

Australian Conservation Foundation

Submission to: Proposed EPBC Standards for MNES and Offsets

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About the Australian Conservation Foundation

The Australian Conservation Foundation is Australia's national environment organisation.

We are over 500,000 people who speak out for nature – for the air we breathe, the water we drink, the food we eat, and the places and wildlife we love. We are independent, non-partisan and funded by donations from our community.



**AUSTRALIAN
CONSERVATION
FOUNDATION**

**Nature
needs us,
now**

The Australian Conservation Foundation welcomes the opportunity to make a submission on the policy papers and exposure drafts for initial National Environmental Standards covering Matters of National Environmental Significance and Environmental Offsets.

Moving to a standards based approach is the central of the Samuel review. This approach has the potential to be transformative if we get the Standards right, supporting the move from a highly discretionary system which as the Samuel review found simply facilitates ongoing environmental decline to one which drives better environmental outcomes.

It is frustrating that more than 5 years after the Samuel review recommended immediate adoption of an initial set of EPBC Act Standards, no standards are yet in place. We ought to have been well into a period of evaluating, refining and improving Standards by this point.

This delay, and the consequences for the ongoing decline of nature over period since the Samuel review, emphasise the urgent need to get on with the job of developing the new Standards and other new regulatory instruments now that the enabling legislative reforms are finally in place.

It is critical, however, that this new approach to regulation gets off on the right footing. The Standards must manifest a clear intention to deliver better outcomes for nature, and their form and language must support accountability for delivering these outcomes.

Standards that are only comprised of vague and non-specific provisions will simply see the continuation of the current approach to regulation under the EPBC, which everyone agrees has failed nature. If we cannot look back in five years' time and identify a clear improvement in environmental outcomes driven by the Standards then they will have failed.

The current proposed draft Standards are a constructive starting point for the new post EPBC reform era, but they fall short in important respects. These shortcomings must be addressed. In particular, as presently drafted, the Standards lack the specificity and clarity needed to deliver gains in environmental protection, and they will not support accountability for delivering on the objectives they contain.

Our submission does not seek to address every single detail of the proposed Standards or to provide a solution to every shortcoming. We have instead focused on high level issues which we believe need to be quickly addressed as the government moves to implement these important reforms.

Recommendations

Recommendation 1:

Prioritise preparing a reform implementation roadmap clarifying intentions for formal Standards development processes and the development of other subordinate regulations under the reformed EPBC Act.

Recommendation 2:

National Environmental Standards must be granular and specific and should support implementation of protections in the principal Act.

Recommendation 3:

Avoid qualified language and discretionary criteria, and ensure all requirements are expressed using terms that are clear, direct and mandatory.

Recommendation 4:

Consideration of climate change should be required for all decisions under the MNES standard. An objective and outcome under the Standard should be the avoidance of climate harm and enhancement of resilience of all MNES under different climate scenarios. A decision making principle explicitly requiring consideration of impacts, avoidance and mitigation measures under a range of climate scenarios should be added to the current principles.

Recommendation 5:

Replace the current generic outcomes in the MNES Standard with clear and specific outcomes for each MNES.

Recommendation 6:

Replace the current objective for the Protection of Water Resources from Unconventional Gas and Large Coal Mining Development in the MNES Standard with an objective covering ecological values regardless of the scale. Ensure that the full range of economic, social and cultural values are recognised and protected.

Recommendation 7:

Rewrite Principle 2 of the MNES Standard to ensure that it is a clear and explicit requirement to consider context and cumulative impacts in all decisions.

Recommendation 8:

Amend Principle 4 to include further details specifying what is required to establish that actions are supported by evidence.

Recommendation 9:

Develop and specify the application of the MNES Standard in a manner that supplies clarity as to regulatory requirements at all stages of the referral, assessment and approval system.

Recommendation 10:

The proposed principles in the Offset Standard covering security and measurable improvements should be tightened.



