follows:

1. Remove s 7(2) and (4) and reframe key provisions and principles using mandatory language and emphasising outcomes over process.
2. Redraft Objective 1 to ensure appropriate protection of habitat for threatened species, ecological communities and migratory species
3. Redraft Principle 2 to include clear references to the need to consider and address cumulative impacts for all actions assessed under the Act in the text of the principle itself (not only in the notes).

1) Emphasis on process, not outcomes, is inconsistent with statutory purpose and Samuel Review recommendations.

One of the key recommendations of the Samuel Review of the *Environment Protection & Biodiversity Conservation Act 1999* (Cth) [EPBC Act] was to shift the focus of decision-making under the Act to delivering environmental *outcomes*, not merely adhering to process, through making and applying National Environmental Standards.¹ The EPBC Act now specifically provides that a National Environmental Standard:

- (a) *must* prescribe one or more outcomes or objectives, and
- (b) *may* prescribe any of the following: (i) parameters within, or principles by which, an outcome or objective is to be achieved, and (ii) processes or actions to be followed or taken in achieving an outcome or objective.²

The Exposure Draft of the National Environmental Standard for Matters of National Environmental Significance (MNES) ['Exposure Draft'] provides:

¹ Graeme Samuel AO, *Independent Review of the EPBC Act* (October 2020) ('Samuel Review'), 49-54, recommendations 3 & 4.

² EPBC Act, s 514YD(4)

- Section 7(2) - ‘an action or class of actions will achieve the outcomes and objectives in section 5 and 6 of this Standard where that action, or class of actions, is consistent with the principles in sections 8, 9, 10 and 11 of this Standard.’³

The effect of this provision is that the objectives and outcomes are deemed to be met where an action, decision, or framework is consistent with the principles. The principles are also given more weight than the outcomes and objectives in decision-making. This is inconsistent with the recommendations of Samuel Review and appears to be inconsistent with EPBC Act provisions governing the marking of National Environmental Standards outlined above which make the provisions of outcomes and objectives mandatory (as opposed to the discretionary provision regarding principles).

Further, the principles specified in ss 8, 9, 10 and 11 are primarily process-oriented. They direct project proponents to follow a series of procedural steps that, if satisfied, will result in the project being deemed as achieving the outcomes and objectives of the Standard. The principles are limited in their substantive requirements to proactively *require* project proponents to take steps to achieve better environmental outcomes for MNES. For example:

- Section 8 - Actions are required to appropriately apply the mitigation hierarchy (a procedural requirement), but requirements to prioritise avoiding or mitigating significant impacts are softened by including the discretionary language of ‘to the extent possible’.
- Section 9 - Actions are required to consider the context in which impacts to protected matters may occur (a procedural requirement) but not required to do anything specifically with this information.
- Section 10 - There is a more substantive requirement to compensate for any residual impacts to protected matters, however, this is only after a significant impact has occurred.
- Section 11 - There is a requirement to consider appropriate evidence, Indigenous engagement and consultation with the public, again, largely procedurally focused requirements.

To address this inconsistency and strengthen the ability of decision-makers to ensure good environmental outcomes, we recommend:

- Removing s7(2) (and associated s7(4) which applies a similar rule to other specific manners of assessment)
- Reframing key provisions and principles using mandatory language (‘must’ rather than ‘should’) and by using the language of outcomes.
- Including ‘significant environmental benefits for protected matters’ as a freestanding principle – e.g., *Decision-makers must aim to achieve significant environment benefits for protected matters that result in improvements to those matters over an ecologically meaningful timeframe*. For more specific recommendations on this and strengthening the principles more broadly, please refer to our previous submission available [here](#).

2) Exposure Draft narrows substantive outcomes and objectives for Threatened Species

Objectives relating to threatened species, ecological communities and migratory species in the Exposure Draft have been significantly narrowed since the 2025 consultation draft. For example, the 2025 draft provided:

- Objective 1 - Habitat, *including critical habitat* of the listed threatened species where the habitat is irreplaceable and necessary for a threatened species to remain viable in the wild, is protected, conserved and restored to support the survival and recovery of the threatened species (Objective 1).

The Exposure Draft now provides:

³ *Exposure Draft*, s 7(2). Section 7(4) sets out a similar rule for decisions, management and authorisation frameworks, NOPSEMA management and authorised frameworks, and other specified manners of assessment.