A reform implementation roadmap needs to be prioritised

With the final form of the legislative reforms now settled following passage of the *Environment Protection Reform Act 2025* by the Australian Parliament late last year, the government must now urgently prioritise the development of a roadmap for the implementation of these reforms. This roadmap should include the development of initial National Environmental Standards, but also clarity as to the intentions and timing for the development of the suite of other subordinate regulatory instruments necessary to implement the package.

We note the following:

- The current consultation relates to “policy papers” that are prominently marked as “not official government policy” and proposed legislative instruments labelled as “exposure drafts”. These documents were prepared prior to the passage of the amendments to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and the now commenced Standards making power in Part 19B of the Act. While we strongly supported access to this information about select proposed Standard in conjunction with the reform Bills, it is unclear how the current consultation now relates to the process for developing Standards in Part 19B. We presume that the statement on the consultation portal that a “revised version of the Standards will be provided for statutory consultation - release date to be determined” indicates that a further formal process of consultation is to follow under s 514YH, but this needs to be clarified.¹
- The government has indicated through the Parliamentary process and in recent material (eg the video explainer published on 15 January 2026) that additional Standards are also proposed covering First Nations Engagement, Community Consultation and Data. The timing of the development of these Standards and how they relate to the two initial Standards that are the subject of this consultation is unclear and should be clarified.
- The policy papers and exposure drafts of the MNES and Offsets standards were prepared prior to the final form of the Bills as passed. The as passed versions of the Bills included some significant changes from the Bills as initially introduced, and consideration should be given to how these changes should be reflected in the initial Standards.

In particular:

- The test for the application of the Standards is now “consistency” rather than “not inconsistent”.
- The scope of the legislative definitions of unacceptable impacts has been narrowed.
- The range of agricultural deforestation actions potentially subject to the EPBC Act has been clarified to include vegetation over 15 years of age and adjacent to watercourses in the Great Barrier Reef catchment.
- Native forest logging under Regional Forest agreements will be subject to the EPBC Act including the standards from mid 2027.

¹ We also understand that the Senate Environment and Communications Legislation Committee inquiry into the Environment Protection Reform Bills is likely to now turn its attention to the initial standards.

- There is now a clear facility for excluding some impacts on MNES from the Restoration Contributions Fund.

Each of these changes are significant updates to the legislative policy settings in the original Bills and the proposed initial Standards and ought to be reflected in updates to the Standards.

- Although the amendments to the principal Act are now in place, it is not possible to understand the application of the proposed Standards without other yet to be developed subordinate instruments. Regulations prescribing which parts of which standards will be applied to which decisions (s 514YK) and the prescription of a definition of "net gain" (s 527K(2)(b)(i)) are especially critical to an appreciation of how the new legislative scheme will operate.
- Similarly, revisions which will be required to current regulations prescribing criteria for determining the appropriate assessment pathway under s 87 which we presume will incorporate references to Standards. The government should clarify its intention in relation to these regulations so that proposed standards can be considered with this information to hand.

Recommendation 1: Prioritise preparing a reform implementation roadmap clarifying intentions for formal Standards development processes and the development of other subordinate regulations under the reformed EPBC Act.

The draft MNES and Offsets standards – overarching comments and suggested direction

While the proposed Standards are a reasonable starting point for documenting high level statements of objectives, outcomes and principles, we believe they fall short of what is needed for core initial standards under the reformed EPBC Act. The Standards are simply too vague and general to deliver on the outcomes based approach recommended by the Samuel review.

As Professor Samuel stated in his submission to the Senate Committee examining the Bills:

The NES - which it is noted are disallowable instruments, effectively preserving parliamentary oversight over delegated laws - must be granular in their detail, avoiding the use of discretionary or judgemental terms (eg. material, substantial, significant). Such terms are replete in the current EPBC Act. The NES must leave no doubt in the minds of development proponents, conservationists and regulators as to their meaning and application. To be otherwise drafted, invites inconsistent decisions, uncertainty and legal challenges.²

The legislative framework for creating and implementing Standards put forward by the government is a highly discretionary one and this remains the case notwithstanding some of the improvements made by the Senate. The Senate Scrutiny of Bills Committee highlighted this as a problem in their report on the *Environment Protection Reform Bill 2025*:

"the committee notes that the structure of the decision-making process envisaged in relation the Commonwealth approval process layers ministerial discretion upon ministerial discretion. The minister is given a broad power to fix, by way of regulation, the content of the national environmental standards. Having established the standards, there is a further discretionary power to prescribe which of those standards apply in relation to management or authorisation processes. It remains unclear to the committee why this structure of layered discretionary powers is necessary given the extent to which it transfers central policy matters from the bill to the regulations"³

² Professor Graeme Samuel AC submission to the Senate Environment and Communications Legislation Committee inquiry into the Environment Protection Reform Bill 2025 and 6 related Bills.

³ Scrutiny Digest 8 of 2025 at page 6.

This situation should not be exacerbated by an initial set of Standards that broaden discretion even further and exacerbate the indeterminacy of the system, the very issue that the Samuel review recommendations seek to address.

The development of the initial set of Standards should be informed by the following overarching principles:

- The Standards, particularly the central MNES Standard outcomes and principles, must contain granular and specific detail, at least with respect to some identified priority matters. Failure to adopt such an approach will simply create an expectation that Standards will always be vague and non-specific and effectively useless as a regulatory tool for removing or reducing doubt as to the outcomes required in any particular case. The initial Standards must model what is to follow as further standards are developed and initial Standards are reviewed and refined.
- Despite the concerns of the Scrutiny of Bills Committee with transferring regulatory detail to subordinate instruments, this approach does lend itself to a process of continuous review and improvement in regulatory settings in a manner which is difficult if these settings are confined to the principal Act. However this process of evaluation and ongoing improvement must have a foundation in the Standards. The Standards need to be sufficiently specific in the outcomes they are intended to deliver such that they can be evaluated and improved over time. Accountability for delivery of the Standards is critical to the success of the new system.
- Further consideration is required as to how standards fit within the regulatory regime and the role they can play in providing clarity on what would otherwise be open ended discretionary legislative criteria. While we agree with statements in the MNES policy paper that Standards should not duplicate provisions of the legislation, the central role of the Standards in the new scheme of regulation and their relationship to the scheme as a whole requires further consideration and a clear statement of intent from the Government. We make the following observations:
 - Although we agree that Standards should not simply reproduce or paraphrase obligations set out in the principal Act, the Standards are likely to be relied upon as a single or definitive source of information as the totality of the regulatory settings. Consideration should be given to how this can be incorporated in the development of the Standards instrument.
 - It should also be clear that coverage of a subject in the principal Act does not mean that there is no role for the Standards to elaborate on the detail of what is required under the legislation. An example would be the requirements for decisions to be not inconsistent with international agreements in Part 9. The Samuel Review proposal of Standards included this requirement, but it has not been removed as it replicates an existing requirement in the Act. There may however still be scope for including details in the Standard relevant to understanding applying the legislative obligation.

Recommendation 2: National Environmental Standards must be granular and specific and should support implementation of protections in the principal Act.

Specific comments on the proposed MNES Standard

Avoid discretionary terms and use clear and mandatory language

Despite the clear intent of the Samuel review proposal, the MNES Standard is replete with vague language and qualifying terms which will make the Standard difficult to interpret and apply consistently. This approach undermines accountability for the delivery of outcomes.

As noted above, the legislative framework already provides excessive discretion in the application of the Standards, and its unnecessary and undesirable for the Standards to add to this "flexibility".

In some cases this means simply removing redundant qualifying language. For example:

- "aims to ensure" or "aims to promote" in clause 5 Objectives – just state the objective as "to ensure" or "to promote"
- Removal of language like "will generally be" from principles 1 and 3.