- Objective 1 - Habitat of the listed threatened species (including critical habitat) *where the habitat is irreplaceable and necessary* for the species to remain viable in the wild is protected, conserved and restored to support survival and recovery of the species. Protection, conservation, restoration and recovery actions support the viability of threatened species in the wild.⁴

As such, the Exposure Draft objective applies only to habitat that is irreplaceable and necessary for the species to remain viable in the wild. This is much narrower than the original application to threatened species habitat generally.

This narrowing of the substantive objectives for threatened species, ecological communities and migratory species has the effect of excluding habitat features which are critical to ensuring species resilience under climate change. For example, a narrow focus on ‘irreplaceable habitat’ risks losing habitat corridors and feeding grounds, ecological niches that shift with climate change, and potential future habitat for population recovery and reintroduction programs.

Further, the EPBC Act already provides for the protection of irreplaceable habitat through its new approval tests. Under s 136B, the Minister must not approve the taking of an action unless satisfied that, taking into account any conditions to be attached to the approval, the taking of the action will not have an unacceptable impact on MNES. Section 527F defines unacceptable impact in relation to listed threatened species as a significant impact that ‘seriously impairs the viability of the listed threatened species; or causes serious damage to critical habitat of the listed threatened species where the habitat is irreplaceable and necessary for the listed threatened species to remain viable in the wild’. The statutory intent of provisions regarding National Environmental Standards appears to be to provide additional and broader direction to decision-makers beyond the explicit approval test of s136B.

To address this concern, we recommend reinstating the text of the principles used in the 2025 consultation draft, including:

- Objective 1 - Habitat, *including critical habitat* of the listed threatened species where the habitat is irreplaceable and necessary for a threatened species to remain viable in the wild, is protected, conserved and restored to support the survival and recovery of the threatened species (Objective 1).

3) Treatment of cumulative impacts requires improvement

The need to improve treatment of cumulative impacts on protected matters by decision-makers under the EPBC Act was a key focus of the Samuel Review: ‘Most decisions of the Commonwealth that determine environmental outcomes are made on a project-by-project basis only when impacts exceed a certain size... This means that cumulative impacts on the environment are not systematically considered. Rather than an integrated system of environmental management that ensure cumulative impacts are well managed, pressure to manage impacts is placed on individual projects.’⁵

While improved bioregional planning and strategic assessment pathways are important mechanisms to respond to this issue, the National Environmental Standard for MNES also has an important role to play in ensuring that cumulative impacts and appropriately considered and addressed in decision-making on *all actions or classes of actions* that trigger the Act.

Principle 2 of the Exposure Draft provides:

- In considering the nature, extent or severity of an adverse impact on a protected matter, regard should be had to the context in which the impact might occur.

Note 2 further provides:

⁴ Similar revisions have been made to Objectives 2 and 3 dealing with threatened ecological communities and listed migratory species.

⁵ See e.g., Samuel Review, Executive Summary, 3.

- *When considering bioregional plans and strategic assessments*, the context may also include (a) the combination of past, present and reasonably foreseeable future events, circumstances and threats affecting the protected matter; and (b) individually minor, but collectively significant action taking place over a period of time.

This has the effect of limiting consideration of cumulative impacts to bioregional plans and strategic assessment processes; and not requiring this consideration when decisions on other individual projects are taken outside of these processes. This approach risks replicating the ineffective and highly risky approach under the previous EPBC Act where individual projects with impacts on MNES are approved and contribute to ‘death by a thousand cuts’ through their combined effect.⁶

To address this weakness, we recommend that Principle 2 be redrafted to include clear references to the need to consider and address cumulative impacts for all actions assessed under the Act in the text of the principle itself (not only in the notes). For example:

- In considering the nature, extent or severity of an adverse impact on a protected matter, regard should be had to the context in which the impact might occur. The context includes, for example, (a) the unique context of a protected matter, including the past, present and reasonably foreseeable future events, circumstances and threats affecting the protected matter; (b) the interaction of different stressors as a result of an action or class of actions (e.g., the combined impacts of light, noise and habitat clearance to breeding success of endangered species); and (c) individually minor, but collectively significant action taking place over a period of time.

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⁶ Jessica T Dales, “Death by a Thousand Cuts: Incorporating Cumulative Effects in Australia’s Environment Protection and Biodiversity Conservation Act” (2011) 20 *Pacific Rim Law and Policy Journal* 149; Wentworth Group of Concerned Scientists, *Preventing “Death by a Thousand Cuts”: Addressing Cumulative Impacts to Matters of National Environmental Significance (MNES) through Reforms to the EPBC Act* (2023) <<https://wentworthgroup.org/wp-content/uploads/2023/10/Wentworth-Group-Cumulative-Impacts-Report-FINAL-1.pdf>>.