In other cases, the current language needs to be substituted with language that clearly communicates that the provision of the Standard needs to be met, and is not simply aspirational in nature. For example:

- Using clear mandatory language like "must" instead of "should" throughout the standard. "Should" suggests that the standard is aspirational rather than required.
- In Principle 1 of the MNES Standard, an action should be planned "in accordance with" the mitigation hierarchy rather than just be "having regard" to it.

There are many other examples where the language use undermines clear and consistent application of the Standard.

Recommendation 3: Avoid qualified language and discretionary criteria, and ensure all requirements are expressed using terms that are clear, direct and mandatory.

Decision making must include consideration of climate risks and different climate change scenarios

It is extraordinary that the proposed MNES Standard, the core standard covering the matters the EPBC Act is intended to protect, makes no mention of climate change.

It is critical that the impacts of climate change on MNES are assessed and considered at every decision point under the Act.

The Samuel review specifically recommended that consideration of impacts on MNES under different climate change scenarios that Standards *"should require development proposals to .. explicitly consider the likely effectiveness of avoidance or mitigation measures on nationally protected matters under specified climate change scenarios"* but the only mention of climate in the two Standards currently proposed is a reference in the context of feasibility in the proposed Offset Standard.

The requirement to consider climate change needs to be explicitly spelled out in the Standard to ensure that there no uncertainty. It is insufficient to assume that it will be considered as part of the broader consideration of impacts.

Recommendation 4: Consideration of climate change should be required for all decisions under the MNES standard. An objective and outcome under the Standard should be the avoidance of climate harm and enhancement of resilience of all MNES under different climate scenarios. A decision making principle explicitly requiring consideration of impacts, avoidance and mitigation measures under a range of climate scenarios should be added to the current principles.

Clear and more detailed outcomes for each MNES, starting with threatened species and ecological communities

The current proposed outcomes lack the detail and specificity needed for the Standards to be effective. This clarity od particularly important for threatened species and ecological communities given the frequency with which this trigger is engaged by proposals regulated the Act, and the lack of clarity in the Act itself about the outcomes the legislative scheme is intended to deliver.

This aspect of the Standard will also be an important foundation for developing MNES specific instruments, such as Protection Statements for threatened species and communities.

The outcomes specified by the draft Standard are generic in form and fail to consider the specificity of outcomes relevant to each of the diverse MNES covered under the Act. As currently expressed, the Standard could justify almost any decision and it is not an appropriate basis for evaluating whether the system is delivering the outcome intended.

The development of the Standard should return to a form more closely aligned with that originally recommended by the Samuel review. For example, ACF has previously supported the following refinement of requirements proposed by the Department in an earlier version of the Standard in relation to threatened species and ecological communities:

Actions, decisions, plans and policies must:

1. *Protect, conserve and support the restoration and recovery of habitat, including but not limited to critical habitat, for threatened species and ecological communities.*
2. *Maintain and enhance the viability of threatened species and ecological communities through protection, management and recovery actions.*
3. *Promote the survival and enhance the conservation status of listed threatened species and ecological communities including by:*
 - a. *Maintaining or improving habitat;*
 - b. *Maintaining and improving the viability of populations of listed threatened species;*
 - c. *Maintaining and improving the extend and condition of listed ecological communities.*
4. *Not exacerbating key threats to the listed threatened species or ecological community.*

Recommendation 5: Replace the current generic outcomes in the Standard with clear and specific outcomes for each MNES.

Standards for water resources must be aligned with scope of the protected matter

The manner in which the objective for Protection of Water Resources from Unconventional Gas Development and Large Coal Mining Development is framed risks narrowing the scope of the trigger. This is as a result of both the language used and the details that are missing.

There is nothing in the manner in which this protected matter is defined that restricts consideration of “ecological functions, components and processes” to those “necessary to support sites of regional and national ecological significance”. The latter phrase adds a scale based gloss to the scope of the trigger which risks narrowing its scope by excluding local impacts and should be removed.

Similarly the second part of the objective covering “reliability and supply of water to support critical human water needs” is unduly confining and should be replaced with language which covers the full suite of “services” provide by the water resource, covering not only reliability and supply but also quality and integrity economic, social and cultural values broadly, not just “critical human needs”.

Recommendation 6: Replace the current objective for the Protection of Water Resources from Unconventional Gas and Large Coal Mining Development with an objective covering ecological values regardless of the scale, Ensure that the full range of economic, social and cultural values are recognised and protected.

Explicitly require consideration of cumulative impacts in all decisions

Principle 2 requires “regard” to be had to the context in which an impact might occur when considering the impact of an action on a protected matter. The primary text together with the notes suggests that the intention is for cumulative impacts to be considered but this is unclear.

The principle should be reformulated as a clear statement of the need to consider the context including potential cumulative impacts for all decisions and at all scales. It should also be clearly specified that cumulative impacts must be considered at the level of individual actions. The fact that understanding and responding to cumulative impacts can be done more optimally through approaches such as bioregional planning does not obviate the need for such matters to be considered in all decisions.

Recommendation 7: Rewrite Principle 2 to ensure that it is a clear and explicit requirement to consider context and cumulative impacts in all decisions.

Principle 4 Actions supported by evidence needs definition

The explanation of the meaning of an action being supported by evidence outlined in the MNES Standard Policy Paper has not been included in the proposed Standard. Principle 4 merely states that actions must be supported by evidence, which provides no clarity at all on the scope or quality of that evidence (including First Nations engagement if that is to be referenced under this principle).

The principle should be amended to include the substance of the explanation proposed in the policy statement or other wording to similar effect. This could include a general requirement to meet best practice principles in relation to the evidence, as well as additional details to clarify the expectation as to what is required by this Principle.

The objective should be to ensure that the Standard itself provides clarity and detail as to what this Principle requires. This will support an understanding of the Standard as a stand-alone requirement and also provide a useful framework for other subject matter specific guidance that might be covered in other instruments or policies.

Recommendation 8: Amend Principle 4 to include further details specifying what is required to establish that actions are supported by evidence.

Provide for application of the Standard to any decision in the referral, assessment and approval process

The material on the proposed application of the MNES Standard at page 2 of the Policy Paper states that the Standard applies to decisions on approval and conditioning. However, this misses the fact that elements of the Standard are also relevant to other decisions in the referral, assessment and approval process such the decision as to whether an action is a controlled action and the determination of the appropriate assessment pathway.

Elements of the Standard for example are potentially applicable to guiding the evidence required to determine whether an action is a controlled action (Principle 4) and to consideration of context and cumulative impacts in determining whether the impact of an action is likely to be significant (see above).

The changes to s 43B and calls from the agricultural sector for clarity on expectations in relation to "self assessment" in relation to referral obligations indicate the potential utility of using standards to clarify expectations at this point of the regulatory process.

Recommendation 9: Develop and specify the application of the Standards in a manner that supplies clarity as to regulatory requirements at all stages of the referral, assessment and approval system.

Offsets standard

ACF is generally supportive of the direction of the Offsets Standards, noting however that our central concern that the Restoration Contribution Holder will not always be subject to these Standards has not been addressed in the amendments as passed.

The comments above in relation to using clear, mandatory language are equally applicable to the drafting of this instrument.

We highlight two important changes below, and endorse the more detailed review and suggestions developed by the Biodiversity Council in relation to this Standard.

Improvements to the Offset Standard

- "Suitable mechanism" under Principle 2 is too vague. "Securely protected" should be specified as "suitable legal mechanisms that are enforceable" or a mechanism that provides an equivalent level of security.
- Principle 4 "measurable improvements" seems to overlap or intersect with the net gain test which has been added to the principal Act and the facility to define "net gain" in the regulations. Regardless of how this principle and other aspects of the scheme interact, it should be made clear that any baseline is an absolute rather than declining baseline, as assessment against a declining baseline will simply lock in further decline.

Recommendation 10: The proposed principles in the Offset Standard covering security and measurable improvements should be tightened.